

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-40957

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BILLY JOE YOUNG,

Defendant-Appellant.

Appeal from the United States District Court
For the Eastern District of Texas
(6:94-CR:14(1))

(April 21, 1995)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:*

Billy Joe Young appeals from his sentence on one count of aiding and abetting in the preparation and presentation of false and fraudulent individual tax returns in violation of 26 U.S.C. § 7206(2) (1988). We affirm.

I

Young fraudulently prepared individual income tax returns on behalf of clients for the years 1989, 1990, and 1991. Young

* Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

overstated his clients' itemized deductions to reduce their tax liability and listed false dependents so that his clients could qualify for earned income credits. The twenty-seven fraudulent returns selected by the IRS for criminal prosecution contained \$449,865.59 in overstated deductions and \$6,605 in false earned income credits.

A federal grand jury indicted Young on eighteen counts of aiding and abetting in the preparation and presentation of false and fraudulent individual tax returns in violation of 26 U.S.C. § 7206(2).¹ He pled guilty to count one of the indictment, and the Government agreed to dismiss counts two through eighteen. The district court then sentenced Young to a fourteen-month term of imprisonment and one year of supervised release, and ordered Young to pay \$5,871.68 to the United States Attorneys' Financial Litigation Unit for the costs of prosecution.

II

At the outset, we address the statement with which Young's counsel opens his brief:

Pursuant to *Anders v. California*, 386 U.S. 738, 744, 18 L. Ed. 2d 493, 87 S. Ct. 1396, 1967, Counsel for the Appellant would state that he has searched the record and there are no tenable arguable points of error which would modify the outcome. Counsel would state that there is

¹ Section 7206(2) provides:
Any person who [w]illfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document . . . shall be guilty of a felony
26 U.S.C. § 7206(2).

only three issues that might even marginally support error, so counsel would address these issues and show authority on why these issues are not tenable.

Counsel's puzzling invocation of *Anders* in no way conforms with the procedure established by the Supreme Court in *Anders* or subsequently described by this Court. As we recently stated in *United States v. Cordero*, 18 F.3d 1248 (5th Cir. 1994):

Anders established standards for an appointed attorney who seeks to withdraw from a direct criminal appeal on the ground that the appeal lacks an arguable issue. After a "conscientious examination" of the case, the attorney must request permission to withdraw and must submit a "brief referring to anything in the record that might arguably support the appeal." *Id.* at 744, 87 S. Ct. at 1399. The attorney must isolate "possibly important issues" and must "furnish the court with references to the record and legal authorities to aid it in its appellate function." *United States v. Johnson*, 527 F.2d 1328, 1329 (5th Cir. 1976). After the defendant has had an opportunity to raise any additional points, the court fully examines the record and decides whether the case is frivolous. *Anders*, 386 U.S. at 744, 87 S. Ct. at 1399-1400.

Id. at 1253. Young's counsel has complied with none of these procedures, however. He has not moved to withdraw, and he has not filed an *Anders* brief. Instead, he has continued to represent Young and raised three frivolous issues in his brief on Young's behalf.²

We remind counsel that *Anders* allows appointed counsel to withdraw from representing a criminal defendant on appeal when he discerns no appealable issues in the record and complies with the procedure established by the Supreme Court in *Anders*. *Anders* is not a disclaimer to be attached to a poorly written brief. In

² Young's counsel also does not "show authority on why these issues are not tenable," as he asserted in the opening paragraph of Young's brief.

McCoy v. Court of Appeals of Wisconsin, Dist. 1, 486 U.S. 429, 108 S. Ct. 1895, 100 L. Ed. 2d 440 (1988), the Supreme Court elaborated on the *Anders* procedure and described it as an accommodation of appointed counsel's dual duties. On one hand, "an indigent defendant has the same right to effective representation by an active advocate as a defendant who can afford to retain counsel of his or her choice." *Id.* at 435, 108 S. Ct. at 1900; see also *Anders*, 386 U.S. at 744, 87 S. Ct. at 1400 ("The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae*"). On the other hand, "[n]either paid nor appointed counsel may . . . consume the time and the energies of the court or the opposing party by advancing frivolous arguments. An attorney, whether appointed or paid, is therefore under an ethical obligation to refuse to prosecute a frivolous appeal." *McCoy*, 486 U.S. at 436, 108 S. Ct. at 1901. Young's counsel, through his strange invocation of *Anders*, has managed to run afoul of both of these duties simultaneously. Nevertheless, as Young's counsel has not sought to withdraw from his appointment, we consider on their merits the issues raised in Young's brief.

III

Young raises three issues with respect to his sentence. "We will uphold a sentence imposed under the guidelines unless it is imposed in violation of law, is the result of an incorrect application of the guidelines, or is an unreasonable departure from

the applicable guideline range." *United States v. Guadardo*, 40 F.3d 102, 103 (5th Cir. 1994) (citing 18 U.S.C. § 3742(e) (1988)).

First, Young argues that it was unfair for the district court to have considered crimes for which he was indicted but not convicted in calculating the aggregate amount of loss caused by his relevant conduct. Young cites no authority in support of this argument, and he does not deny that his sentence conforms with the sentencing guidelines. Instead, he argues that "[a] better policy would be for the sentencing guidelines to adhere to the amounts in those counts pled to, with a plea agreement stating that the Court shall have the right to depart upward where 'relevant conduct' so warrants." As a policy argument, this contention would be more appropriately directed to the United States Sentencing Commission than this Court, and as a legal argument, it is frivolous. See *United States v. Byrd*, 898 F.2d 450, 452 (5th Cir. 1990) ("This Court has made clear that the guidelines allow consideration of relevant conduct of which the defendant has not been convicted."); *United States v. Taplette*, 872 F.2d 101, 106 (5th Cir.) (noting that "the guidelines allow the consideration of relevant conduct for which the defendant was not convicted"), *cert. denied*, 493 U.S. 841, 110 S. Ct. 128, 107 L. Ed. 2d 88 (1989); *United States v. Juarez-Ortega*, 866 F.2d 747, 748 (5th Cir. 1989) ("[T]he [sentencing] court may properly consider past crimes, including those for which a defendant has been indicted but not convicted, as well as the factual basis of dismissed counts.").

Second, Young argues that it was unfair for the district court

to have included in his criminal history a DWI conviction that occurred more than ten years before the conduct charged in count one of his indictment, the one count to which he pled guilty. Section 4A1.2(e) of the sentencing guidelines provides that a prior sentence that does not exceed one year and one month's imprisonment and that was not imposed within ten years of the defendant's "commencement of the instant offense" is not counted in the computation of a defendant's criminal history. United States Sentencing Commission, *Guidelines Manual*, § 4A1.2(e) (Nov. 1991).³ The DWI conviction at issue occurred in July, 1980, more than ten years before the conduct charged in count one but less than ten years before Young's relevant conduct began. Young concedes that the commentary to section 4A1.2(e) defines "commencement of the instant offense" to include "any relevant conduct,"⁴ but he restates his position that it is unfair to base his sentence on crimes for which he was indicted but not convicted. This argument is as frivolous as Young's first.⁵

III

For the foregoing reasons, we AFFIRM.

³ The district court used the 1991 *Guidelines Manual* because it concluded that use of the 1993 manual would violate the *ex post facto* clause.

⁴ U.S.S.G. § 4A1.2, cmt. (n.8).

⁵ We do not reach the merits of Young's third argument because, as he acknowledges in his brief, his third argument depends on the success of his second.