

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3871
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ARTHUR J. COLLINS, JR.,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. CR-92-258-N
- - - - -

June 23, 1993

Before POLITZ, Chief Judge, WIENER, and DeMOSS, Circuit Judges.

PER CURIAM:*

Arthur Collins Jr.'s sole challenge on appeal is to the district court's upward departure. A departure from the guidelines will be upheld if (1) the district court provided acceptable reasons for the departure; and (2) the departure was reasonable. United States v. Webb, 950 F.2d 226, 231-32 (5th Cir. 1991), cert. denied, 112 S.Ct. 2316 (1992).

Collins contends that the district court did not provide enough specificity in articulating its reasons for the upward

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

departure. The Guidelines only require the district court to state in open court the specific reason for the departure. 18 U.S.C. § 3553(c)(2); United States v. Hernandez, 943 F.2d 1, 3 (5th Cir. 1991). In the instant case the district court specifically stated that it was departing upward based on its conclusion that Collins's criminal history category was inadequately represented. This is an acceptable reason for an upward departure under the sentencing guidelines and the law of this Circuit. U.S.S.G. § 4A1.3; Webb, 950 F.2d at 232.

Collins also contends that upward departures under § 4A1.3 are reserved for crimes that are more egregious and serious than fraud. While Collins cites several examples of cases where we affirmed upward departures based on § 4A1.3, there is nothing in those decisions to suggest that departures under § 4A1.3 are limited solely to the substantive crimes in those cases.

Collins also argues that the district court's departure consisted of a purely mathematical calculation in contravention of the intent of the Sentencing Commission in formulating § 4A1.3. In United States v. Lambert, 984 F.2d 658 (5th Cir. 1993) (en banc), however, we directed district courts departing upward to "evaluate each successive criminal history category above or below the guideline range," before arriving at the final sentence. Id. at 662.

The district court in the instant case arrived at its final sentence by extending the criminal history categories, concluding that Collins's twenty-one criminal history points would place him in a criminal history category of eight. Applying that to the

offense level of nine would yield a guideline range of twenty-seven to thirty-three months. We noted in Lambert that the November 1, 1992 amendment to § 4A1.3 specified that a court departing above criminal history category VI should stay within the guidelines by considering higher base offense levels.

Therefore, under Lambert the district court's extension of criminal history categories, rather than base offense levels, amounts to a technical misapplication of the guidelines. See Lambert, 984 F.2d at 663. Had the district court had the benefit of Lambert at the time of Collins's sentencing, however, the same guideline range for Collins would have been achieved by moving Collins from a base offense level of nine to a base offense level of eleven. As the district court offered adequate reasons for its departure, and as the error did not affect the district court's selection of the sentence imposed, the district court's error in using criminal history categories rather than base offense levels is harmless under Williams v. United States, _____ U.S. _____, 112 S.Ct. 1112, 1120-21, 117 L.Ed.2d 341 (1992); Lambert, 984 F.2d at 663 & n.11.

Finally, in light of our reluctance to disturb sentences that are within the statutory maximum absent a "gross abuse of discretion," United States v. Murillo, 902 F.2d 1169, 1171 (5th Cir. 1990) (citation omitted), the district court's upward departure of six months is AFFIRMED.