

UNITED STATES COURT OF APPEALS  
For the Fifth Circuit

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No. 91-6307  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

GONZALO CORONADO,

Defendant-Appellant.

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

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(M 91 CR 128 S4 01)

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( May 27, 1993 )

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:\*

**BACKGROUND**

Gonzalo Coronado pleaded guilty to accessory after the fact to kidnapping Pascual Valdovino Diaz and hindering the apprehension of Macedonio Ramirez, in violation of 18 U.S.C. § 3. Coronado's offense level of 26 and criminal history category of I resulted in

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

a guidelines range of 63 to 78 months imprisonment. However, the district court upwardly departed pursuant to U.S.S.G. § 5K2.1, because of the death of the victim, to a sentence of 105 months imprisonment, followed by three years of supervised release, and restitution in the amount of \$443.75.

#### OPINION

Coronado argues that the district court's upward departure based on the death of the victim did not consider the extent to which the kidnapping guideline, U.S.S.G. § 2A4.1, already considers adjustments for physical injury and death.<sup>1</sup>

Under § 2A4.1(b)(2)(A) and (B) the offense level is increased if the victim sustained either permanent or life-threatening bodily injury or serious bodily injury. U.S.S.G. § 2A4.1(b)(2). An adjustment for serious bodily injury does not preclude a § 5K2.1 departure for death because the guideline definition of the term does not include death. United States v. Billingsley, 978 F.2d 861, 866 (5th Cir. 1992), cert. denied, 113 S. Ct. 1661 (1993). Such reasoning applies here. Although permanent or life-threatening bodily injury can mean injury involving a substantial risk of death, the state of death itself is not contemplated by the term's definition. U.S.S.G. § 1B1.1, comment. (n. 1(h)).

Coronado also argues that U.S.S.G. § 2A4.1 considers death because § 2A4.1(c) instructs a court to apply the offense level for

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<sup>1</sup>Coronado agrees 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, Coronado argues that the real issue is whether the kidnapping guideline U.S.S.G. § 2A4.1 considers the possibility of death.

first degree murder if the victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111. However, the district court refused to apply the offense level for first degree murder because it was not convinced that at the beginning of the kidnapping the objective of the kidnapping was to commit first degree murder. Coronado ignores the fact that death can still occur without first degree murder. For example, death of a victim during kidnapping could result from second degree murder, involuntary manslaughter, or accident. Such instances of death are not provided for under § 2A4.1(c).

"[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). The sentencing court must provide acceptable reasons for the departure, and the sentence imposed must be reasonable in light of the court's rationale. United States v. Carpenter, 963 F.2d 736, 744 (5th Cir.), cert. denied, 113 S. Ct. 355 (1992); Murillo, 902 F.2d at 1172. Departure on the basis of death is permitted only when there exists a "'nexus' between the harm caused and the offense of the conviction." Billingsley, 978 F.2d at 866.

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). Plain error is a mistake so fundamental that it constitutes a "miscarriage of justice." Id.

The sentencing court found that an upward departure under § 5K2.1 was warranted because the kidnapped victim was killed and Coronado had participated in some of the events that led to the killing. Coronado's sworn statement indicates that after an altercation in a bar, Macedonio Ramirez and Coronado's brother, Arturo, kidnapped the victim because Ramirez believed the victim had a gun and would use it on Ramirez's brother. Coronado and Ramirez's brother, Pedro, followed in another vehicle. The men proceeded to Mexico where they started to beat the victim. Coronado joined in by kicking the victim. Coronado then saw Ramirez take a shovel and hit the victim with it several times, striking him at least once on the neck. Afterwards, Coronado helped Ramirez drag the victim's body down a levee to the water. From this evidence, it was reasonable for the district court to find a nexus between the victim's death and the kidnapping.

The district court departed upward from a guidelines range of 63 to 78 months to a sentence of 105 months imprisonment. Considering the circumstances surrounding the victim's death, the district court's departure was not plain error. Under less egregious circumstances this Court has not disturbed a § 5K2.1 departure to a sentence of 30 years for kidnapping. See United States v. Melton, 883 F.2d 336, 338-39 (5th Cir. 1989) (kidnap victim died when she either jumped or was pushed out of kidnapper's car while traveling at 65 miles per hour). Coronado also contends that if an upward departure is warranted, it is not proper in his case because he was an accessory after the fact and did not foresee the murder at the time of the kidnapping. Coronado cites no

authority for this position. Also, he failed to raise this objection at the district court level. Consequently, the argument is reviewed only for plain error. Lopez, 923 F.2d at 50.

U.S.S.G. § 5K2.1 contemplates an upward departure "if death resulted." Although § 5K2.1 gives guidance as to what the district court should consider when contemplating the extent of the upward departure, the section does not indicate that the upward departure is only appropriate for those who committed the murder. Therefore, the district court's upward departure based on the death of the victim did not result in plain error.

Coronado argues that the district court improperly found that the shovel used to kill the kidnapped victim was a "dangerous weapon" within the meaning of U.S.S.G. § 2A4.1(b)(3), which requires an upward adjustment in the offense level if a dangerous weapon was used. He cites no authority for this position, but argues that although shovels and other items designed and intended for non-dangerous use can be used to inflict injury, such items should not be considered dangerous weapons.

This Circuit reviews applications 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). U.S.S.G. § 2A4.1(b)(3) provides a two-level increase in the base offense level "if a dangerous weapon was used." The guidelines define "dangerous weapon" as "an instrument capable of inflicting death or serious bodily injury." U.S.S.G. § 1B1.1, comment. (n. 1(d)).

The victim was struck several times with a shovel, including a blow to the victim's head. Coronado remembers the shovel may have hit the right side of the victim's neck. An autopsy of the victim revealed that the victim had sustained several blunt cut wounds to the head and neck and that one of the causes of death was severe blood loss due to a laceration of the right side of the neck. The shovel inflicted bodily injury which resulted in death. Consequently, the district court did not err in determining the shovel was a deadly weapon within the meaning of U.S.S.G. § 2A4.1(b)(3).

Coronado also argues that the district court improperly found that a shovel was "used" within the meaning of § 2A4.1(b)(3), in that it was not used to kidnap the victim, but rather to murder him after the abduction. Coronado cites no authority for this position. Also, as he did not raise this objection at the trial level, review is limited to plain error. Lopez, 923 F.2d at 50.

Although this Circuit has not determined the duration of a kidnapping, the Ninth Circuit has determined that a kidnapping continues as long as the victim is held and is not complete until the victim ceases to be held. United States v. Garcia, 854 F.2d 340, 343-44 (9th Cir. 1988), cert. denied, 490 U.S. 1094 (1989). In this situation, the kidnapping was not complete until the victim died. Therefore, plain error did not occur when the district court found that a shovel was "used" within in the meaning of § 2A4.1(b)(3).

We AFFIRM the judgment of the district court.