

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1885
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JUAN MANUEL LUEVANO,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(4:92-CR-058-Y)

(May 21, 1993)

Before GARWOOD, JONES, and EMILIO GARZA, Circuit Judges.*

EDITH H. JONES, Circuit Judge:

Appellant Luevano pleaded guilty to being a felon in possession of a firearm. After making an upward departure, the court sentenced Luevano to the statutory maximum of ten years of imprisonment. Appellant challenges his sentence, but we find no error and affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

BACKGROUND

The Presentence Investigation Report (PSR) applied U.S.S.G. § 2K2.1(a)(2) which assigns a base offense level of 24 if the defendant has at least two prior felony convictions of either a crime of violence or controlled substance offense. PSR ¶ 11. The PSR noted that Luevano has two prior convictions for attempted murder and one prior conviction for murder. Id. The PSR then subtracted two points for acceptance of responsibility to reach a total base offense level of 22. Id. at ¶ 16.

The PSR computed 8 criminal history points. Id. at ¶¶ 20-24. The PSR then added 2 points pursuant to § 4A1.1(d) because Luevano committed the instant offense while on state parole for his murder conviction and added one point pursuant to § 4A1.1(e) because Luevano committed the instant offense less than two years after his release from the sentence for murder, to reach a total of 11 criminal history points. Id. at ¶¶ 26-27. With a base offense level of 22 and a total criminal history score of 11, the PSR recommended a sentencing range of 77 to 96 months of imprisonment. Id. at ¶ 41.

The sentencing court elected to depart upward twenty-four months (to the statutory maximum) pursuant to § 4A1.3, after concluding that Luevano's criminal history category underrepresented the seriousness of Luevano's criminal record. In an addendum to the judgment, the court meticulously set forth the specific reasons for its upward departure, focused on the nature

and seriousness of Luevano's commission of murder and two shootings.

DISCUSSION

Luevano asserts that the court erred when it upwardly departed because his prior convictions were counted three times in reaching his sentence: (1) to calculate his criminal history category; (2) to enhance his base offense level; and, (3) to upwardly depart. Luevano argues that this methodology contravenes § 5K2.0 which prohibits the court from upwardly departing if the guidelines already account for the factors used for the departure. Id. at 19. Luevano also argues that because under Texas' sentencing scheme sentences are inflated and convicts are not expected to serve full terms, he was not given lenient treatment for his former offenses. Id. at 20-22. He further argues that when the court used the length of his prior sentences to determine that he had received extremely lenient treatment for his past offenses, it violated his equal protection rights. Id. at 22-23. Last, he asserts that recidivism is not a valid basis for an upward departure because the guidelines' criminal history scoring system already considers such conduct. Id. at 23-24.

The Guidelines provide that the court is warranted in making an upward departure "[i]f 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. . . ."

U.S.S.G. § 4A1.3 (p.s.). "[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." U.S. v. Lambert, 984 F.2d 658, 662 (5th Cir. Feb. 16, 1993, No. 91-1856, slip p. 2660). In its reasons for departure the court explicitly addressed why the next criminal history category was inadequate.

"A departure from the guidelines will be affirmed if the district court offers acceptable reasons for the departure and the departure is reasonable." U.S. v. Velasquez-Mercado, 872 F.2d 632, 635 (5th Cir.) (internal quotation marks and citation omitted), cert. denied, 493 U.S. 866 (1989). The court's decision to upwardly depart because Luevano's criminal history category did not adequately reflect the seriousness of his past criminal conduct is a factual finding reviewed for clear error, while the court's decision to depart upward is reviewed for abuse of discretion. U.S. v. Laury, 985 F.2d 1293 (5th Cir. March 2, 1993, No. 91-8649, slip p. 2944).

That a defendant's criminal history category does not adequately reflect the seriousness of his past criminal conduct (constant recidivism and violent behavior), and is not accounted for by the guidelines, is a permissible justification for an upward departure. Id. at slip p. 2943-44; see also Lambert, at slip p. 2661-62 (defendant used weapons in two of his former crimes, two previous crimes were committed while serving time for other crimes, and two crimes were counted as only one because they

had been consolidated); U.S. v. Carpenter, 963 F.2d 736, 745 (5th Cir. 1992), cert. denied, 113 S.Ct. 355 (1992) (two prior convictions were not counted, defendant had been charged with murder but pleaded to a lesser offense and served only one-third of his sentence before being paroled, committed offenses while on probation and parole, and received especially lenient treatment).

As noted by the court, Luevano's past criminal conduct included crimes of violence, in particular murder; no criminal history points were assigned for the second victim of the attempted murder; Luevano committed the offenses within a short span of time; and, because he was paroled early in his sentences, he received extremely lenient treatment. Therefore, the court did not err when it found that Luevano's criminal history did not adequately reflect the seriousness of his criminal history. Furthermore, because the next criminal history category would have increased Luevano's sentence by only nine months, the court did not abuse its discretion in upwardly departing from the guidelines.

As to the reasonableness of the departure, to the extent that it was within the statutory limit, it is reviewed "only for a gross abuse of discretion." Laury, at slip. p. 2944 (internal quotations and citations omitted). In light of the court's articulated reasons for the departure, a twenty-four-month departure to the statutory maximum was not unreasonable. See id. (twenty-five-month departure based on same reasons held not unreasonable).

For the foregoing reasons, the judgment of the district court is **AFFIRMED**.