

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-3517  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

OSAMWONYA OHONBA,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Eastern District of Louisiana  
(CR 92 009 "I")

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March 25, 1993

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

PER CURIAM:

Appellant pleaded guilty to making a false statement in an immigration document in violation of 18 U.S.C. § 1001. Ohonba and the United States both took issue with the presentence report and filed objections, the effect of which would have required the district court to select a sentence level ranging from 6 to 10 with a corresponding punishment range from probation to 12 months

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

imprisonment. Neither the probation office nor the government had suggested that a departure was warranted beyond whatever base offense level the district court settled on. Nevertheless, at the close of the sentencing hearing, the district court suddenly and without notice departed upward to assess a two-year term of imprisonment. On appeal, appellant contends that this action violated Burns v. United States, \_\_\_ U.S. \_\_\_, 111 S. Ct. 2182 (1991). We agree, we believe the district court's failure to comply with Burns constituted plain error, and we accordingly vacate and remand for resentencing.

The rule stated in Burns could not be clearer:

The question in this case is whether a district court may depart upward from the sentencing range established by the Sentencing Guidelines without first notifying the parties that it intends to depart. We hold that it may not.

Burns, 111 S. Ct. at 2182. As Burns was decided in 1991, and sentencing occurred in this case in May, 1992, there is no reason why the district court should have overlooked Burns.

The government's only defenses against resentencing are that appellant did not object to the departure in the district court, that appellant was constructively on notice of the possibility of a departure, and that the departure was in any event reasonable or not plain error. We dispose of these contentions in reverse order.

The fact that a sentence imposed by a district court is otherwise reasonable cannot salvage a sentencing decision from the misapplication of the guidelines. We express no opinion on

whether, if the district court had given proper notice to Ohonba, the departure was appropriate.

The government's contention that Ohonba had constructive knowledge of the court's ability to depart is nonsense. Every defendant is informed at his guilty plea colloquy that the court may depart upward. Burns states that "Rule 32 requires that the district court give the parties reasonable notice that it is contemplating such a ruling. This notice must specifically identify the ground on which the district court is contemplating an upward departure." \_\_\_\_ U.S. \_\_\_\_, 111 S. Ct. at 2187 (emphasis added).

Finally, while we agree that sentencing errors ordinarily should be drawn to the court's attention immediately, see United States v. Vontsteen, 950 F.2d 1086 (5th Cir.) (en banc), cert. denied, 112 S. Ct. 30, 39 (1992), we hold that in this case plain error occurred. The district court's upward departure was so unexpected, so abrupt, so determined, and so obviously at odds with Burns that appellant's counsel had to be taken aback. The contrast with Vontsteen is instructive. In that case, the district court had every reason to believe he was resentencing the defendant in accordance with law, so it was up to the defendant to call his attention promptly to an error. In this case, the district court ought to have had Burns firmly in mind before it awarded a departure, and there was no reason to forget it or deviate from its command. The court's self-supervision should have prevented the error. The error is "plain" because it at least doubled

appellant's period of incarceration and gave him no opportunity to respond.

**VACATED** and **REMANDED** for resentencing.