IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10776
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MICHAEL ANTHONY CAMPBELL,

Defendant-Appellant.

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Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:94-CR-098-G

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March 21, 1995

Before GARWOOD, BARKSDALE, and STEWART, Circuit Judges.

PER CURIAM:*

Michael Anthony Campbell pleaded guilty to being a felon in possession of a firearm and was sentenced to 27 months' imprisonment and three years' supervised release. In his sole issue on appeal, Campbell argues that the district court incorrectly calculated his base offense level as 20 under U.S.S.G. § 2K2.1(a)(4)(A). He contends that because his 1977 conviction for aggravated robbery was too old to be counted in his criminal history under § 4A1.2(e)(1), it could not count as a prior felony conviction of a crime of violence. His argument is

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

based on application note five to § 2K2.1. The Government argues that Campbell's interpretation of application note five is incorrect, and that even if it were correct, that Campbell's 1977 conviction could and should have been counted in his criminal history under § 4A1.2(e)(1) because Campbell was incarcerated on that conviction within the fifteen years preceding the commission of the instant offense.

This court reviews the district court's legal interpretation of the sentencing guidelines *de novo*. United States v. Radziercz, 7 F.3d 1193, 1195 (5th Cir. 1993), cert. denied, 114 S. Ct. 1575 (1994). Section 2K2.1(a)(4)(A) provides for a base offense level of 20 if the defendant had one prior felony conviction of a crime of violence. The actual guideline provision does not contain a time limitation. The commentary states that "crime of violence" and "prior felony conviction(s)" are defined in § 4B1.2 subsections (1) and (2), and states that "[f]or purposes of determining the number of such convictions under subsections (a)(1), (a)(2), (a)(3), and (a)(4), count any such prior conviction that receives any points under § 4A1.1 (Criminal History Category)." § 2K2.1, comment. (n.5).

Section 4A1.2(e) provides time limitations on prior sentences of imprisonment which can be counted in computing the criminal history category. Section 4A1.2(e)(1) provides that

> [a]ny prior sentence of imprisonment exceeding one year and one month that was imposed within fifteen years of the defendant's commencement of the instant offense is counted. Also count any prior sentence of imprisonment exceeding one year and one month, whenever imposed, that

> resulted in the defendant being incarcerated during any part of such fifteen-year period.

§ 4A1.2(e)(1). Citing this provision, the probation office did not count Campbell's 1977 conviction for aggravated robbery in his criminal history score.

The issue in this case is whether application note five to § 2K2.1 incorporates this time limitation in § 4A1.2(e)(1) into § 2K2.1(a)(4)(A). In Radziercz, 7 F.3d at 1194 n.2, this court implicitly decided that it did and proceeded to determine whether the defendant's prior conviction fell within the second sentence of § 4A1.2(e)(1).

Although Campbell may be correct on the legal issue, Campbell's argument does not provide a basis for reversing his sentence, because as the Government correctly points out, his 1977 conviction is not too old under the counting methods of § 4A2.1(e)(1). Campbell was sentenced on November 7, 1977, to ten years in prison. He was incarcerated on this sentence until December 16, 1981, when he was paroled. His current offense occurred on August 19, 1993. Campbell was incarcerated on this prior conviction during the fifteen-year period prior to his commencement of the instant offense. Therefore, under the second sentence of § 4A1.2(e)(1), this conviction should have been counted in his criminal history score. Because this conviction could have been counted under § 4A1.2(e)(1), the district court did not err in applying § 2K2.1(a)(4)(A).

AFFIRMED.