

January 12, 2005

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 03-51301

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JUAN ANTONIO MURILLO-REZA,

Defendant-Appellant.

Appeals from the United States District Court
for the Western District of Texas

Before KING, Chief Judge, JOLLY and DENNIS, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

Juan Antonio Murillo-Reza (Murillo-Reza) appeals his sentence. He pleaded guilty to crimes involving transporting illegal aliens for profit. On the Government's motion, the district court imposed a greater sentence than called for by the Guidelines. On appeal, Murillo-Reza argues that the district court erred because the Guideline sentence -- already enhanced because of the death of an alien -- had taken into account the circumstances that were used to justify the upward departure. Moreover, because the facts of this case are within the "heartland" of alien smuggling cases where death occurs, the upward departure cannot be justified on this record. We therefore vacate the sentence and remand to the

district court for resentencing and, if necessary, for further development of the relevant facts.

I

On August 20, 2002, U.S. Immigration and Naturalization Service agents found thirty-two undocumented aliens inside a trailer home in Campbelltown, Texas. The agents arrested several people at that time, some of whom were eventually charged in an alien-transporting scheme. Through interviews with the aliens, agents learned that they had made arrangements with the smugglers to be led from Mexico across the border. The aliens, who were from Honduras and Mexico, paid between \$1,200 and \$1,500 to be smuggled to the San Antonio area. On August 16, the smugglers guided the aliens across the Rio Grande. The group walked through the desert until August 18, when they were picked up by other conspirators and taken to the trailer where Immigration and Naturalization agents discovered them.

One of the aliens, Iginio Lopez Alfaro (Lopez), identified the defendant-appellant Murillo-Reza as the group's main guide because of his use of a cell phone to maintain contact with the co-conspirators during their trek across the desert. Lopez also stated that another of the aliens, Victor Nunez (Nunez), became ill soon after the group crossed the Rio Grande. He began vomiting, but the guides forced the aliens to continue walking through the night with only short breaks. Eventually, Nunez could walk no farther. After being helped along for some time, Nunez lost

consciousness and was unable to drink water. According to Lopez's statement, Murillo-Reza told the group that he would call immigration officials to have them come for Nunez. He also told them that they had to leave because there was nothing they could do for the sick man. The group then left for the rendezvous point where they were picked up by the other conspirators. Nunez died. Lopez later identified his body, which apparently had been mostly devoured by wild animals.

II

Murillo-Reza pleaded guilty to one count of conspiring to transport illegal aliens for profit and one count of aiding and abetting in the transportation of illegal aliens.¹ At sentencing, the district court enhanced Murillo-Reza's offense level by two levels under the Sentencing Guidelines for "intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person". U.S.S.G. § 2L1.1(b)(5). Murillo-Reza also received an eight-level upward adjustment based on Nunez's death. U.S.S.G. § 2L1.1(b)(6)(4). Murillo-Reza received upward adjustments for the large number of aliens involved and because some of the co-conspirators wielded pellet guns in the commission of the offense. In the light of his criminal history category of

¹ 8 U.S.C. §§ 1324(a)(1)(A)(ii), (a)(1)(A)(v)(I), (a)(1)(A)(v)(II) and (a)(1)(B)(i).

zero, these adjustments resulted in an offense level of 28 and a guideline range of 78 to 97 months' imprisonment for Murillo-Reza.²

Before Murillo-Reza's sentencing, the Government moved for an upward departure from the guideline range. In its motion, the Government argued that such a departure was warranted under U.S.S.G. § 5K2.1 because Murillo-Reza knowingly risked a death during the commission of the offense and under § 5K2.8 because Murillo-Reza's conduct was unusually heinous, cruel and degrading to the victim. Murillo-Reza opposed this motion, contending that those factors had already been taken into account by the Sentencing Guidelines enhancements in U.S.S.G. §§ 2L1.1(b)(5) and (b)(6)(4). The district court granted the Government's Motion for Upward Departure and sentenced Murillo-Reza to the statutory maximum of 120 months' imprisonment on the conspiracy count, noting that it did so for the reasons stated in the Government's motion.³

III

On appeal, the parties basically make the same arguments as were made to the district court. Murillo-Reza argues that the Guidelines adequately took into account the circumstances on which

² Without these upward adjustments within the Guidelines, Murillo-Reza's offense level would have been 18 and the resulting sentencing range, taking into account his criminal history score of zero, would have been 27-33 months.

³ The district court also sentenced Murillo-Reza to five years' imprisonment for the count of aiding and abetting the transportation of illegal aliens. This sentence was to run concurrently with the ten-year sentence he received for the conspiracy count.

the Government relied in seeking the upward departure. He points out that he received a two-level enhancement under the Guidelines for "intentionally or recklessly creating a substantial risk of death or serious bodily injury" pursuant to § 2L1.1(b)(5). He also received an eight-level enhancement for Nunez's death under § 2L1.1(b)(6)(4). Still further, he argues that the facts of this case do not remove it from the "heartland" of alien smuggling cases.

In response, the Government argues that aggravating circumstances, to wit, abandoning Nunez to die in the desert without calling for help, "are present of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission." 18 U.S.C. § 3553(b)(1). In other words, the particularly gruesome facts of this case take it outside the heartland of alien smuggling cases.

In addition to the substantive arguments, Murillo-Reza argues that the district court erred procedurally. He argues that the district court failed to articulate its reasons for departing. The absence of factual findings by the district court, he contends, requires that his sentence be vacated and the case remanded for findings of fact.

The Government thinks there was no procedural error. The district court made itself clear by adopting the factual findings of the presentencing report and indicated at sentencing that it based its departure on the Government's Motion for Upward

Departure. This reference is sufficient to comply with the sentencing court's obligation to specify its reasons for departure under 18 U.S.C. § 3553(c).⁴

We now turn to address these issues.

IV

Our review is de novo when the district court departs under subsections (3)(A) and (3)(B) of 18 U.S.C. § 3742(e). United States v. Bell, 371 F.3d 239, 241 (5th Cir. 2004). Under subsection (3)(A), we must determine whether "the district court failed to provide the written statement of reasons required by section 3553(c)." Subsection (3)(B) directs us to decide whether the "sentence departs from the applicable guideline range based on a factor that--(i) does not advance the objectives set forth in

⁴ Murillo-Reza also raises issues under Blakely v. Washington, 124 S. Ct. 2531 (2004). These arguments are foreclosed by United States v. Pineiro, 377 F.3d 464 (5th Cir. 2004).

section 3553(a)(2);⁵ or (ii) is not authorized under section 3553(b);⁶ or (iii) is not justified by the facts of the case[.]”⁷

A

We first turn to the question whether the district court adequately provided the written statement of reasons required by 18 U.S.C. § 3553(c). Murillo-Reza argues that the district court’s statement that it departed from the guideline range for the reasons stated in the Government’s Motion for Upward Departure is inadequate.⁸

In two unpublished opinions, we have said that where the court adopts the factual findings and guideline applications of the presentencing report, the requirements of §§ 3553(c) and 3742(e)(3)(A) are satisfied. See United States v. Edwards, 94 Fed.

⁵ The objectives included in § 3553(a)(2) are for a sentence: (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment; (B) to afford adequate deterrence for criminal conduct; (C) to protect the public from further crimes by the defendant; and (D) to provide the defendant with needed educational training, medical care or other correctional treatment.

⁶ This subsection requires that the sentence must be within the guideline range unless “there exists an aggravating or mitigating circumstance of any kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.”

⁷ If the district court’s departure decision survives evaluation under § 3742(e)(3)(A) and (B), then this court will review the extent of the departure for abuse of discretion. Bell, 371 F.3d at 243.

⁸ He does not, however, argue specifically that this statement of reasons fails to satisfy § 3553(c).

Appx. 235, 2004 WL 830787 (5th Cir. April 16, 2004)(stating that the reasons provided by the district court were sufficient where the court adopted the presentencing report's findings and guideline application and where the statement of reasons specifically indicated that the court concurred with the Government's motion for upward departure); United States v. Carbajal-Martinez, 87 Fed. Appx. 368, 2004 WL 287309 (5th Cir. February 12, 2004) (finding the district court's adoption of fact findings and guideline applications of the presentencing report adequate to satisfy § 3553(c)). Although these opinions do not have specific precedential effect for us today, we see no reason to question or to reject those holdings and thus choose to follow them. In addition, we find those cases sufficiently analogous to extend their holdings to a case such as this where the district court upwardly departs for the reasons stated in the Government's motion for upward departure and so states. We therefore hold that the district court's statement satisfies its obligation under 18 U.S.C. §§ 3553(c) and 3742(e)(3)(A) to provide a written statement of reasons for its departure.

B

Next, we turn to the question whether the district court erred in departing from the Sentencing Guidelines' recommended range. Subsection (3)(B) directs us to decide whether the "sentence departs from the applicable guideline range based on a factor that--(i) does not advance the objectives set forth in section

3553(a)(2); or (ii) is not authorized under section 3553(b); or (iii) is not justified by the facts of the case[.]” Section 3553(b) requires that the sentence must be within the guideline range unless “there exists an aggravating or mitigating circumstance of any kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.”

Here, we are concerned primarily with the requirements of § 3553(b) and whether the departure is justified by the facts of the case. Our case law provides some guidance. In determining whether to depart, we have said that a sentencing court should inquire: 1) whether the case includes features that potentially take it outside the Guidelines’ “heartland,” making it an unusual or special case; 2) whether the Sentencing Commission has forbidden departures on those grounds; 3) whether the Commission has encouraged departures on those grounds; and 4) whether the Commission has discouraged departures on those grounds. United States v. Evans, 148 F.3d 477, 484-85 (5th Cir. 1998).

The Government points out that the Commission has encouraged departures on the basis of a death that resulted in the course of the criminal offense⁹ and on the basis of “unusually heinous, cruel, brutal, or degrading” treatment of the victim.¹⁰ According to the Government, Murillo-Reza’s actions with regard to the victim

⁹ U.S.S.G. § 5K2.1

¹⁰ U.S.S.G. § 5K2.8

are aggravating circumstances not adequately taken into account by the Sentencing Commission in § 2L1.1 and Murillo-Reza's conduct takes this case outside the "heartland" of alien smuggling cases.

The Government argued, and the district court agreed, that the upward departure was warranted because Murillo-Reza was "directly responsible for abandoning the victim" in the mid-August heat of South Texas after forcing him and the others in the group to walk for hours with little rest. Furthermore, Nunez was abandoned along an inconspicuous smuggling route where there was little chance that he would be discovered. Nunez was left to die, and his body was exposed to the elements and to wild animals. The Government notes that Murillo-Reza told the group he would call immigration officials to solicit medical assistance for Nunez, but no such call was ever received. The Government further emphasizes that Murillo-Reza left Nunez obscured in the brush rather than in a more conspicuous location where he might have been found.¹¹ At oral argument, the Government stated that Nunez was sick at the time the group crossed the Rio Grande, and that his death could have been avoided if Murillo-Reza had allowed Nunez to remain behind to seek

¹¹ Murillo-Reza disputes the suggestion that he intentionally left Nunez obscured so that he would be less likely to be found. He contends that Nunez was covered to provide some shelter from the sun. Furthermore, the area through which the group traveled was so remote that Nunez would not have been discovered regardless of his being covered by brush. He also disputes the Government's charge that he should have called for help using his cell phone. Murillo-Reza's counsel noted that it was likely that he would not have been able to make a cell phone call in such a remote area.

medical help. These circumstances, the Government contends, are sufficient to take this case outside the heartland of alien smuggling cases such that the Sentencing Commission could not have taken them into consideration in drafting the guideline for that offense.

There is, however, an inherent flaw in the Government's argument. Where an encouraged factor has been taken into consideration by the guidelines or is inherent in the offense, the sentencing court may depart upward "only if the factor is present to a degree substantially in excess of that which is ordinarily involved in the offense." Koon v. United States, 518 U.S. 81, 88 (1996) (quoting U.S.S.G. § 5K2.0). We agree that the Sentencing Commission has encouraged departures from the Guidelines based on the factors argued by the government -- namely, the unusually cruel, heinous, and brutal treatment of the victim and his resulting death; however, the problem is that these factors are not "present to a degree substantially in excess of that which is ordinarily involved in the offense."

It is indisputable that this case involves cruel, heinous, and brutal conduct that resulted in Nunez's death. Yet, the regrettable truth is that the factors present here are not unusual in the commission of an alien smuggling offense. The heartland of alien smuggling cases includes circumstances such as forced marches through rugged terrain in intense heat; failure to seek medical help due either to an inability to do so or out of fear of capture

by immigration authorities; and the substantial risk of death or serious injury to aliens being smuggled under such circumstances. Moreover, the commentary to § 2L1.1 states that “[r]eckless conduct to which the adjustment from subsection (b)(5) applies includes a wide variety of conduct.” It is thus clear that the scope of the upward adjustments in §§ 2L1.1(b)(5) and (b)(6)(4) is sufficiently broad to encompass conduct such as Murillo-Reza’s, as reflected in the record on appeal.

Finally, our case authority compels us to reject the Government’s argument. We recently reviewed a sentence resulting from a factual situation nearly identical to the one before us today. In United States v. Garcia-Guerrero, 313 F.3d 892 (5th Cir. 2002), Garcia-Guerrero appealed the application of U.S.S.G. §§ 2L1.1(b)(5) and (b)(6)(4) to his sentence pursuant to a conviction for the illegal transportation of aliens. We held that those provisions encompassed his conduct in leading a group of aliens through the south Texas desert and abandoning one of those aliens to die of heat stroke. Murillo-Reza’s conduct in the present case is virtually indistinguishable from that of the defendant in Garcia-Guerrero.

We therefore conclude that the facts as developed in this record do not remove the case from the heartland of alien smuggling cases. We conclude that U.S.S.G. §§ 2L1.1(b)(5) and (b)(6)(4) adequately took into consideration Murillo-Reza’s treatment of Nunez and Nunez’s death, as those factors are addressed in the

record before us. However, we also conclude that the district court should be given an opportunity further to explore whether additional facts not reflected in the Government's Motion for Upward Departure might justify a departure from the Sentencing Guidelines.

V

In sum, we hold that in the light of the facts presented in the record, Murillo-Reza's conduct does not remove this case from the heartland of alien smuggling cases. Therefore, the enhancements he received under U.S.S.G. §§ 2L1.1(b)(5) and (b)(6)(4) adequately took into consideration the circumstances surrounding Murillo-Reza's offense. We therefore VACATE Murillo-Reza's sentence and REMAND for resentencing not inconsistent with this opinion, leaving open the possibility that upon further development of the record an upward departure from the Sentencing Guidelines might be warranted.

VACATED and REMANDED.