

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-2445
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

RICHARD EARL LOLLAR,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR H 90 0086 01)

(November 25, 1992)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:¹

Lollar challenges his sentence on grounds that the district court's upward departure was both improper and the unreasonably high. We affirm.

I.

Lollar pleaded guilty to a one-count superseding information charging him with possession of three firearms by a convicted felon. In exchange for his guilty plea, the government

¹Local 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

successfully moved for the dismissal of the pending indictment charging Lollar with violating 18 U.S.C. §§ 922(g)(1) and 924(e)(1).

The presentence report (PSR) determined Lollar's criminal history category to be VI. The district court found Lollar to be a career offender under U.S.S.G. § 4B1.2 and sentenced him to 120 months imprisonment, three years supervised release, and \$50 special assessment. This court affirmed Lollar's sentence. **United States v. Lollar**, No. 90-2747 (5th Cir. Nov. 15, 1991) (unpublished). The government successfully moved for this court to vacate its prior decision based upon the Sentencing Commission's "clarification" that the crime of possession of a firearm by a felon is not a crime of violence for career offender determination. **United States v. Lollar**, No. 90-2747 (5th Cir. Feb. 10, 1992) (unpublished).

The district court resentenced Lollar to the same sentence: 120 months imprisonment, three years supervised release, and \$50 special assessment. This time, the district court departed upward from the guideline range of 30-37 months. The court's departure was based upon the revised U.S.S.G. § 2K2.1 and upon the finding that Lollar's "criminal history category d[id] not adequately represent the seriousness of his past criminal conduct or the likelihood that [Lollar] w[ould] commit other crimes . . . under Section 4A1.3." The district court later modified its reasons for departure, sustaining Lollar's objection against using the new

U.S.S.G. § 2K2.1 as an ex post facto violation. Lollar filed timely notice of appeal.

II.

Lollar argues that the district court improperly departed from the applicable guideline range and that the departure was unreasonable. "An upward departure is permissible when an aggravating circumstance exists that was not adequately taken into consideration by the guidelines. 18 U.S.C. § 3533(b)." **United States v. Rogers**, 917 F.2d 165, 169 (5th Cir. 1990), **cert. denied**, 111 S.Ct. 1318 (1991); U.S.S.G. § 5K2.0, p.s. "The standard of review employed to analyze a district court's departure from the Sentencing Guidelines requires [this court] to determine two issues: 1) was the departure based on acceptable reasons, and 2) was it a reasonable departure." **United States v. Webb**, 950 F.2d 226, 231 (5th Cir. 1991), **cert. denied**, 112 S.Ct. 2316 (1992).

Lollar's criminal history score of fourteen excluded two prior burglary convictions, excluded because they were consolidated at sentencing with another burglary conviction. Lollar was originally sentenced in July 1990, so the PSR reflects the 1989 guidelines. Thus, the PSR does not refer to the 1991 amendment to U.S.S.G. § 4A1.1 which allows prior convictions to be counted in the computation if their underlying crimes were crimes of violence. U.S.S.G. § 4A1.1(f). No new or supplemental PSR was prepared for the April 3, 1992 resentencing, when the November 1991 version of the Guidelines was in effect.

Lollar argues that because the district court used these two uncounted convictions as its basis for departure, a circumstance already taken into consideration under U.S.S.G. § 4A1.1(f), the district court improperly departed from the guidelines. "The guideline provision in effect at the time of sentencing dictates which version of the guidelines [this court] must apply." **United States v. Ainsworth**, 932 F.2d 358, 362 (5th Cir.), **cert. denied**, 112 S.Ct. 327, 346 (1991).

But the district court based its determination of the inadequate criminal history on more than the failure of the guidelines to factor in the two prior burglary convictions:

The defendant is a career criminal who, since the age of eighteen, has engaged in a variety of criminal acts, including possession of illegal drugs, burglary of homes, buildings and motor vehicles, and theft. His criminal history category . . . under represents the seriousness of his conduct since three of his early convictions were not calculated in calculating his criminal history category. A presentence investigation report shows that even when the defendant is in prison, he has continued to commit a variety of illegal acts, including assaults of various types and possession of contraband, including narcotic drugs.

"[O]nce the court of appeals has decided that the district court misapplied the Guidelines, a remand is appropriate unless . . . on the record as a whole, . . . the error was harmless, i.e., that the error did not affect the district court's selection of the sentence imposed." **Williams v. United States**, ___ U.S. ___, 112 S.Ct. 1112, 1120-21, 117 L.Ed.2d 341 (1992). The district court stated adequate reasons for its departure and the departure was proper. **See Webb**, 950 F.2d at 231; **Rogers**, 917 F.2d at 169-70.

Lollar argues that the extent of the departure was unreasonable and that the district court should have limited its departure to ten to fifteen percent above the applicable range. This court "may affirm the sentence as long as it is also satisfied that the departure is reasonable under [18 U.S.C.] § 3742(f)(2). The reasonableness determination looks to the amount and the extent of the departure in light of the grounds for departing." **Williams**, 112 S.Ct. at 1121. Lollar's applicable guideline range was 30-37 months. The district court departed to 120 months, the maximum term of incarceration under § 924(a)(2).

Once the district court has stated appropriate reasons for the departure, it need not justify the precise length of the sentence. **Rogers**, 917 F.2d at 169. "Nothing in section 3553 requires the sentencing judge to justify his choice of sentence further by explaining, for example, why 120 months is more appropriate than 100 months." **United States v. Roberson**, 872 F.2d 597, 607 (5th Cir.), **cert. denied**, 493 U.S. 861 (1989). In light of Lollar's revolving-door history of incarceration and his criminal behavior while in prison, we cannot say the district court's sentence in this case is unreasonable. **See Rogers**, 917 F.2d at 169.

AFFIRMED.