IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1632

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

LARRY WAYNE BENTON,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
CR4 92 043 A

June 21, 1993

Before SMITH, DUHÉ, and WIENER, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

Larry Benton appeals the sentence imposed after his plea of guilty to theft of more than $100 from a financial institution. After finding that Benton's past criminal conduct and the likelihood that he would commit other crimes were not adequately reflected in his criminal history category under the Federal Sentencing Guidelines, the district court departed from the

[*] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

sentencing range suggested by the guidelines and sentenced Benton to a prison term more than four times the suggested range. Because we find that the court improperly applied U.S.C.G. § 4A1.3(e), we vacate Benton's sentence and remand for resentencing.

I.

On March 5, 1992, Benton entered a federally-insured Fort Worth bank and, after filling out a withdrawal slip under a false name and presenting the slip to the teller, reached across the counter and grabbed a stack of $50 bills totaling $1000. When Benton grabbed the bills, one tore into two pieces. Benton retained one half of the bill, and the teller retained the other. Benton was arrested the following day when he attempted to exchange the torn bill at another branch of the bank. On May 8, 1992, a federal grand jury returned a one-count indictment charging theft of more than $100 from a financial institution in violation of 18 U.S.C. § 2113(b). Benton pleaded guilty.

At sentencing, the district court determined that Benton's total offense level was seven and that his criminal history category was II, mandating an imprisonment range of 2-8 months. After considering ten other offenses committed by Benton described in the Presentence Investigation Report (PSI) and the probation officer's suggestion that the court consider the adequacy of Benton's criminal history category, the court determined that a criminal history category of II did not adequately reflect the seriousness of his past criminal conduct or the likelihood that he

would commit other crimes.[1] Pursuant to section 4A1.3(e), the court departed from the guidelines range and sentenced Benton to 36 months' imprisonment.

Benton argues that the district court misapplied section 4A1.3(e) and that, even if the district court had properly applied section 4A1.3(e), the extent of the upward departure was unreasonable. Because we find that the district court improperly applied section 4A1.3(e), we need not address Benton's unreasonableness argument.

II.

A.

Title 18 U.S.C. § 3553(b) provides as follows:

> Application of guidelines in imposing a sentence.)) The court shall impose a sentence of the kind, and within the range, [mandated by the guidelines] unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in

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[1] In ¶¶ 27-30 of the PSI, the probation officer identified the following acts committed by Benton:

27. 1) Theft of $40.00 and food stamps from a Stop-N-Go in Arlington, Texas, on March 5, 1992; 2) theft of food, cigarettes and other items from a Winn-Dixie store in Arlington, Texas, on an unspecified date; and 3) theft of an undetermined amount of money from a store clerk in a Classic Mini-Mart in Arlington, Texas, on February 17, 1992.

28. Benton was charged with robbery with bodily injury after robbing a woman of her purse, money, checkbook and credit cards on March 2, 1992, and admitted committing the robbery, and the woman positively identified Benton in a police lineup.

29. Benton was charged with five cases of abusing credit cards stolen in the March 2 robbery.

30. Benton was charged on March 24, 1992, with robbery of a Diamond Shamrock store in Arlington, Texas, and admitted that he committed the robbery; the victim positively identified him.

> formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.

18 U.S.C. § 3553(b) (Supp. 1993). Section 4A1.3 provides in pertinent part,

> §4A1.3 Adequacy of Criminal History Category (Policy Statement)
>
> > If reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes, the court may consider imposing a sentence departing from the otherwise applicable guideline range. Such information may include, but is not limited to, information concerning:
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> > * * *
> >
> > (e) prior similar adult criminal conduct not resulting in a criminal conviction.
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> > * * *
> >
> > The court may, after a review of all the relevant information, conclude that the defendant's criminal history was significantly more serious than that of most defendants in the same criminal history category, and therefore consider an upward departure from the guidelines. However, a prior arrest record itself shall not be considered under §4A1.3.

U.S.S.G. § 4A1.3 (1991).

We review factual findings regarding sentencing factors for clear error. United States v. Sanders, 942 F.2d 894, 897 (5th Cir. 1991). We will reverse a sentence, however, if the sentence resulted from the incorrect application of the guidelines. Id.; 18 U.S.C. § 3742(f)(1). A sentencing court's use of an invalid

departure ground is an incorrect application of the guidelines. Williams v. United States, 112 S. Ct. 1112, 1119 (1992).

Benton does not contest the factual findings regarding the theft-related offenses described in paragraph 27 of the PSI; he contends only that the district court erred in its application of section 4A1.3(e) in that the theft-related offenses upon which the district court relied constituted an invalid departure ground under subsection (e). Benton argues that he must have been convicted for the offenses or that the offenses must have been otherwise litigated in order for the district court properly to rely upon them in departing upward from his criminal history category of II. Benton contends that the three unlitigated, unindicted, and uncharged theft-related offenses described in paragraph 27 do not constitute "prior similar adult criminal conduct" under subsection (e). Benton argues that the court's consideration of those offenses amounts to consideration of a "prior arrest record," which section 4A1.3 forbids.

Furthermore, Benton asserts that the district court may not rely upon acts that were part of the same course of conduct or common scheme or plan as the offense of conviction in making an upward departure. Finally, Benton argues that the district court's consideration of the theft-related conduct violates his Fifth and Sixth Amendment rights and the Sentencing Reform Act of 1984, 28 U.S.C. §§ 991 et seq.

The plain language of section 4A1.3(e) negates Benton's argument that he must have been convicted of or charged with the

theft-related offenses in order for those offenses to justify the district court's upward departure. Subsection (e) specifically prohibits a district court's reliance upon criminal conduct that results in a conviction.[2] In this case, the district court did not rely upon a prior arrest record but upon information contained in the PSI detailing acts to which Benton had confessed and for two of which the victims had identified him.

Benton relies upon United States v. Coe, 891 F.2d 405 (2d Cir. 1989), in support of his assertion that the district court erred in using his contemporaneous conduct to justify an upward departure.[3] In Coe, the court relied upon a pattern of four robberies committed by the defendant to justify a departure. Coe had pleaded guilty to one of the four robberies and had stipulated to the commission of the three additional offenses, and the district court had counted all four robberies in calculating Coe's base offense level. The

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[2] See United States v. Carpenter, 963 F.2d 736, 742 (5th Cir.) (upholding district court's upward departure based upon offense for which defendant was charged but for which charge was dismissed because of insufficient evidence), cert. denied, 113 S. Ct. 355 (1992); United States v. Lee, 955 F.2d 14, 16 (5th Cir.) (upholding district court's upward departure based upon commission of other similar offenses that were not prosecuted to conviction), cert. denied, 112 S. Ct. 3010 (1992); United States v. Miller, 903 F.2d 341, 350 (5th Cir. 1990) (stating that had district court based its upward departure upon fact that defendant admitted to committing certain crimes for which he was never prosecuted, departure might well have been justified). Similarly, § 4A1.3 expressly states that the district court may consider "reliable information" in determining whether to depart upward from the guidelines.

[3] The government asserts that Benton did not properly preserve the issue of contemporaneous conduct for appellate review. The government contends that Benton never argued or factually developed, at the hearing, that the additional criminal conduct was a part of the same course of conduct or scheme or that the court should consider the conduct as relevant conduct rather than a basis for departure pursuant to § 4A1.3(e). At the sentencing hearing, however, Benton's attorney pointed out that "[t]his situation, as the court is aware, surrounds, I think, a number of events occurring over a short period of time related to my client's drug addiction." By this, Benton's attorney properly preserved the issue regarding contemporaneous conduct.

court stated that "it would be elevating form over substance to regard the early episodes in the series as `prior criminal history' simply because the defendant pled guilty to the last in the series, rather than the first." Id. at 410. The court determined that to utilize the same four offenses in departing upward constituted "impermissible double-counting." Id.

Such was not the case in Benton's sentencing. The district court did not count the theft-related offenses described in paragraph 27 as relevant conduct in calculating Benton's original sentence. Furthermore, no evidence exists in the record that the theft-related offenses were part of a common scheme or plan and thus should be considered relevant conduct. Finally, "[r]epeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation." Coe, id. at 412 (quoting U.S.S.G. ch. 4, pt. A, intro. comment).

Benton's arguments concerning violation of his Fifth and Sixth Amendment rights and of the Sentencing Reform Act likewise fail. Benton asserts that Fifth Amendment due process demands greater protections against a court's use of unlitigated or uncharged offenses in the sentencing stage of a criminal prosecution, and that the Sixth Amendment rights to trial by jury, to be informed of the charges against him, to effective assistance of counsel, and confrontation also are implicated in sentencing. We previously have rejected similar constitutional challenges to the guidelines.[4]

[4] See United States v. Harris, 932 F.2d 1529, 1539 (5th Cir.) (rejecting contention that guidelines are unconstitutional because they permit district (continued...)

"At the sentencing stage . . . a convicted criminal is entitled to less process than a presumptively innocent accused . . . . [O]nce convicted, a defendant has a liberty interest in the correct application of the guidelines within statutory limits, nothing more and nothing less." Galloway, 976 F.2d at 425 (quoting United States v. Mobley, 956 F.2d 450, 455 (3d Cir. 1992) (citations omitted)). Similarly, we have rejected contentions that a district court, acting pursuant to the guidelines, violated the Sentencing Reform Act. See United States v. Thomas, 932 F.2d 1085, 1088-89 (5th Cir.) (holding that district court did not violate Sentencing Reform Act by considering crimes outside the count of conviction in formulating sentence under guidelines), cert. denied, 112 S. Ct. 264 (1991).

Because the plain language of section 4A1.3(e) authorizes the district court to rely upon information concerning Benton's prior, similar unconvicted criminal conduct in departing from the guidelines, we conclude that the court did not err in considering Benton's theft-related offenses and in relying upon his uncharged conduct in increasing his criminal history category.

(...continued)
courts to resolve factual disputes without benefit of jury), cert. denied, 112 S. Ct. 270 (1991); United States v. Casto, 889 F.2d 562, 569-70 (5th Cir. 1989) (rejecting defendant's contention that guidelines violated due process rights by allowing trial judge to decide sentencing factor by preponderance of evidence), cert. denied, 493 U.S. 1092 (1990); see also United States v. Galloway, 976 F.2d 414, 424-25 (8th Cir. 1992) (concluding that factoring uncharged conduct into sentencing calculus is constitutionally permissible), cert. denied, 113 S. Ct. 1420 (1993).

B.

Title 18 U.S.C. § 3553 provides in pertinent part,

> (c) Statement of reasons for imposing a sentence.)) The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence))
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> (2) is not of the kind, or is outside the range, [mandated by the guidelines], the specific reason for the imposition of a sentence different from that described.

18 U.S.C. § 3553(c) (1985 & Supp. 1993). Section 4A1.3 provides as follows:

> In considering a departure under this provision, the Commission intends that the court use, as a reference, the guideline range for a defendant with a higher or lower criminal history category, as applicable. For example, if the court concludes that the defendant's criminal history category of III significantly underrepresents the seriousness of the defendant's criminal history, and that the seriousness of the defendant's criminal history most closely resembles that of most defendants with a Category IV criminal history, the court should look to the guideline range specified for a defendant with a Category IV criminal history to guide its departure.

U.S.S.G. § 4A1.3 (1991).

After examining the PSI and making a tentative ruling that an upward departure was warranted under section 4A1.3(e), the district court calculated the additional criminal history points that would have resulted from the offenses set forth in paragraphs 27-30 of the PSI if those offenses had been included in the criminal history computation.[5] The court calculated an additional sixteen criminal

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[5] The court calculated the additional criminal history points as follows:

1. Theft from Stop-N-Go, PSI ¶ 27, three criminal history points.

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history points, which, combined with Benton's three pre-existing criminal history points, totaled nineteen. Benton raised no objection. The court then made the following statement:

> . . . I don't think there is any question but what the defendant's criminal history does not adequately reflect the seriousness of his past criminal conduct, and, perhaps more importantly, I don't think there is any question but that his criminal history category does not adequately reflect the likelihood that he will commit other crimes. I would hope that I could be assured that he would not, but this series of activities that he engaged in that are reflected by paragraphs 27, 28, 29 and 30 of the presentence report cause me to conclude that there is a great likelihood that, if he's given a short sentence, we would be faced with further crimes committed by this defendant. Therefore, the court has determined that the court will make an upward departure, and the upward departure will be for the reasons I have stated under Section 4A1.3 of the guidelines.
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> The court finds from a preponderance of the evidence that there is reliable information indicating that this defendant's criminal history category does not adequately reflect the seriousness of his past criminal conduct or the likelihood that he will commit other crimes. Therefore, I plan to make an upward departure . . . .

The district court adopted the findings and conclusions set forth in the PSI, assigned Benton his total offense level and criminal history category, and informed Benton of the appropriate sentencing range. The court stated as follows:

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2. Theft from Winn-Dixie, PSI ¶ 27, one criminal history point.

3. Theft from Classic Mini-Mart, PSI ¶ 27, three criminal history points.

4. Robbery with bodily injury, PSI ¶ 28, three criminal history points.

5. Credit card abuse, PSI ¶ 29, three criminal history points. The court considered the five charges of credit card abuse as related cases.

6. Robbery of Diamond Shamrock store, PSI ¶ 30, three criminal history points.

> Now, on the matter of an upward departure, I have considered where we would be under the different criminal history categories, and I have concluded that, even if we were to create in this case)) Based on the criminal history, we have a category VI. If we were to impose a sentence based on an application of the offense level to a category VI, that still would not create a sentence that would be sufficient, taking into account the likelihood that this defendant would commit other crimes or the seriousness of the defendant's past criminal conduct. Therefore, I plan to depart to a point above that.
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> The court orders and adjudges that the defendant is committed to the custody of the Bureau of Prisons to serve a term of imprisonment of 36 months.

We will affirm a departure from the guidelines if the district court offers acceptable reasons for the departure and the departure is reasonable. United States v. Lambert, 984 F.2d 658, 663 (5th Cir. 1993) (en banc) (citing United States v. Velasquez-Mercado, 872 F.2d 632 (5th Cir.), cert. denied, 493 U.S. 866 (1989)). In United States v. Lopez, 871 F.2d 513 (5th Cir. 1989), we considered whether the district court properly disregarded the guidelines upon finding that the defendant's criminal history category of I did not adequately reflect the defendant's past criminal conduct and propensity to commit future crimes. The district court in that case drastically departed from the guidelines to impose a two-year sentence, the maximum sentence for a criminal history category of V. The court did not consider the possible sentences using categories II-IV to adjust for the defendant's criminal history.

We concluded that where a defendant's score does not adequately reflect his criminal history, the guidelines require sentencing courts first to consider upward adjustments of the criminal history category before a departure sentence may be

justified on that basis, and that when a sentencing court fails to do this, resentencing is appropriate. Id. at 515. We vacated and remanded for resentencing, stating as follows:

> . . . [W]e emphasize that in some cases involving defendants with low criminal history scores, it may be justified to impose a sentence reflecting a much higher criminal history category or to go beyond the range corresponding to the highest category VI. However, in such cases the sentencing judge should state definitively that he or she has considered lesser adjustments of the criminal history category and must provide the reasons why such adjustments are inadequate.

Id.

In Lambert, admittedly decided after the district court sentenced Benton, we reaffirmed our holding in Lopez and reiterated our conclusion that "a district court must evaluate each successive criminal history category above or below the guideline range for a defendant as it determines the proper extent of departure." 984 F.2d at 662. We directed that when a district court imposes a sentence that reflects a much higher criminal history category or goes beyond the guidelines completely, the court should state for the record that it has considered each intermediate adjustment and should explain why the criminal history category as calculated under the guidelines is inappropriate, why the category the court chooses is appropriate, and why the category or categories between the two are inadequate. Id. at 662-63. We stated that "[i]f the district court finds that it is necessary to go beyond the guidelines, the court must give adequate reasons why the guideline calculation is inadequate and why the sentence it imposes is inappropriate." Id. at 663.

We do not require, however, a "ritualistic exercise" in which the district court "mechanically discusses each criminal history category it rejects en route to the category that it selects." Id. In Lambert, we acknowledged that the district court's reasons frequently will be implicit in its explanation for its departure and for its chosen category. Id. We observed, however, that the district court must make its reasons more explicit in certain cases:

> In a very narrow class of cases, we can conceive that the district court's departure will be so great that, in order to survive our review, it will need to explain in careful detail why lesser adjustments in the defendant's criminal history score would be inadequate. Also, in some cases it will not be evident simply from the stated ground for departure why a sentence commensurate with a bypassed criminal history category was not selected; in that event, the appellate court must be able to ascertain from the reasons given for the sentence selected, read in the context of the record as a whole, the legitimate basis or bases on which the district court deemed the bypassed category inadequate.

Id.

We find that the district court's drastic upward departure from Benton's criminal history category of II and a sentencing range of 2-8 months to a sentence greater than that required under the highest criminal history category of VI presents such a case. The district court's language in stating its reasons for an upward departure parallels the language in section 4A1.3. The court stated that it found, by a preponderance of the evidence, that Benton's criminal history did not adequately reflect the seriousness of his past criminal conduct or the likelihood that Benton would commit other crimes. The court stated that it based its

upward departure upon section 4A1.3.

More specifically, the court stated that imposition of a sentence commensurate with a criminal history category of IV would be insufficient to address section 4A1.3 concerns. The court did not specify its reasons for rejection of a category VI sentence which, combined with Benton's offense level of 7, could have encompassed up to 21 months in prison. Moreover, the court did not specify its reasons for rejection of any interim-level sentence that it could have imposed under criminal history categories III-V. The court merely stated that it had "considered where we would be under the different criminal history categories." The court made no other mention of having evaluated the criminal history categories between II and VI.

The district court's statement of reasons for its upward departure is insufficient under Lopez and Lambert, as the court failed to evaluate each successive criminal history category above category II, either separately or in globo. The court did not explain why the interim criminal history categories were inappropriate or why its departure beyond a sentence commensurate with category VI was appropriate. Indeed, this case is unlike Lambert, where we determined that the appeal was "one of the cases in which the district court's explanation for its sentence also explains why it rejected a lesser departure." 984 F.2d at 664. In Lambert, we observed that "it is not clear what else the court could have said to explain its sentence other than to repeat the various factors in the defendant's criminal history for which the guidelines did not

account." Id.

In the instant case, the district court offered no reasons, even though it could have offered much more in the way of explanation as to why a lesser sentence was inappropriate. It could have cited the sentencing range mandated by each of the interim criminal history categories and explained why such a sentence was not proportional to Benton's past criminal conduct as described in the PSI. Furthermore, as in Lopez, we cannot conclude, without further explanation from the district court, that Benton's past criminal history was so "patently outrageous that any [more minor] adjustments would be inadequate." Lopez, 871 F.2d at 515.[6] Because the

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[6] Cf. United States v. McKenzie, 1993 U.S. App. LEXIS 10878 (5th Cir. May 10, 1993) (holding that district court adequately stated its reasons for departure and did not abuse its discretion in departing upward from guidelines). In McKenzie, the defendant's criminal history category was IV, and his total offense level was 14, mandating a sentence of 27-33 months under the guidelines. The district court departed upward pursuant to § 4A1.3, sentencing the defendant to 60 months' imprisonment. In reciting its reasons for departing upward, the district court stated that "the court is of the view that your criminal conduct is certainly more proportional to a higher category)) criminal history category, that is, a Category 5 or 6 than the one that is contained in the basic calculations." Id. at *5. We concluded that "[a]lthough the district court's rationale for departing could have been more explicit, we are satisfied that the court's stated reasons, when read in the context of the record as a whole, `presents a basis upon which we may reasonably conclude that the district court thoroughly considered the appropriate guidelines in arriving at its ultimate sentence.'" Id. at *6 (citing Lambert, 984 F.2d at 663).

McKenzie can be distinguished from the case at bar. First, the district court's language in that case indicated that the court specifically had considered the proportionality of the defendant's past criminal conduct to the sentences mandated by the higher criminal history categories of V and VI. Second, the defendant's past criminal conduct in McKenzie is comprised of much more serious offenses than Benton's past criminal conduct as described in the PSI. In McKenzie, we noted that the seriousness of the defendant's prior criminal conduct, which included arrests for possession of a weapon and for possession of cocaine with intent to distribute, along with charges of possession of marihuana and crack cocaine, took that case out of the "narrow class of cases" where the departure is so great that we require the district court to "explain in careful detail why lesser adjustments" are inadequate. Id. at *9 n.7 (citing Lambert, 984 F.2d at 663).

Finally, the departure in McKenzie was less drastic than the court's

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district court failed to follow the methodology mandated by Lopez and Lambert in making its upward departure, we VACATE the sentence imposed by the district court and REMAND for resentencing replete with explanations sufficient to comply with such methodology and thus sufficient to permit appellate review.

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departure in Benton's case. While we rejected the "degree of departure" distinction promulgated in the United States v. Harvey and United States v. Lopez line of cases, see Lambert, 984 F.2d at 662 (overruling Harvey, 897 F.2d 1300 (5th Cir.), cert. denied, 111 S. Ct. 568 (1990), and its progeny), the less drastic departure in McKenzie, combined with the seriousness of the defendant's prior criminal conduct and the district court's explicit language, made McKenzie a case where the district court's reasoning for rejecting intermediate categories was implicit, if not explicit, in the court's explanation for its departure. In such cases, we do not require the district court to go through the "ritualistic exercise in which it mechanically discusses each criminal history category it rejects." Lambert, 984 F.2d at 663.