

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED

April 15, 2008

No. 07-30416
Summary Calendar

Charles R. Fulbruge III
Clerk

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

MARCUS WAYNE HENDERSON

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 2:05-CR-20223-1

Before JOLLY, DENNIS, and PRADO. Circuit Judges.

PER CURIAM:*

Marcus Wayne Henderson appeals the 120-month sentence he received following his guilty-plea conviction for using a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c). The sentence imposed exceeded the advisory guidelines range as calculated in the PSR. However, the record is unclear whether the sentence was the result of an upward departure authorized by the Guidelines or whether it was the result of a variance and thus was a non-guidelines sentence.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Although the memorandum ruling states that the sentence was a non-guidelines sentence and did not result from an upward departure under U.S.S.G. § 4A1.3, it simultaneously cites § 4A1.3 in support of the purported variance. Additionally, as Henderson points out, the Statement of Reasons indicates that the sentence was the result of a guidelines upward departure, specifically citing U.S.S.G. §§ 4A1.3, 5K2.0, and 5K2.21. The oral pronouncement provides little guidance in resolving the conflict.

Because resolution of the question is a necessary precursor to applying the appropriate standard of review, we order a LIMITED REMAND to the district court for the sole purpose of clarifying whether the sentence resulted from an upward departure pursuant to §§ 4A1.3, 5K2.0 and 5K2.21 or whether it resulted from a non-guidelines variance. Once the district court issues such clarification, the case shall be returned to this court for further proceedings. This court retains jurisdiction over this case for all other purposes.