

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40136
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHARLES ALLEN MALOY,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Louisiana
(1:93-CR-10013-01)

(September 28, 1994)

Before KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:*

I

On the second day of a surveillance of a marijuana garden, Maloy and his codefendant, Williams, appeared in the garden where the law enforcement officers observed Maloy cutting some of the plants and giving them to Williams. After Maloy had harvested about seventeen of the plants, the officers confronted and arrested

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Maloy and Williams. At the time of arrest, Maloy and Williams were carrying loaded pistols. Both defendants claimed that they did not cultivate the garden, but rather were harvesting some of the plants for their own personal use. Maloy further stated to police that he had found other gardens within the forest and led the police to these other gardens. The first garden contained 297 marijuana plants and the additional gardens contained approximately forty-three plants.

After trial by jury, Maloy was convicted of possession with the intent to distribute 339 marijuana plants in violation of 21 U.S.C. § 841(a)(1) and use and carrying of a firearm in relation to a drug trafficking offense in violation of 21 U.S.C. § 924(c)(1). Maloy was sentenced to seventy-two months on the drug offense, followed by a sixty-month mandatory sentence for the firearm offense.¹

Maloy appeals his conviction and sentence, contending that (1) the Firearm Owner's Protection Act 18 U.S.C. § 924(c) is unconstitutionally vague and overbroad; (2) the Firearm Owner's Protection Act as applied in the instant case violates the Double Jeopardy Clause; (3) the district court abused its discretion in refusing to include a requested jury instruction requiring that the jury exclude every reasonable hypothesis that is consistent with innocence in order to find Maloy guilty; and (4) the district court

¹Maloy will also serve a four-year term of supervised release and will pay a fine of \$12,500.

erred in failing to give Maloy credit in sentencing for acceptance of responsibility. Finding no error, we affirm.

II

Maloy initially contends that 18 U.S.C. § 924(c)(1) is unconstitutionally vague and overbroad. Maloy argues that the gun played no part in the drug offense as he was lawfully in possession of the firearm and only carried it in his pocket without display.

Therefore, Maloy concludes that his being in lawful possession of the gun could not possibly know that his conduct became unlawful when combined with illegal activity.

Maloy failed to raise the void for vagueness and overbreadth arguments in the district court. Parties are required to challenge errors in the district court. When a defendant in a criminal case has forfeited an error by failing to object, this court may remedy the error only in the most exceptional case. United States v. Rodriguez, 15 F.3d 408, 414 (5th Cir. 1994). The United States Supreme Court held cases to be exceptional when satisfying a two-part analysis. United States v. Olano, ___ U.S. ___, 113 S.Ct. 1770, 1777-79, 123 L.Ed.2d 508 (1993).

First, an appellant who raises an issue for the first time on appeal has the burden to show that there is actually an error, that it is plain, and that it affects substantial rights. Olano, 113 S.Ct. at 1777-78; Rodriguez, 15 F.3d at 414-15; Fed. R. Crim. P. 52(b). An error is "plain" when it is clear or obvious and "affects substantial rights" when it is prejudicial. Olano, 113

S.Ct. at 1777-78. This Court lacks the authority to relieve an appellant of this burden. Id. at 1781.

Second, even when the appellant carries his burden, "Rule 52(b) is permissive, not mandatory. If the forfeited error is 'plain' and 'affect[s] substantial rights,' the Court of Appeals has authority to order correction, but is not required to do so." Olano, 113 S.Ct. at 1778 (quoting Fed. R. Crim. P. 52(b)). The Court of Appeals should correct a plain forfeited error affecting substantial rights if the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." Olano, 113 S.Ct. at 1779 (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)). Thus, our discretion to correct an error pursuant to Rule 52(b) is narrow. Rodriguez, 15 F.3d at 416-17.

We are fully satisfied that Maloy has failed to meet the plain error standard that would justify our review. Because Maloy failed to raise this issue in the district court, we refuse to consider the argument for the first time on appeal.²

III

Maloy contends that his conviction for the offense of using or carrying a firearm in relation to a drug trafficking offense violates the Double Jeopardy Clause. The government correctly asserts that Maloy has failed to brief this argument adequately.

²We do, however, observe that this issue totally without merit. See United States v. Thomas, 12 F.3d 1350, 1361-62 (5th Cir. 1994) cert. denied, 114 S.Ct. 1861 (1994); United States v. Magee, No. 92-7766, slip op. at 11-12 (5th Cir. Apr. 22, 1994).

Rule 28(a)(4) of the Federal Rules of Appellate Procedure requires that the "appellant's argument contain the reasons he deserves the requested relief 'with citation to the authorities, statutes and parts of the record relied on.'" Yohey v. Collins, 985 F.2d 222, 225 (5th Cir. 1993) (quoting Weaver v. Puckett, 896 F.2d 126, 128 (5th Cir.1990), cert. denied, 498 U.S. 966 (1990)). Maloy gives little explanation of why he was subjected to double jeopardy, but rather states that he faces quadruple jeopardy in state and three federal courts "for essentially the same conduct or transaction." He adds that his conviction

smacks of double jeopardy, and yet not in the hornbook sense that that concept is usually understood. In what other instance can one cite a situation where a lawful activity when taken in conjunction with a crime results in a punishment that is often more than unlawful activity would bring when multiplied by two?

Maloy has not supported his argument with citations to the record or to authority. Therefore, we determine that Maloy has abandoned this argument by failing to adequately brief his position. See Yohey, 985 F.2d at 225.

IV

Maloy next contends that the district court erred in denying his requested jury instruction that the district court instruct the jury that "in order to find a defendant guilty you must exclude every reasonable hypothesis that is consistent with innocence." The trial judge has substantial latitude in formulating the jury charge, and this court reviews the district court's refusal to give

a requested jury instruction for an abuse of discretion. United States v. Aggarwal, 17 F.3d 737, 745 (5th Cir. 1994). We may reverse only if the requested instruction "(1) is substantially correct; (2) was not substantially covered in the charge actually given; and (3) concerns an important point such that failure to give it seriously impaired the defendant's ability to effectively present a given defense." Id.

The district court did not abuse its discretion in refusing to give the requested instruction because it is not substantially correct. "It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt." United States v. Bell, 678 F.2d 547, 549 (5th Cir. 1982) (en banc), aff'd, 462 U.S. 356 (1983).

V

Finally, Maloy contends that the district court erred by failing to reduce his sentence for acceptance of responsibility and for cooperation with the government. Instead, Maloy argues that he received an enhanced sentence after confessing and leading the authorities to an additional marijuana patch.

In regard to an adjustment for acceptance of responsibility, the Pre-sentencing Report provided:

This defendant put the Government to its burden of proof at trial by denying the essential factual elements of guilt and was convicted by a jury verdict. He has not

taken any extraordinary steps or made any additional effort to admit guilt or express remorse. In view of the above, he is not being credited with acceptance of responsibility.

Contrary to Maloy's objection at sentencing, the district court found that "there ha[d] not been any evidence of acceptance of responsibility." Maloy's argument was based primarily on the fact that he had led authorities to a marijuana patch that was growing separately from that discovered by the officials. The court indicated that it had considered those factors but was unpersuaded that a guideline reduction was warranted.

Further, Maloy's argument has been an attempt to minimize his participation in the drug activity by urging that instead of cultivating the marijuana for distribution, he and his cousin were merely trying to steal some of the marijuana for their own personal use. The jury clearly disbelieved this testimony in part by acquitting him of the cultivation offense but convicting him of the offense of possession with the intent to distribute. Maloy did not demonstrate "sincere contrition" regarding the full extent of his criminal conduct. See United States v. Wilder, 15 F.3d 1292, 1299 (5th Cir. 1994). In the light of this fact and Maloy's failure to provide any authority for his proposition that limited cooperation with the government entitles him to a reduction for acceptance of responsibility, we affirm his sentence.

VI

For the foregoing reasons, the judgment of the district court
is

A F F I R M E D.