IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50230
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GREGORY A. NIEHENKE,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(P-93-CR-107-2)

(January 24, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

Defendant-Appellant Gregory A. Niehenke appeals the sentence imposed by the district court following his conviction on a plea of guilty for burglary of a U. S. Post Office in violation of

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

18 U.S.C. § 2115. Niehenke contendsSQfor the first time on appealsQthat the district court erred in increasing both his criminal history category and his offense level to reach a sentencing range covering the statutory maximum sentence for the crime of conviction, and sentencing him to serve such maximum. Finding no plain error in the district court's sentencing of Niehenke, we affirm.

I

FACTS AND PROCEEDINGS

Niehenke pleaded guilty to burglary of a U. S. Post Office. In the Presentence Report (PSR) his offense level was calculated at 10 and his criminal history category at V, producing a sentencing guideline range of 21 to 27 months imprisonment. U.S.S.G. Ch. 5, Pt. A. Additionally, however, the PSR contained a notation to the effect that an upward departure would be warranted based on the criminal history category's inadequate reflection of the seriousness of Niehenke's past criminal conduct and the likelihood that he will commit other crimes. Niehenke did not object to the PSR, but at the sentencing hearing the district court heard argument against upward departure from Niehenke's counsel. Determining that the seriousness of Niehenke's past criminal conduct and potential recidivism was not reflected in the applicable sentencing guideline range, the district court increased Niehenke's criminal history category to VI and his offense level to 17, producing a sentencing range of 51 to 63 months. U.S.S.G. Ch. 5, Pt. A. The district court then sentenced Niehenke to the

statutory maximum of 60 months imprisonment, three years supervised release and a special assessment of $50; and Niehenke timely appealed.

II

ANALYSIS

Niehenke contends that his offense level was incorrectly adjusted from 10 to 17 under U.S.S.G. § 4A1.3, p.s., which contemplates an increase in criminal history category only. His argument to the district court, however, was more a plea for leniency than a legal argument contesting the proper application of the Sentencing Guidelines for purposes of upward departure. Indeed, Niehenke failed to raise this specific argument in the sentencing hearing, so our review is limited to plain error. Fed. R. Crim. P. 52(b); see United States v. Pigno, 992 F.2d 1162, 1166-67 (5th Cir. 1991).

Parties must challenge errors in the district court; otherwise they are forfeited or waived. When an appellant in a criminal case has forfeited an assignment of error by failing timely to object in the trial court, we may remedy the error only when the appellant shows: (1) there is an error, (2) such error is plain, and (3) such error affects the appellant's substantial rights. United States v. Rodriguez, 15 F.3d 408, 414-15 (5th Cir. 1994) (citing United States v. Olano, ____ U.S. ____, 113 S. Ct. 1770, 1777-79, 123 L.Ed.2d 508 (1993)); Fed. R. Crim. P. 52(b). We have no authority to relieve an appellant of this burden. Olano, 113 S. Ct. at 1781. If the forfeited error is `plain' and

`affect[s] substantial rights,' the Court of Appeals may order correction, but is not required to do so." Olano, 113 S. Ct. at 1778 (quoting Fed. R. Crim. P. 52(b)). "Plain is synonymous with `clear' or `obvious,' and `[a]t a minimum,' contemplates an error which was `clear under current law' at the time of trial." See United States v. Calverly, 37 F.3d 160, 162 (5th Cir. 1994) (en banc).

Niehenke's argument stumbles at the first step of the Olano analysis: He fails to demonstrate a clear or obvious error by the district court. The sentencing court may depart from the otherwise applicable guideline range if reliable information indicates that the criminal history category does not adequately reflect either the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes. § 4A1.3. The Guidelines condone an upward departure "in the case of younger defendants (e.g., defendants in their early twenties or younger) who are more likely to have received repeated lenient treatment, yet who may actually pose a greater risk of serious recidivism than older defendants." § 4A1.3 comment. (backg'd).

When making such an upward departure, the district court should consider each incremental criminal history category, and explain why the applicable guideline category is inappropriate and why the higher category selected by the court is appropriate. United States v. Lambert, 984 F.2d 658, 662-63 (5th Cir. 1993) (en banc). When the sentencing court determines that the extent and nature of the defendant's criminal history warrant departure

above Criminal History Category VI, it should structure the departure by moving incrementally down the sentencing table to the next higher offense level in Category VI until it finds a guideline range appropriate to the case. Id. at 663; § 4A1.3 comment. An upward departure will be affirmed on appeal if: (1) the district court provides acceptable reason for the departure, and (2) the departure is reasonable. Lambert, 985 F.2d at 663.

Here the district court followed the correct procedure in departing upward under § 4A1.3. After determining that the applicable guideline sentencing range did not adequately reflect Niehenke's criminal history and recidivism, the district court increased his criminal history category to VI, then increased his offense level to reflect a sentence range within the statutory limit for his offense deemed appropriate by the court. This procedure is commensurate with that anticipated in § 4A1.3. Therefore, Niehenke's argument is without merit. Moreover, even if we were to assume arguendo that the district court committed error in its method of departing upward, it did not commit plain error.

Niehenke's sentence is

AFFIRMED.