

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-6306
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ARTURO CORONADO,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Southern District of Texas
USDC No. CR-M-91-128-S3
- - - - -
August 20, 1993

Before JOLLY, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:*

Arturo Coronado argues that there was an insufficient factual basis for his guilty plea to the offense of accessory after the fact. When a defendant enters a guilty plea, there must be "a factual basis for the plea." United States v. Adams, 961 F.2d 505, 508 (5th Cir. 1992) (quoting Fed. R. Crim. P. 11(f)). To support a conviction for accessory after the fact, the record must reveal specific facts that Coronado, knowing that Macedonio Ramirez had committed an offense, gave him comfort or

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

assistance for the purpose of hindering or preventing Ramirez's apprehension, trial, or punishment. United States v. Triplett, 922 F.2d 1174, 1180 (5th Cir.), cert. denied, 111 S.Ct. 2245 (1991).

The sufficiency of the factual basis for the plea is reviewed for clear error. Adams, 961 F.2d at 509. To determine whether the district court erred in concluding that there was an adequate factual basis for the plea, this Court examines the information, the plea hearing, and the presentence report if the record indicates that the district court relied upon it. Id. at 509 and n.3.

During the plea hearing, Coronado affirmed the Government's assertion that he had actual knowledge that Ramirez committed an offense because he drove the vehicle containing Ramirez and the victim into Mexico so Ramirez could assault the victim. Upon the district court's inquiry, Coronado also affirmed that he assisted Ramirez in avoiding apprehension of the crime by driving Ramirez back to the United States to his home with the specific purpose of helping Ramirez proceed as if nothing had happened. Coronado confirmed that he and Ramirez discussed the fact that Coronado would not mention what had happened.

The district court's inquiry into the elements of the offense satisfies the development of an adequate factual basis to a plea. See Adams, 961 F.2d at 508; see also United States v. Montoya-Camacho, 644 F.2d 480, 485 (5th Cir. 1981). Consequently the district court properly concluded that a sufficient factual basis existed for Coronado's guilty plea.

Coronado argues that the district court's upward departure based on the death of the victim was improper because the kidnapping guideline, U.S.S.G. § 2A4.1, already considers adjustments for physical injury and death.**

"[S]entences which fall within the statutory limits, even though constituting an upward departure from the guidelines, will not be disturbed absent a `gross abuse of discretion.'" United States v. Murillo, 902 F.2d 1169, 1171 (5th Cir. 1990) (citation omitted). As Coronado did not object to the upward departure, review is limited to plain error. United States v. Lopez, 923 F.2d 47, 50 (5th Cir.), cert. denied, 111 S.Ct. 2032 (1991).

An adjustment for serious bodily injury does not preclude a departure for death because the guideline definition of the term did not include death. United States v. Coronado, No. 91-6307, 2-3 (5th Cir. May 27, 1993) (unpublished). During the kidnapping Coronado drove Ramirez and the victim into Mexico in order for Ramirez to assault the victim, drove Ramirez away from the body, and followed Ramirez's directions not to talk about what had happened and proceed as if nothing had happened. Considering this evidence, the district court's upward departure from a guidelines range of 63 to 78 months to a sentence of 120 months imprisonment was not plain error. See id. at 4.

Coronado argues that his upward departure for the death of

**Coronado asserts that although he was convicted for accessory after the fact of kidnapping, accessory after the fact guideline U.S.S.G. § 2X3.1 incorporates the offense level of the underlying offense of kidnapping. Therefore, the real issue is whether the kidnapping guideline U.S.S.G. § 2A4.1 considers the possibility of death. Blue brief, 10-11.

the victim was improper because the shovel used to kill the kidnap victim was not a "dangerous weapon" within the meaning of U.S.S.G. § 2A4.1(b)(3). He also argues that the shovel was not "used" within the meaning of § 2A4.1(b)(3), in that the shovel was used for the murder, not the kidnapping.

As Coronado did not raise these objections at the trial level, review is limited to plain error. Lopez, 923 F.2d at 50. This Circuit reviews application of the guidelines to the facts for clear error and reviews *de novo* interpretations of the guidelines. United States v. Jackson, 978 F.2d 903, 913 (5th Cir. 1992), cert. denied, 61 U.S.L.W. 3788 (1993).

The shovel used to kill the victim was a dangerous weapon within the meaning of § 2A4.1(b)(3), and it was "used" within the meaning of that section. Coronado, No. 91-6307 at 5-6. Coronado's sentence is AFFIRMED.