

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No.94-20620
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

KENNETH A. HENDERSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

(CR H 91 0116)

(September 14, 1995)

Before POLITZ, Chief Judge, DAVIS and EMILIO M. GARZA, Circuit
Judges.

POLITZ, Chief Judge:*

Kenneth Henderson appeals the district court's imposition of
sentence asserting that the court erred in: (1) failing to comply

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should not be published.

with Fed.R.Crim.P. 32(c)(3)(D),¹ (2) denying him a two-point reduction for acceptance of responsibility, (3) relying on information contained in the presentence report, and (4) treating four prior robbery convictions as separate offenses. Finding neither error nor abuse of discretion, we affirm.

Background

On June 4, 1991, Henderson ran past a vehicle occupied by Agent Horton of the Federal Bureau of Investigation and fell, feigning an injury. Horton exited his vehicle to offer assistance only to have Henderson brandish a pistol and order him to the ground. After taking Horton's keys and wallet, Henderson entered the vehicle and there discovered that Horton was a law enforcement officer. He immediately returned to where Horton lay and, placing the pistol against Horton's head, threatened to kill him because he was a lawman. Henderson then left the scene in Horton's vehicle which he later abandoned, stealing weapons, cameras and other electronic equipment located therein.

Henderson was arrested and charged with the assault of a federal officer,² unlawful receipt of a firearm shipped through interstate commerce,³ possession of a firearm during a crime of

The rule applicable to Henderson's sentencing was the old Federal Rule 32(c)(3)(D), which was amended in 1994. Under the new rule, the corresponding section is Fed.R.Crim.P. 32(c)(1). The amendment was not substantive and did not change practice under the rule. See Fed.R.Crim.P. 32(c) advisory committee's note.

18 U.S.C. § 111 (1988).

18 U.S.C. §§ 922(g)(1), 924(e)(1) (1988).

violence,⁴ and the assault of a person having control of federal property with the intent to rob by use of a dangerous weapon.⁵ He pleaded guilty to all of the charges and the district court ordered the preparation of a presentence report. During an interview with the probation officer assigned the task, Henderson denied threatening Horton with a pistol and denied stealing weapons from Horton's vehicle. The probation officer recommended that Henderson not receive the two-point reduction in his offense score for acceptance of responsibility.⁶ The PSR recommended an upward enhancement for four prior felony robbery convictions involving the use of a deadly weapon.⁷ The calculated sentencing range was 262-327 months, followed by the mandatory 5 year prison term for conviction of possession of a firearm during a crime of violence.⁸

Henderson filed no objections to the contents of the PSR but submitted a writing entitled "Amended Statement During Interview With Probation Officer for PSI," stating that he had not told the truth when he denied both threatening Horton with a pistol and

18 U.S.C. §924(c)(1) (Supp. V 1993).

18 U.S.C. §2114 (1988).

U.S.S.G. § 3E1.1 (1994).

18 U.S.C. §924(e)(1); U.S.S.G. §4B1.4. Henderson was arrested one time for all four robberies. He pled guilty and was sentenced to one count on September 15, two counts on October 10, and one count on October 11. His sentences on the four counts ran concurrently.

The convictions also affected Henderson's criminal history calculation under U.S.S.G. §4A1.2, but the armed career criminal provisions control the criminal history category and offense level. Compare U.S.S.G §4A1.2 with U.S.S.G. §§4B1.1, .4.

See 18 U.S.C. §924(c)(1).

stealing weapons from the vehicle. At the sentencing hearing, Henderson also objected to the factual assertion in the PSR that he used a deadly weapon during the four prior robberies. The district court rejected Henderson's objections, accepted the PSR's factual findings "in toto," and sentenced Henderson to 387 months imprisonment, five years of supervised release, and the statutory mandatory assessment.

Henderson filed a motion to correct his sentence under Fed.R.Crim.P. 35 which was denied by the district court. He then filed an untimely appeal which we rejected for lack of appellate jurisdiction. Claiming that ineffective assistance of counsel resulted in his failure to file a timely notice of appeal, Henderson sought relief in the district court under 28 U.S.C. §2255. The district court granted relief, allowing the instant out-of-time appeal. Henderson now asserts that the district court erred at sentencing in failing to comply with Fed.R.Crim.P. 32(c)(3)(D), in denying him a two-point reduction for acceptance of responsibility, in relying on information contained within the PSR, and in treating his four prior robbery convictions as separate offenses.

Analysis

Henderson contends that the district court failed to make specific factual findings regarding his objections to facts in the PSR, as required by Fed.R.Crim.P. 32(c)(3)(D). He asserts that his "Amended Statement During Interview With Probation Officer for PSI" constituted an objection to the PSR requiring the court to make a

specific factual finding regarding his acceptance of responsibility and that the court's acceptance "in toto" of the findings in the PSR did not satisfy the dictates of Rule 32. We are not persuaded.

We first note that nowhere within Henderson's statement does he object to any facts cited in the PSR; however, because the district court apparently treated this statement as an objection to the PSR's recommendation on Henderson's acceptance of responsibility, we will assume, **arguendo**, that the statement suffices as an objection. Rule 32 (c)(3)(D) "requires the court either to make specific findings as to all contested facts contained in the PSR that the court finds relevant in sentencing, or determine that those facts will not be considered in sentencing."⁹ A district court satisfies this requirement when it rejects a defendant's objections and orally adopts the findings of the PSR.¹⁰ In the instant case, the district court specifically overruled all of Henderson's objections and endorsed the findings of the PSR. "In so doing the court, at least implicitly, weighed the positions of the probation department and the defense and credited the probation department's facts."¹¹ There was no violation of Rule 32.

United States v. Sherbak, 950 F.2d 1095, 1098 (5th Cir. 1992) (quoting **United States v. Hooten**, 942 F.2d 878, 881 (5th Cir. 1991)).

United States v. Brown, 29 F.3d 953 (5th Cir.), **cert. denied**, 115 S.Ct. 587 (1994); **Sherbak**, 950 F.2d at 1099 ("Rule 32 does not require a catechismic regurgitation of each fact determined and each fact rejected when they are determinable from a PSR that the court has adopted by reference.").

Sherbak, 950 F.2d at 1099.

This conclusion applies equally to Henderson's claim that the district court failed to comply with Rule 32 when it overruled his objection to the PSR's finding that he used a deadly weapon, specifically a knife, in each of his four prior robbery offenses. Henderson raised this issue at the sentencing hearing and the court asked the probation officer the basis for the recommended finding. The probation officer informed the court that the representation in the PSR was based upon the original indictments involving those offenses. Henderson offered no rebuttal evidence other than his unsworn assertions that he did not use a knife. The district court rejected all of Henderson's objections and adopted the findings in the PSR, thus satisfying the requirements of Rule 32.¹²

Henderson next challenges the district court's denial of the two-point reduction for acceptance of responsibility. We review this denial for clear error.¹³ The record shows that Henderson pleaded guilty to all charges but then denied most of the charged conduct when interviewed by the probation officer. Only when the effect of that denial upon his sentence was driven home did Henderson submit his "amended statement" admitting the charged conduct and ostensibly expressing remorse for such. Considered in this setting, the district court did not clearly err in determining that Henderson had not accepted responsibility for his actions.¹⁴

Id.

United States v. Tremelling, 43 F.3d 148 (5th Cir.), **cert. denied**, 115 S.Ct. 1990 (1995).

See **United States v. Pofahl**, 990 F.2d 1456 (5th Cir.) (noting that defendant bears the burden of demonstrating sincere

Henderson also contends that the court erred in relying upon "clearly false and inaccurate PSR conclusions." He cites as inaccurate the PSR's findings on his acceptance of responsibility, his possession of a knife during the robberies, and his status as a career offender. We previously have recognized that a sentencing court may adopt facts contained in a PSR if the facts have an adequate evidentiary basis and the defendant does not present rebuttal evidence.¹⁵ In the instant case, the conclusions stated in the PSR were based upon Henderson's behavior when interviewed and thereafter as well as the indictments for his prior crimes. Henderson offered no rebuttal evidence other than his unsworn assertions that he never used a knife in the prior robberies. We perceive neither error nor abuse of discretion in the district court's adoption of the facts contained in the PSR.¹⁶

In his final assignments of error, Henderson contends that the district court erred in considering his four robbery convictions as separate offenses when computing his criminal history points under U.S.S.G. §4A1.2(a)(2) and when characterizing him as a career offender under U.S.S.G. §4B1.4. Noting that the commentary to §4A1.2 provides that sentences for prior offenses are "related" if

contrition), **cert. denied**, 114 S.Ct. 266 (1993). See also **United States v. Taylor**, No. 93-5941, 1994 WL 260848 (4th Cir. Jun. 15, 1994)(unpublished)(finding no clear error in denial of adjustment when defendant denied relevant conduct in interview with probation officer but later recanted the denial after release of the PSR).

United States v. Valencia, 44 F.3d 269 (5th Cir. 1995).

See **United States v. Lghodaro**, 967 F.2d 1028, 1030 (5th Cir. 1992)("[O]bjections were merely in the form of unsworn assertions, which are unreliable and should not be considered."); **Valencia**.

the offenses "were consolidated for trial or sentencing,"¹⁷ he maintains that his prior offenses were informally consolidated under Chapter 3 of the Texas Penal Code. Although we rejected this argument in **United States v. Garcia**,¹⁸ Henderson insists that an intervening decision by the Texas Court of Criminal Appeals has changed the law relied upon by the **Garcia** court.¹⁹

We first note that we review this claim only for plain error because Henderson did not object to the PSR or lodge an objection at the sentencing hearing on this basis.²⁰ Even if we assume that Texas law now allows informal consolidation, the district court did not err in treating Henderson's offenses as separate. First, Texas law is not binding on the issue whether the sentences for prior offenses are related under the sentencing guidelines.²¹ Further, the district court had an ample basis to conclude that the offenses in question had not been consolidated and were, in fact, unrelated and distinct. The four robbery offenses at bar occurred on different dates and involved different victims. The pleas and sentences thereon were entered on three separate dates. No formal

U.S.S.G. §4A1.2, cmt. n. 3 (1994).

962 F.2d 479 (5th Cir.), **cert. denied**, 113 S.Ct. 293 (1992).

See **LaPorte v. State**, 840 S.W.2d 412 (Tex. Cr. App. 1992).

United States v. McCaskey, 9 F.3d 368 (5th Cir. 1993), **cert. denied**, 114 S.Ct. 1565 (1994). Plain error requires an error which is clear and obvious under the prevailing law and which affects substantial rights. **United States v. Calverley**, 37 F.3d 160 (5th Cir. 1994)(en banc), **cert. denied**, 115 S.Ct. 1266 (1995).

United States v. Ainsworth, 932 F.2d 358 (5th Cir.), **cert. denied**, 112 S.Ct. 327 (1991).

order of consolidation was ever entered and the cases retained separate cause numbers.²² Even if the district court had erred, it is manifest that the error would not have been "plain."

The sentences appealed are AFFIRMED.

See **United States v. Ford**, 996 F.2d 83 (5th Cir. 1993), **cert. denied**, 114 S.Ct. 704 (1994).