

**BLOOD IS THICKER THAN FEDERAL SENTENCING
CONCERNS: *UNITED STATES V. WHITELAW*, NO. 50346, 2009 WL
2515670 (5TH CIR. AUGUST 19, 2009).**

Highlight

Justin Levy

On June 10, 2004, Appellant Alan Whitelaw pled guilty to federal bank fraud charges in the Southern District of Texas.¹ Per an oral agreement between the Government and the appellant, the district court ruled that he could withdraw his guilty plea if the court did not order that his federal sentence run concurrently with a state sentence based on similar charges.² The district court honored the agreement and the appellant served five years in prison.³ After his release from prison, the appellant began serving a term of supervised release.⁴

In October 2007, the appellant's probation office filed a petition for an arrest warrant because the appellant allegedly violated the conditions of his release.⁵ The Western District of Texas issued the warrant and the Government filed a motion to revoke the appellant's supervised release.⁶ The district court held an evidentiary hearing and found that the majority of the Government's charges were true.⁷ The court revoked the appellant's supervised release and sentenced him to the statutory maximum of thirty-six months in prison.⁸ The Sentencing Guidelines suggested that the appellant serve four to ten months in prison.⁹

The appellant appealed to the Fifth Circuit and argued that the district court's sentence was unreasonable because the court ordered the sentence to run consecutively to other sentences.¹⁰ The appellant also asserted that the district court erred because it did not consult the Sentencing Guidelines and

¹ United States v. Whitelaw, No. 50346, 2009 WL 2515670, at *1 (5th Cir. August 19, 2009).

² *Id.*

³ *Id.* The state court sentenced the appellant to sixty years of imprisonment and the federal court sentenced the appellant to forty-sixth months of imprisonment. *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at *3.

did not state the reasons for his sentence.¹¹ The appellant argued that the Fifth Circuit should correct the district court’s plain error because it affected his “substantial rights.”¹²

Upon conducting a plain error review, the Fifth Circuit affirmed the district court’s sentence.¹³ First, the court rejected the appellant’s argument that the sentence was unreasonable because it ran consecutively to other sentences.¹⁴ The appellate court held that district courts have the discretion to determine whether a sentence should run concurrently or consecutively to other sentences.¹⁵ District courts do not need to indicate in their opinions that they have knowledge of the discretion because appellate courts presume that the lower courts know and correctly apply sentencing laws.¹⁶ Additionally, the Fifth Circuit rejected the appellant’s argument because there was no indication that the plea agreement imposed restrictions on any sentences subsequent to the revocation of appellant’s supervised release.¹⁷ For these reasons, the appellate court held that the district court did not err when it ordered that his sentence run consecutively to other sentences.¹⁸

Next, the Fifth Circuit analyzed the appellant’s argument that the district court erred by not consulting the Sentencing Guidelines and by not stating the reasons for his sentence.¹⁹ The appellate court held that the district court did not err with respect to the appellant’s Sentencing Guidelines argument.²⁰ The record indicated that the district court calculated its sentence within the range identified by the appellant and the Government.²¹ The Fifth Circuit also held that the appellant did not prove that the district court ordered an above range sentence without considering the policy statements in the relevant chapter of the Sentencing Guidelines.²²

The Fifth Circuit, however, did hold that the district court committed plain error when it failed to state its reasons for the appellant’s sentence.²³ The court held that sentencing judges must state their reasoning “where the

¹¹ *Id.* at *4.

¹² *See id.* at *2. The appellant also argued that the sentence was substantively unreasonable. *Id.* In the interest of brevity, this Highlight focuses on the appellant’s first and second arguments.

¹³ *Id.* at *8.

¹⁴ *Id.* at *3.

¹⁵ *Id.*

¹⁶ *Id.* (citing *United States v. Izaguirre-Losoya*, 219 F.3d 437, 440 (5th Cir. 2000)).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at *4.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

defendant or prosecutor presents nonfrivolous reasons for imposing a different sentence,” and “where the judge imposes a sentence outside the Guidelines.”²⁴ In this case, the appellant’s sentence was “more than three times the high end of the guidelines range”²⁵ The judge sentenced the appellant to thirty-six months in prison even though the Guidelines suggested that he serve four to ten months in prison.²⁶ Thus, the district court committed plain error when it did not explicitly state its reasons for the appellant’s sentence above the guidelines.²⁷

Nonetheless, the Fifth Circuit affirmed the district court’s sentence because the error did not affect the defendant’s substantial rights.²⁸ In this case of first impression, the appellate court held that the defendant did not prove “a probability ‘sufficient to undermine confidence in the outcome.’”²⁹ The Fifth Circuit rejected the D.C. and Second Circuit’s “relaxed” approach to plain error review of above guideline sentences and applied a more stringent standard.³⁰ Those courts relax the defendant’s burden because “the absence of a statement of reasons affects the appellate court’s ability to perform a meaningful review of the sentence.”³¹

The Fifth Circuit, however, adopted a standard more consistent with its own jurisprudence.³² The court required the appellant to prove that the district court’s error affected his sentencing outcome.³³ The court presumed that there was no prejudice and concluded that it was able to conduct a meaningful appellate review.³⁴ The Fifth Circuit held that the district court implicitly adopted the Government’s rationale for the sentence because the court granted the Government’s recommended sentence and found that the majority of the Government’s revocation charges were true.³⁵ For these reasons, the Fifth Circuit held that the district court’s error did not affect the appellant’s substantial rights.³⁶

²⁴ *Id.* (quoting *Rita v. United States*, 551 U.S. 338, 356-57 (2007)).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at *7. The Fifth Circuit also held that the error did not affect the public reputation of judicial proceedings. *Id.* In the interest of brevity, this Highlight focuses on whether the error affected the appellant’s substantial rights.

²⁹ *See id.* at *5 (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004)).

³⁰ *Id.* at *5-6.

³¹ *Id.* at *6 (citing *In re Sealed Case*, 527 F.3d 188, 193 (D.C. Cir. 2008); *United States v. Lewis*, 424 F.3d 239, 248 (2d Cir. 2005)).

³² *Id.* at *5-6.

³³ *Id.* at *6 (citing *United States v. Mares*, 402 F.3d 511, 521 (5th Cir. 2005)).

³⁴ *Id.* at *6-7.

³⁵ *Id.* at *7.

³⁶ *Id.*

The Fifth Circuit's holding is significant because it accentuates the district courts' broad discretion with respect to sentencing.³⁷ Even if a challenging party successfully overcomes the seemingly insurmountable presumption that district courts correctly apply sentencing laws, the appellate court's holding indicates that it is unlikely to find prejudice.³⁸ The appellate court will find implicit reasoning within the record to excuse plain error.³⁹ Such rulings undermine the controlling jurisprudence that requires sentencing judges to state their reasons for ordering sentences that are above the guideline range.⁴⁰ In response, parties before the court should not restrict their advocacy to sentences that fall within the Sentencing Guidelines. If an aggressive argument persuades the district court, the Fifth Circuit will likely uphold the ruling.⁴¹

Consequently, the Fifth Circuit's holding undermines the rationale of the Federal Sentencing Guidelines.⁴² In its opinion, the Fifth Circuit found implicit reasoning within the record to excuse plain error.⁴³ Thus, the court's holding does not "avoid the confusion and implicit deception that arose out of the pre-guidelines sentencing system"⁴⁴ Additionally, the Fifth Circuit affirmed a sentence that substantially exceeded the high end of the guidelines range.⁴⁵ As a result, the district court's sentence does not promote "uniformity in sentencing."⁴⁶ In future cases, the Fifth Circuit should not be so quick to prioritize its own jurisprudential concerns over those related to federal sentencing.

³⁷ See *id.* at *3, 6-7.

³⁸ See *id.* at *6-7.

³⁹ See *id.*

⁴⁰ See *Rita v. United States*, 551 U.S. 338, 356-57 (2007); *In re Sealed Case*, 527 F.3d 188, 193 (D.C. Cir. 2008); *United States v. Lewis*, 424 F.3d 239, 248 (2d Cir. 2005).

⁴¹ See *United States v. Whitelaw*, No. 50346, 2009 WL 2515670, at *6-7 (5th Cir. August 19, 2009).

⁴² See United States Sentencing Commission, *Guidelines Manual*, ch. 1, pt. A, subpt. 1, § 3 (2000) [hereinafter *USSG*].

⁴³ *Whitelaw*, 2009 WL 2515670, at *6-7.

⁴⁴ See *USSG*, ch. 1, pt. A, subpt. 1, § 3; *id.*

⁴⁵ *Whitelaw*, 2009 WL 2515670, at *4.

⁴⁶ See *USSG*, ch. 1, pt. A, subpt. 1, § 3; *id.* at *6-7.