

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50093
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ELCO MENDOZA-GONZALES,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Western District of Texas
USDC No. P-93-CR-104-2
- - - - -
(September 20, 1994)

Before KING, SMITH, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Elco Mendoza-Gonzales pleaded guilty to attempted escape and was sentenced to a term of imprisonment of 12 months to run consecutively to the term of imprisonment imposed for a previous conviction which he was serving at the time of his attempted escape. Mendoza-Gonzales argues that his sentence should be vacated because the district court did not state its reasons for imposing a consecutive sentence.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Mendoza-Gonzales was serving a term of imprisonment when he committed the instant offense. According to U.S.S.G. § 5G1.3(a), the district court was required by the Sentencing Guidelines to impose the sentence for the instant offense to run consecutively to the undischarged term of imprisonment. Therefore, the only way that the court could have imposed a concurrent sentence was to depart downward from the guidelines. See United States v. Miller, 903 F.2d 341, 344-49 (5th Cir. 1990)(if § 5G1.3(a) mandates consecutive sentence, court could impose concurrent sentence only by departure from guidelines).

A district court is not required to explain its reasons for refusing a request for a downward departure unless the court's reasons would be required to show that the sentence was imposed in violation of law. United States v. Mueller, 902 F.2d 336, 347 (5th Cir. 1990). The district court imposed a consecutive sentence as required by the guidelines and stated that it found no reason to depart from the guidelines. The court was required to do no more.

Mendoza-Gonzales argues that the district court violated Fed. R. Crim. P. 11 because it did not inform him that he would in all likelihood receive a consecutive sentence. When a defendant claims that a district court has violated Rule 11, this Court conducts a two-part analysis: 1) Did the sentencing court vary from the procedures required by Rule 11; and 2) if so, did the variance affect the substantial rights of the defendant, i.e., was it harmless error? United States v. Johnson, 1 F.3d 296, 298 (5th Cir. 1993) (en banc).

Rule 11 does not require the district court to inform a defendant that his sentence will be consecutive to any sentence that he may currently be serving. United States v. Saldana, 505 F.2d 628, 628 (5th Cir. 1974). Mendoza-Gonzales's argument would require the district court to inform him of the likely sentence he would receive under the guidelines. The guidelines do not change the substantive penalties provided by law. "The district court is not required to calculate or explain the applicable guideline sentence before accepting a guilty plea." United States v. Jones, 905 F.2d 867, 868 (5th Cir. 1990). The district court did not violate Rule 11 by not explaining to Mendoza-Gonzales that he was likely to receive a consecutive sentence under the guidelines.

AFFIRMED.