

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20413
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANDREW ROBERT COATS,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Southern District of Texas
USDC No. CR-H-89-0404-01 & CR-H-90-0083-01
- - - - -

(March 22, 1995)

Before GARWOOD, BARKSDALE, and STEWART, Circuit Judges.

PER CURIAM:*

In this direct criminal appeal, Andrew Robert Coats first contends that his sentence was imposed in violation of law because the district court sentenced him to a term of imprisonment in excess of the applicable range set forth in U.S.S.G. § 7B1.4, p.s. Because Coats failed to raise this issue in the district court, review is for plain error only.

Under Fed. R. Crim. P. 52(b), this court may correct forfeited errors only when the appellant shows the following factors: (1) there is an error, (2) that is clear or obvious, and

* 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

(3) that affects his substantial rights. United States v. Calverley, 37 F.3d 160, 162-64 (5th Cir. 1994) (en banc) (citing United States v. Olano, 113 S. Ct. 1770, 1776-79 (1993)), cert. denied, 1994 WL 36679 (Feb. 27, 1995) (No. 94-7792). If these factors are established, the decision to correct the forfeited error is within the sound discretion of the court, and the court will not exercise that discretion unless the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. Olano, 113 S. Ct. at 1778.

Coats's argument that the district court was required to follow the policy statements of Chapter 7 of the Sentencing Guidelines when imposing a sentence upon revocation of supervised release is foreclosed by this court's opinion in United States v. Mathena, 23 F.3d 87 (5th Cir. 1994). "[W]hen a court sentences a defendant upon revoking his supervised release under [18 U.S.C.] § 3583(e), the policy statements of Chapter 7 are advisory only." Mathena, 23 F.3d at 93. Thus, the court must consider the applicable policy statements but is not bound by them. Id. Coats has not demonstrated any error by the district court.

Coats also argues, in the alternative, that the district court did not adequately consider the applicable Chapter 7 policy statements when sentencing him. Because this issue was not raised in the district court, it is also reviewed for plain error only.**

** Coats's contention, raised for the first time on appeal, that he was not afforded an adequate opportunity to object to the court's "upward departure" is also reviewed under the plain error standard. The contention is misplaced. "A sentence which

At the conclusion of the revocation hearing, the district court outlined Coats's repeated, wilful violations of conditions of his supervised release and stated that the guideline range of six to twelve months was inappropriate. The court also found the range inadequate in light of the seriousness of Coats's past crimes and the likelihood that he would commit future crimes. Thus, the record reflects that the court considered the policy statements and Coats has identified no error.

APPEAL DISMISSED. See 5th Cir. R. 42.2.

diverges from advisory policy statements is not a departure such that a court has to provide notice or make specific findings normally associated with departures under [18 U.S.C.] § 3553(b)." Mathena, 23 F.3d at 93 n.13.