IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 92-1872

Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KEVIN JOHNSON

Defendant-Appellant.

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Appeal from the United States District Court
for the Northern District of Texas
3:90 CR 231 D

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May 3, 1993

Before KING, DAVIS, and WEINER, Circuit Judges.

PER CURIAM:[*]

Defendant Kevin Johnson appeals his sentence for conviction by guilty plea of unlawful use of a communications facility, 21 U.S.C. § 843(b). We affirm.

I.

On April 9, 1990, Kevin Johnson used the United States mail to transport approximately nine pounds, thirteen ounces of

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

cocaine from Los Angeles, California, to the address of Sharon Evans in Dallas, Texas.[1] Postal inspectors conducted a controlled delivery of the package on April 10, 1990. Following acceptance of the package, Sharon Evans, Evans' daughter, and a man named Rohan Pryce were taken into custody. Johnson was arrested on April 20, 1992.

On July 17, 1992, Johnson pleaded guilty to using the United States mail to send 1.3 kilograms of cocaine from Los Angeles to Dallas with the intent to facilitate the distribution of the cocaine in the Dallas area. On October 2, 1992, he was sentenced to forty-eight months imprisonment to be followed by one year of supervised release. Johnson filed a timely notice of appeal on October 5, 1992.

Johnson raises five separate issues on appeal to this court, all of which arise out of his disappointment with the sentence he received after his guilty plea. Three of these challenges pertain to the district court's upward departure to the forty-eight month statutory maximum. Johnson complains that (1) the departure violates the ex post facto clause of the United States Constitution; (2) the court did not articulate a sufficient reason for the departure; and (3) the level of departure was unreasonable. In addition, Johnson complains that the district court erred by not granting Johnson a two-point reduction for

[1] Previously, on March 28, 1990, an express mail package of nearly the identical size and weight had been delivered from Los Angeles to the same residence. The contents of that package were never recovered. Johnson admits to mailing this package, but claims that it contained clothing for Sharon Evans.

being a minor participant; and that the Government breached its plea agreement by not asking the district court for a downward departure for substantial assistance under U.S.S.G. § 5K1.1.

A. Upward Departure

First, Johnson argues that the sentencing judge violated the ex post facto clause by relying on a newly amended version of the Guidelines for purposes of Johnson's sentencing. He is incorrect.

Courts must apply the sentencing guideline in effect at the time of sentencing unless an ex post facto concern exists. United States v. Ihegworo, 959 F.2d 26, 29 n.7 (5th Cir. 1992). The ex post facto prohibition is violated by the retrospective application of a law that disadvantages the offender affected by it. Miller v. Florida, 482 U.S. 423, 430 (1987). An increase in sentence based on an amendment to the Guidelines effective after the offense was committed would violate the ex post facto clause. United States v. Suarez, 911 F.2d at 1016, 1022 (5th Cir. 1990). The sentencing judge recognized the possibility of ex post facto problems in sentencing Johnson under the amended version of U.S.S.G. § 2D1.6 in effect at the time of sentencing. As a result, he clearly did not apply the amended version, but the version in effect at the time of Johnson's criminal conduct.[2]

[2] The sentencing judge explicitly stated: "let me make clear on the record . . . [that] the court is not in any way indicating that Mr. Johnson should be sentenced based on a new version of 2D1.6. That would violate the application of the guidelines. . . . So if the court imposes a sentence . . . above the range, it is doing so solely as a departure. It is not doing so because it is applying the new version of 2D1.6."

Section 2D1.6 (Nov. 1989), the version of the guideline in effect at the time of Johnson's criminal conduct, provided for a base offense level of twelve, which, when combined with Johnson's criminal history of one, results in a guideline imprisonment range of ten to sixteen months. In November 1990, § 2D1.6 was amended to correlate that section with § 2D1.1, which requires an offense level calculation based on drug quantities. U.S.S.G. § 2D1.6, comment (Nov. 1990). Explaining the rationale behind this amendment, the Sentencing Commission stated that the guideline was amended because the convictions under 21 U.S.C. § 843(b) are frequently:

> the result of a plea bargain because the statute has a low maximum (four years with no prior felony drug conviction; eight years with a prior felony drug conviction) and no mandatory minimum. The current guideline has a base offense level of 12 and no specific offense characteristics. Therefore, the scale of the underlying drug offense is not reflected in the guideline. This results in a departure from the guideline range frequently being warranted.

U.S.S.G. App. C, amendment 320 (Nov. 1990) (emphasis added).

The sentencing judge decided to depart upwardly because the November 1, 1989 guideline did not reflect the drug quantity involved. He determined that the amendment to § 2D1.6 indicated that the Sentencing Commission believed that an upward departure under § 5K2.0, p.s.[3] was often warranted under the pre-1990 version of § 2D1.6 because the drug quantity was not adequately taken into account by this prior guideline. He explicitly stated

[3] This section of the Guidelines empowers the district court, in its discretion, to depart upward or downward to craft a sentence that fits the particular facts of the offense. See 18 U.S.C. § 3553(b).

that he was not applying the amended version of § 2D1.6, but was utilizing the 1989 version, plus § 5K2.0, p.s. as authority for an upward departure. Section 5K2.0, p.s. was available to the sentencing judge as a mechanism for upward departure in the 1989 version of the Guidelines. As a result, we find that no ex post facto problem is presented by the district court's upward departure.

Second, Johnson contends that the sentencing judge failed to articulate sufficient reasons for an upward departure. He is incorrect.

A sentencing judge may depart from the Guidelines if he finds an "aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the [G]uidelines." 18 U.S.C. § 3553(b); U.S.S.G. § 5K2.0, p.s. When a sentencing judge departs from the sentencing guideline range, he must state specific reasons explaining his departure. 18 U.S.C. § 3553(c)(2). If a sentence falls within the statutory limits, even though constituting an upward departure from the Guidelines, it will not be disturbed by this court absent a gross abuse of discretion. United States v. Murillo, 902 F.2d 1169, 1170-71 (5th Cir. 1990).

In Johnson's case, the sentencing judge stated that he departed upwardly because the guideline in effect at the time of Johnson's criminal conduct did not take into account the drug quantity involved. The Sentencing Commission acknowledged the

propriety of departure on this ground under the pre-1990 version of § 2D1.6. when it amended this section. See U.S.S.G. App. C, amendment 320 (Nov. 1990). We cannot find that the sentencing judge failed to state adequate grounds for departure. See United States v. Velasquez-Mercado, 872 F.2d 632, 637 (5th Cir.), cert. denied, 493 U.S. 866 (1989) (if reasons justifying upward departure are "reasonable" and "acceptable," the departure will be affirmed).

Third, Johnson argues that the upward departure from the ten to sixteen month Guideline range to the forty-eight month sentence was unreasonable. Again, he is incorrect.

As previously stated, an upward departure that does not exceed the statutory maximum will not be disturbed unless the sentencing judge has grossly abused his discretion. Murillo, 902 F.2d at 1171-72. The statutory maximum for Johnson's offense is forty-eight months. See 21 U.S.C. § 843(c).

The Sentencing Commission explicitly ratified departures in § 2D1.6 cases where the drug quantity was not taken into account. See U.S.S.G., App. C, amendment 320 (Nov. 1990). A § 2D1.6 offense may warrant a departure based on drug quantity. See United States v. Barbontin, 907 F.2d 1494, 1499 (5th Cir. 1990) (section 2D1.6 offense departures are different from other departures based on quantity because "the Commission did not delimit degrees of culpability for various drug quantities associated with the particular substantive offense charged"). Based on the facts of this case, we cannot find that the

sentencing judge grossly abused his discretion in departing from the suggested guideline range.[4]

B. Minor Participant

Johnson contends that the sentencing judge erred by not explaining his reasons for refusing to grant a reduction in offense level for Johnson's being a minor participant. This argument is unavailing.

A two to four level decrease for a defendant who is either a "minimal participant" or a "minor participant" is provided by U.S.S.G. § 3B1.2. A minimal participant lacks knowledge or understanding of the scope and structure of the enterprise and the activities of others. U.S.S.G. § 3B1.2(a), comment. (n.1). A minor participant is one who is less culpable than other participants, but whose role cannot be described as minimal. U.S.S.G. § 3B1.2(b), comment. (n.3). A sentencing judge must articulate reasons for the factual finding that the defendant was an average participant and not entitled to a § 3B1.2 reduction. United States v. Melton, 930 F.2d 1096, 1099 (5th Cir. 1991). Factual determinations under § 3B1 are reviewed under the clearly erroneous standard. United States v. Hewin, 877 F.2d 3, 4 (5th Cir. 1989).

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[4] Johnson points out that the departure was unreasonable because it was three times the maximum of the guideline range. This contention is irrelevant. See United States v. Roberson, 872 F.2d 597, 606 n.7 (5th Cir.), cert. denied, 493 U.S. 861 (1989) (fact that sentence imposed exceeds guideline range by multiple factor is not important to analysis of whether sentence is reasonable).

The sentencing judge did not specifically elucidate the factual basis for finding Johnson to be an average participant. During the sentencing phase, however, the judge overruled Johnson's request for a two level decrease, "conclud[ing] based on a preponderance of the evidence that has a sufficient indicia [sic] of reliability to support its probable accuracy that the defendant was not a minor participant in the criminal activity in question." It is clear that he was addressing the factual findings contained in the presentence report[5] when he overruled Johnson's request. The presentence report bears sufficient indicia of reliability to be considered as evidence by the sentencing court in making factual determinations required by the Guidelines. United States v. Alfaro, 919 F.2d 962, 966 (5th Cir. 1990); see also Murillo, 902 F.2d at 1173 (we view the probation officer's recitation of facts in the presentence report with considerable deference). The sentencing judge articulated sufficient reasons for not granting Johnson a minor participant reduction. As a result, we cannot find the judge's factual

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[5] In the presentence report, the probation officer stated the following concerning Johnson's role in the offense:

> Investigative disclosure reveals that cocaine was being mailed from California to Mesquite, Texas. Two codefendants in Texas, Rohan Price and Phil LNU, were the recipients of the illicit drugs. Investigation information indicates that over $170,000 was wire-transferred back to California with 8 transfers totaling $38,700 being sent directly to Kevin Johnson. Other participants picked up or admitted picking up money in Johnson's behalf. . . . Therefore, it is believed by the probation officer that the defendant['s] role was more than a minor participant in this illicit drug distribution organization.

determination that Johnson was not a minor participant to be clearly erroneous.

C. Violation of the Plea Agreement

Finally, Johnson argues that the Government violated the plea agreement by not making a U.S.S.G. § 5K1.1 motion for a downward departure for "substantial assistance." He is incorrect.

The plea agreement provided that the "[G]overnment agrees to file a motion for downward departure under section 5K1.1 of the [S]entencing [G]uidelines if, in the [G]overnment's estimation, J[ohnson] provides substantial assistance to law enforcement authorities." The Government subsequently concluded that Johnson failed to provide such assistance.

The Government has a prerogative, not an obligation, to file a § 5K1.1 motion. United States v. Urbani, 967 F.2d 106, 109 (5th Cir. 1992). Its decision not to file a § 5K1.1 motion is reviewable by this court only if the refusal to file was "'based on an unconstitutional motive' such as the defendant's race or religion." Id. at 109, quoting Wade v. United States, ___ U.S. ___, 112 S. Ct. 1840, 1843 (1992). While Johnson asserted that he provided substantial assistance to law enforcement authorities, this naked assertion does not entitle Johnson to an evidentiary hearing on the issue or an order requiring the Government to file a § 5K1.1 motion. Urbani, 967 F.2d at 109. Nothing in the plea agreement removed the Government's discretion not to move for a downward departure at sentencing. Accordingly,

we find that the Government did not violate the plea agreement by not moving for a downward departure.

## III.

Johnson's sentence is AFFIRMED.