

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-41251  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JASON BRADLEY KIRBY,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Eastern District of Texas  
(3:94 CR 12)

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May 9, 1995

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

PER CURIAM:\*

Jason Bradley Kirby appeals the sentence he received following his conviction of taking a motor vehicle by force, violence, or intimidation and causing serious bodily harm, in violation of 18 U.S.C. § 2119. Finding no error, we affirm.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

## I.

Kirby pleaded guilty. The Presentence Investigation Report ("PSR") reflected a total offense level of 30, a criminal history category of I, and a resultant guideline range of 97 to 121 months.<sup>1</sup> After Kirby filed his objections to the PSR, it was amended to reflect changes resulting from these objections. Kirby did not object to the amended version or to the sentencing recommendation.

Before sentencing, Kirby moved for downward departure on the ground that he suffered from recurrent, major depression, a significant psychological problem not taken into account by the guidelines.<sup>2</sup> Kirby and his attorney were provided the opportunity to speak on mitigating circumstances, but the court denied Kirby's request to call two unnamed character witnesses.

The district court overruled Kirby's motion for downward departure and sentenced him to the range maximum of 121 months, five years' supervised release, and restitution of \$28,683.

## II.

Kirby argues that he was denied due process and his Sixth Amendment right to present testimony by the refusal to allow

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<sup>1</sup> Sentencing took place November 16, 1994, so the 1994 edition of the guidelines should have been used to prepare the PSR. See 18 U.S.C. § 3553(a)(4)(A), (b); § 1B1.11(a), p.s. (Nov. 1994). The probation officer used the 1993 edition. There is no error, however, as the guidelines and policy statements germane to this appeal did not change.

<sup>2</sup> Kirby had been clinically treated for depression in May 1991 and May 1993.

character witnesses. Kirby contends that this testimony would have presented necessary facts and information that would have justified a lower sentence. The district court stated that it did not ordinarily take character testimony into account, and it would not be beneficial in this case because Kirby had no prior criminal record.

At sentencing, the defendant must be given the opportunity to comment on the PSR findings and other matters relating to the appropriate sentence and, in the discretion of the court, may introduce testimony or other information relating to any alleged factual inaccuracies. FED. R. CRIM. P. 32(c)(1). The right of allocution includes the chance to inform the court of any mitigating circumstances by speaking in his own behalf, but not the right to call character witnesses. United States v. Jackson, 700 F.2d 181, 191 (5th Cir.), cert. denied, 464 U.S. 842 (1983). The decision to allow such testimony lies within the discretion of the district court. United States v. Narvaez, 38 F.3d 162, 165 (5th Cir. 1994). The sentencing court must determine, on a case-by-case basis, the "appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law." Id. (citation omitted).

Upon Kirby's objection, the amended PSR included input concerning his most recent mental health treatment and a letter from a psychologist. As Kirby made no objection to the amended PSR, the district court was presented with no factual disputes in need of resolve through additional testimony. The court allowed

Kirby the opportunity to speak in his own behalf. Kirby's counsel also argued that a sentence at the lower range would be appropriate to serve the purpose of justice and rehabilitation. Under these circumstances, the district court provided Kirby his right of allocution and did not abuse its discretion in disallowing character testimony. See Jackson, 700 F.2d at 191.

Kirby relies upon Washington v. Texas, 388 U.S. 14, 19 (1967), to support his argument that he was denied his Sixth Amendment right to present testimony. Washington is factually distinguishable, because it deals with the right to present testimony during the guilt/innocence phase of the trial. Washington held that "[t]he right to offer testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." Id. Thus, Kirby waived this right by pleading guilty; the allowance of testimony at sentencing lies within the district court's discretion.

### III.

Kirby argues that the district court misapplied the sentencing guidelines because it had the impression that it could not consider Kirby's depression or mental illness. Kirby also argues that the court misapplied the guidelines by sentencing him to the highest possible sentence because Kirby used a weapon and because the victim suffered a prolonged illness.

Because Kirby did not object to the amended PSR, our review is for plain error. United States v. Guerrero, 5 F.3d 868, 870 (5th Cir. 1993), cert. denied, 114 S. Ct. 1111 (1994). Under FED. R. CRIM. P. 52(b), we may correct forfeited errors only when the appellant shows the following factors: (1) there is an error, (2) that is clear or obvious, and (3) that affects his substantial rights. United States v. Calverley, 37 F.3d 160, 162-64 (5th Cir. 1994) (en banc), cert. denied, 115 S. Ct. 1266 (1995) (citing United States v. Olano, 113 S. Ct. 1770, 1776-79 (1993)). If these factors are established, the decision to correct the forfeited error is within our sound discretion, and we will not exercise that discretion unless the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. Olano, 113 S. Ct. at 1778.

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, we may remedy the error only in the most exceptional case. Calverley, 37 F.3d at 162.

The Supreme Court has directed the courts of appeals to determine whether a case is exceptional by using a two-part analysis. Olano, 113 S. Ct. at 1777-79. 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; United States v. Rodriguez, 15 F.3d 408, 414-15 (5th Cir. 1994); FED. R. CRIM. P. 52(b). Plain error is one that is "clear or obvious, and,

at a minimum, contemplates an error which was clear under current law at the time of trial." Calverley, 37 F.3d at 162-63 (internal quotation and citation omitted). "[I]n most cases, the affecting of substantial rights requires that the error be prejudicial; it must affect the outcome of the proceeding." Id. at 164. We lack the authority to relieve an appellant of this burden. Olano, 113 S. Ct. 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)). Our discretion to correct an error pursuant to rule 52(b) is narrow. Rodriguez, 15 F.3d at 416-17.

The statutory maximum term of imprisonment Kirby faced was 25 years. 18 U.S.C. § 2119. The district court sentenced Kirby within the sentencing guideline range and within the statutory maximum. The district court complied with the mandates of FED. R. CRIM. P. 32 by providing Kirby and his attorney the opportunity to address the court and advising Kirby of his right to appeal his sentence. Thus, the district court did not commit plain error.

The district court stated at sentencing that

it has been demonstrated that the))or at least there is an opinion by a psychologist that . . . the defendant was suffering from a major depression at the time of the shooting. This is a very serious mental situation. Unfortunately, the guidelines don't appear to make))don't appear to make allowance for that, the seriousness of the mental condition as was considered by the Sentencing Commission. Were it left to me, rather than the guide-

lines, I might take that into consideration in assessing sentence, but the guidelines preclude it.

Kirby argues that the court misapplied the guidelines because U.S.S.G. § 5H1.3, p.s., states that "[m]ental and emotional conditions are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range," but "may be relevant in determining the conditions of probation or supervised release," and thus it would be illogical to have a rule forbidding the court to consider mental or emotional conditions when deciding what sentence a defendant should receive within the applicable range.

The guidelines contain no provision precluding the court from considering the defendant's mental condition, nor requiring such consideration. The guidelines allow for departure outside the applicable range for such reasons as use of a dangerous weapon, physical injury, abduction, and criminal purposes, all of which are present in this case. See U.S.S.G. §§ 5K2.2, p.s.; 5K2.4, p.s.; 5K2.6, p.s.; 5K2.9, p.s. The guidelines allow the district court discretion to assess sentence anywhere within the applicable range.

The provisions providing for upward departure could serve as a foundation for the district court's determination that Kirby's actions warranted sentence at the top of the applicable range. The court was not required to consider Kirby's mental condition in assessing the sentence. Nothing in the record evidences that the court misapplied the sentencing guidelines. Kirby fails to show plain error affecting his substantial rights.

#### IV.

Kirby argues that he was denied due process because the district court failed to examine adequately his financial ability in assessing restitution of \$28,680 and awarded restitution without considering the factors under 18 U.S.C. § 3664(a). Kirby contends that because the PSR made the specific finding that he did not have the present ability to pay restitution, the court denied him due process by failing to adopt that finding.

Kirby did not, however, raise a due process argument in his objection to the court's restitution assessment. This argument is thus raised for the first time on appeal and will be reviewed for plain error as discussed above.

In determining whether to assess restitution, the district court should consider "the amount of loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate." 18 U.S.C. § 3664(a). The defendant bears the burden of demonstrating his inability to pay. § 3664(d). Specific fact findings regarding restitution factors are not required, the question on review being whether the record contains sufficient data for the appellate court to perform its mandated review. United States v. Gelais, 952 F.2d 90, 97 (5th Cir.), cert. denied, 113 S. Ct. 439 (1992).

Kirby was twenty years old at the time of sentencing; he never married and had no dependents; he lived with his parents, both of



whom were employed; he completed eleventh grade; he had been employed for the previous year; and the victim sustained a loss of \$28,680 as a result of the offense. Kirby did not present evidence of his inability to pay restitution. He fails to show plain error affecting his substantial rights.

AFFIRMED.