

UNITED STATES COURT OF APPEALS  
For the Fifth Circuit

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No. 94-40511  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

CHARLES EVERETT BLACKBURN,

Defendant-Appellant.

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Appeal from the United States District Court  
For the Eastern District of Texas  
(5:93-CR-10)

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(November 29, 1994)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.

PER CURIAM:<sup>1</sup>

Charles Everett Blackburn appeals a 30-month sentence assessed by the district court on the grounds that the court erred in calculating his sentence under the U.S. Sentencing Guidelines. We affirm.

I.

A.

Blackburn pled guilty to one count of falsifying a Bureau of Alcohol, Tobacco, and Firearms ("ATF") firearm purchase

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<sup>1</sup> 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 Pursuant to that Rule, the court has determined that this opinion should not be published.

application in violation of 18 **U.S.C.** § 922(g)(a)(6). One of the questions on the ATF application inquired whether the applicant had ever been committed to a mental institution. Blackburn stated that he had never been committed despite the fact that a district court had previously committed Blackburn to the Terrell State Hospital for observation.

The district court sentenced Blackburn to 30 months imprisonment based on the presentence report, which assigned Blackburn a total offense level of 17 under the U.S. Sentencing Guidelines. The presentence report based its recommendation on § 2K2.1 of the guidelines, titled "Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition." Section 2K2.1(a)(4)(A) assigns a base-offense level of 20 for defendants having "one prior felony conviction of either a crime of violence or a controlled substance offense." In 1981 Blackburn pled guilty to a felony charge of aggravated assault and received a sentence of probation. Based on this conviction, the presentence report assigned Blackburn a base-offense level of 20 under § 2K2.1(a)(4)(A). The presentence report applied a three-point reduction for "acceptance of responsibility" under § 3E1.1(a)-(b) for a total offense level of 17.

Blackburn's sole contention on appeal is that the district court erred by considering his aggravated assault conviction because the prior conviction was over ten years old. Blackburn points to Application Note Five to § 2K2.1 to support his claim of error. Note Five states that, for purposes of calculating the base-offense level under § 2K2.1, the court should count only those

felony convictions receiving criminal history points under § 4A1.1 of the guidelines. Blackburn contends that § 4A1.2(e)(2) of the guidelines prohibits the use of convictions that are more than ten years old to calculate criminal history points. Because Blackburn's aggravated assault sentence was imposed in 1981, which is more than ten years prior to his present offense, Blackburn maintains that the district court erroneously used that conviction to raise his base-offense level under § 2K2.1.

B.

The first issue we must consider is the appropriate standard of review to apply. We will ordinarily affirm a sentence imposed under the sentencing guidelines unless the sentence is imposed in violation of law or as a result of an incorrect application of the guidelines. **United States v. Shipley**, 963 F.2d 56, 58 (5th Cir.), **cert. denied**, \_\_\_ U.S. \_\_\_, 113 S.Ct. 348 (1992). Where the defendant raises an objection to a sentence for the first time on appeal, however, we limit our review to whether the district court committed "plain error". **United States v. Rodriguez**, 15 F.3d 408, 416 (5th Cir. 1994). The appropriate standard of review, therefore, turns on whether Blackburn made a timely objection to the district court.

While Blackburn objected to the use of his prior conviction during the sentencing hearing, his objections were based on different grounds than those presented to us on appeal. During the sentencing hearing, Blackburn's counsel argued that, under 21 **U.S.C.** § 921, Blackburn's prior felony sentence could not be considered a "conviction" for purposes of the sentencing guidelines

because it was a deferred adjudication. Blackburn's counsel also objected to the use of the prior conviction on the grounds that the prior conviction was constitutionally infirm. The district court overruled both of these objections.

In order to preserve a claim of error for appeal, the defendant must state the grounds of the objection with sufficient specificity to provide the district court fair notice of the basis for the objection. **United States v. Devine**, 934 F.2d 1325, 1342 (5th Cir.), **cert. denied** \_\_\_ U.S. \_\_\_, 112 S.Ct. 349 (1991); **United States v. Navejar**, 963 F.2d 732, 735 (5th Cir. 1992). We conclude that Blackburn's objections during the sentencing hearing were insufficient to put the district court on notice that the age of Blackburn's prior conviction prevented its use to determine his base-offense level under § 2K2.1 of the guidelines. Blackburn's objections during the sentencing hearing did not address the time limitations of § 4A1.2(e), nor did he raise any question concerning the age of the conviction. Instead, Blackburn urged the court not to consider the earlier conviction solely because it was a deferred adjudication and because it was constitutionally infirm. Accordingly, we can grant relief to Blackburn only if the district court's use of the prior conviction is plain error.

C.

The U.S. Supreme Court recently announced a three-part definition of plain error: (1) the district court must have committed error, (2) the error must be "plain" or "obvious," and (3) the error must affect the "substantial rights" of the defendant. **United States v. Olano**, \_\_\_ U.S. \_\_\_, 113 S.Ct. 1770,

1777-1779 (1993). Even if this three-part definition is satisfied, an appellate court's consideration of the defendant's claim of error is discretionary. **Id.** Whether or not an appellate court chooses to exercise its discretion ultimately depends "on the facts of the particular case." **Rodriquez**, 15 F.3d at 416. We conclude that Blackburn has failed to show plain error.

Although the district court's use of Blackburn's prior conviction was error, the error was not obvious. We have previously held that plain error requires "a mistake so blatant and fundamental as to constitute a miscarriage of justice." **United States v. Francies**, 945 F.2d 851, 852 (5th Cir. 1991). Blackburn's claim that convictions over ten years old cannot be used to elevate his sentence is not obvious from the language of § 2K2.1. To discover this rule, the district court would have been required to first refer to the application notes for § 2K2.1 to learn that § 4A1.2's "criminal history" requirements relating to prior convictions also apply in determining the base-offense level under § 2K2.1. Then the district court would have to turn to § 4A1.2 to find the prohibition against using convictions more than ten years old. We cannot expect the district court to be fully versed in every section and subsection of the sentencing guidelines. Had Blackburn brought the error to the court's attention it could have quickly corrected the error. Furthermore, Blackburn had access to the presentence report and had ample notice that the district court would be relying on his 1981 conviction to fix his sentence. In short, we conclude that any error committed by the district in applying the guidelines was not plain error.

AFFIRMED.