UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-60142
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

VICTORIANO VASQUEZ, JR.,

Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Texas

(87-CR-318-1)

(January 10, 1995)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:[*]

BACKGROUND

A grand jury returned a one-count indictment against Victoriano Vasquez, Jr., charging him with possessing 567 kilograms of marijuana with the intent to distribute. A jury convicted Vasquez of the charge. The presentence report (PSR) computed

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Vasquez's sentencing range as 78 to 97 months based on a criminal history category of I and an offense level of 28. Following a sentencing hearing, the district court sentenced Vasquez to 97 months in prison.

Vasquez did not file a notice of appeal within ten days of the sentence, but he later filed a 28 U.S.C. § 2255 motion. United States v. Vasquez, 7 F.3d 81, 83 (5th Cir. 1993). As a result of that motion, the district court ultimately issued an order granting Vasquez the right to file an out-of-time appeal. Pursuant to that order, Vasquez has filed this appeal challenging the 97-month sentence imposed by the district court. His sole contention on appeal is that the district court sentenced him to the maximum sentence within the guideline range for improper reasons.

OPINION

The Government correctly points out that Vasquez did not object at sentencing to either the offense level calculation or the sentence imposed by the court. Accordingly, this Court's review is limited to a search for plain error. See United States v. Guerrero, 5 F.3d 868, 869-70 (5th Cir. 1993), cert. denied, 114 S. Ct. 1111 (1994).

Parties are required to challenge errors in the district court. Fed. R. Evid. 103. When a defendant in a criminal case has forfeited an error by failing to object, this Court may remedy the error only in the most exceptional case. United States v. Rodriguez, 15 F.3d 408, 414 (5th Cir. 1994). The Supreme Court has directed the courts of appeals to determine whether a case is

exceptional by using a two-part analysis. United States v. Olano, ___ U.S. ___, 113 S. Ct. 1770, 1777-79, 123 L. Ed. 2d 508 (1993) (interpreting "plain error" of Fed. R. Crim. P. 52(b)).

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 ("clear" or "obvious"), and that it affects substantial rights. Olano, 113 S. Ct. at 1777-78; Rodriguez, 15 F.3d at 414-15; Fed. R. Crim. P. 52(b). Plain errors are "readily apparent" errors with "clear answers under the current law" in effect at the time of the decision. United States v. Calverley, 37 F.3d 160, 163 (5th Cir. 1994) (en banc). This Court lacks the authority to relieve an appellant of this burden. Olano, 113 S. Ct. at 1781.

Second, the Supreme Court has directed that, 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 (alteration in original) (quoting Fed. R. Crim. P. 52(b)). As the Court stated in Olano:

> the standard that should guide the exercise of [this] remedial discretion under Rule 52(b) was articulated in United States v. Atkinson, 297 U.S. 157, 56 S. Ct. 391, 80 L. Ed. 555 (1936). The Court of Appeals should correct a plain forfeited error affecting substantial rights if the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."

Id. at 1779 (citations omitted).

Appellate review of sentences imposed under the Guidelines is limited to a determination whether the sentence was imposed in violation of law, as a result of an incorrect application of the sentencing guidelines, or was outside of the applicable guideline range and was unreasonable. United States v. Howard, 991 F.2d 195, 199 (5th Cir.), cert. denied, 114 S. Ct. 395 (1993). As a practical matter, therefore, sentences that fall within or below the applicable guideline range are insulated from review, unless the sentence was imposed in violation of law. United States v. Lara-Velasquez, 919 F.2d 946, 954 n.1 (5th Cir. 1990).

"Within a particular range of punishment, . . . the district court has wide discretion in assessing a criminal sentence. This discretion allows the court to consider any circumstances of the offense and the offender that might justify a longer or shorter sentence within the applicable range of punishment." Id. at 956. Accordingly, "the court may consider any relevant information that the Sentencing Guidelines do not expressly exclude from consideration." Id. at 955.

The district court gave the following reasons for imposing the 97-month sentence:

> The Court finds that this particular point in the guidelines should be assessed because the Defendant's prior conviction is narcotics, because the prior conviction of seventeen pounds was also this very same offense, possession with intent to distribute marijuana, and more important, the Court finds that the guidelines are not sufficiently strict on amounts of marijuana and narcotics at the high end of the range, that there is a grouping by the United States Sentencing Commission that in an offense level is

> inappropriate, too many and too much weight is within one level. . . .
>
> The government at one time furnished an information of prior conviction, but never furnished to the Court a copy of the certified copy of the final judgment that would essentially prove up its enhancement, and the government has announced it is not seeking enhancement.
>
> The Court, nonetheless, takes into account that the intent of Congress is to stop second drug offenses. The criminal history category of one does not reflect that the previous conviction was for narcotics, just that it was a previous conviction, and therefore, the Court believes that the high end of the guidelines range is appropriate. And frankly, the Court finds that more would be appropriate in the absence of the guidelines. . . .

Vasquez first argues that the district court erred by imposing a sentence at the top of the range based, in part, on his prior drug conviction because the information the court had concerning the underlying facts of that offense was not sufficiently reliable. The PSR described the prior felony drug conviction as a conviction for possession of more than four ounces of marijuana. At the sentencing hearing, counsel for Vasquez, in response to a question from the court, stated that the offense involved 17 pounds of marijuana. Apparently, based on counsel's statement, the district court concluded that the prior conviction was for possession with the intent to distribute because of the quantity involved.

At sentencing, a district court may consider any information provided the information has "sufficient indicia of reliability to support its probable accuracy." U.S.S.G. § 6A1.3. Generally, unsworn assertions do not bear sufficient indicia of reliability to

be considered at sentencing. United States v. Alfaro, 919 F.2d 962, 966 (5th Cir. 1990). "If information is presented to the sentencing judge with which the defendant would take issue, the defendant bears the burden of demonstrating that the information cannot be relied upon because it is materially untrue, inaccurate or unreliable." United States v. Angulo, 927 F.2d 202, 205 (5th Cir. 1991). Vasquez did not contest his attorney's statement regarding the amount of marijuana involved in the prior conviction or indicate that it was inaccurate. Thus, the district court did not err in relying on this statement as a basis for its decision to sentence Vasquez at the top of the range. Even assuming the district court plainly erred in relying on this statement, however, the error did not affect Vasquez's substantial rights as he was sentenced within the range provided for by the guidelines.

Next, Vasquez contends that the district court erred by taking into account two unadjudicated state offenses in sentencing him at the top of the range. The record refutes Vasquez's contention that the court relied on these arrests.

The PSR indicates that state charges against Vasquez were pending for (1) driving while intoxicated and causing serious bodily injury in 1987, and (2) unlawful possession of a weapon, possession of stolen items, and possession of marijuana in 1978. At sentencing, the prosecutor argued that the court should consider these unadjudicated offenses in determining Vasquez's sentence. The prosecutor suggested that the court consider a departure based on these charges. In response, the court observed that it did not

have any proof that the offenses occurred. The court also noted that the 1978 arrest was "a little bit stale." The court, therefore, declined to depart from the guidelines based on these charges. Moreover, the court made no reference to the charges when explaining why it sentenced Vasquez at the top of the sentencing range. In any event, "when considering the appropriate sentence under the guidelines, [a court] can consider not only crimes that have not been proven beyond a reasonable doubt, but crimes that have not even been charged." United States v. Singleton, 946 F.2d 23, 26 (5th Cir. 1991), cert. denied, 112 S. Ct. 1231 (1992). Thus, even if the court had considered these prior arrests in setting Vasquez's sentence, the court would not have committed plain error.

Finally, Vasquez argues that the district court erred by sentencing him to the top of the sentencing range based on the court's opinion that the punishment provided for in the guidelines was inadequate. Although the record supports the factual basis for Vasquez's argument, the court's statements do not rise to the level of plain error.

In United States v. Lopez, 875 F.2d 1124, 1126-27 (5th Cir. 1989), this Court held that a sentencing court's personal disagreement with the level of punishment provided by the guidelines could not justify a departure from the sentencing range. The Court reasoned that the guidelines were enacted pursuant to a constitutional delegation of power by Congress to the Sentencing Commission and that sentencing courts must sentence within the

guidelines range, unless there exists a valid reason for departure. Id. at 1126.

Here, the court complied with Lopez by sentencing Vasquez within the properly calculated guidelines range. The court's statements revealed the court's belief that the punishment range provided by the guidelines for large quantities of marijuana was insufficient. Unlike the district court in Lopez, however, the district court here did not ignore the law based on its personal opinion. Accordingly, Vasquez has failed to establish plain error in connection with this argument.

AFFIRMED.