IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-40229

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LARRY DEAN WAGONER,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(4:93-CR-43)

(September 14, 1994)

Before KING, GARWOOD, and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:[*]

Wagoner pled guilty to kidnapping and was sentenced to 360 months in prison. He claims that, under 18 U.S.C. §§ 3006A(e) and 4241, the district court should have provided him with a psychological or psychiatric expert or examination.This motion stated that he had been diagnosed in 1979 as suffering from "passive dependent personality with episodic excessive drinking" and that he suffered "from periodic episodes of confusion and

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

depression." The motion conclusorily alleged that Wagoner was unable to communicate with his lawyer to help him prepare for the sentencing hearing. Wagoner filed a second motion seeking appointment of an expert to help him prepare for the sentencing hearing.

In response, the government noted that the 1979 evaluation that diagnosed passive dependent personality concluded that Wagoner was mentally competent. The government also noted that Paul Hennen, the probation officer, had met with Wagoner three times and had noted no communication problems relating to the facts of the case or the consequences of Wagoner's actions. Hennen noted that Wagoner had problems stating a reason for committing the offense, but one would expect it to be difficult to explain the commission of such a brutal crime. In light of Wagoner's failure to plead specific facts calling competency into question, the district court did not abuse its discretion in denying Wagoner's motions to appoint an expert and order an examination and in finding Wagoner competent to be sentenced. See United States v. Castro, 15 F.3d 417, 421-22 (5th Cir.), petition for cert. filed, (U.S. May 27, 1994) (No. 93-9334) (holding that previous confinement to mental institution and heroin addiction were insufficient to place at issue sanity during commission of crime).

Wagoner's second argument is that the district court should have considered two of his prior convictions as consolidated cases for purposes of calculating his criminal history. On December 12, 1981, Wagoner pled guilty to and was sentenced for two counts of

burglary on August 26, 1981. On the same day, he pled guilty to and was sentenced for committing assault and battery with a dangerous weapon on October 21, 1981. The district court treated the burglary convictions as one offense and the assault conviction as a separate offense. Wagoner argues that, even though there was no formal order of consolidation, the state trial court treated the convictions as consolidated because it ordered that the sentences run concurrently. However, the imposition of concurrent sentences on the same day in two distinct cases does not indicate that the convictions were consolidated. United States v. Ford, 996 F.2d 83, 86 (5th Cir. 1993), cert. denied, 114 S. Ct. 704 (1994).

Wagoner argues further that he was entitled to a three-point reduction in offense level for acceptance of responsibility. He claims that the only respect in which he had not accepted responsibility is for the sexual assault, and that to require him to accept responsibility for that crime before he had been convicted of it would violate his privilege against self-incrimination. Even apart from the sexual assault, however, Wagoner did not fully accept responsibility. He told the probation officer that he hit Whitten with the tire tool only after she had first attacked him with it, and he denied that he ever forced Whitten into the trunk of the car. Thus, Wagoner did not fully accept responsibility. Even if the district court predicated its ruling on the denial of the sexual assault, any error was harmless because the failure to accept full responsibility for the

kidnapping was adequate support for the denial of the three-point reduction.

Finally, Wagoner argues that there was insufficient evidence to support an upward adjustment to his offense level for the sexual assault. The presentence report and FBI agent Jim Blanton offered uncontradicted evidence about the rape. Wagoner did not testify and offered no rebuttal evidence. Thus, the district court's finding that Wagoner committed a sexual assault in the course of the kidnapping was not clearly erroneous. Wagoner argues that the district court lacks jurisdiction to increase a federal sentence because of a state-law sexual offense, but under the comment to U.S.S.G. § 2A4.1, a state offense can serve to enhance a punishment for a federal crime. AFFIRMED.