UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-4716
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

HILTON LANGLEY,

Defendant-Appellant.

92-4789
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JOHN L. BROUSSARD,

Defendant-Appellant.

Appeals from the United States District Court
for the Western District of Louisiana
(CR-91-60025-02)

(February 17, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:[1]

---

[1]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."

Appellants appeal their sentences following their guilty plea to one count of conspiracy to export defense articles on the United States munitions list without export licenses. We find no error and affirm.

Appellants pled guilty pursuant to plea agreements to one count of conspiracy to export defense articles on the United States munitions list without export licenses. These pleas followed a sting operation in which Broussard and Langley agreed to sell third generation night vision goggles for export to North Korea. Appellants transferred one set of the night vision goggles and agreed to furnish a large shipment in exchange for $500,000.

Broussard raises two issues worthy of discussion. He argues first that the court erred in assigning a base offense level of 22. Under the current and applicable version of § 2M5.2, a defendant is assigned a base offense level of 22 unless the offense involved only ten or fewer non-fully automatic small arms. **See United States v. Peters**, 978 F.2d 166, 169 (5th Cir. 1992). The prior version of U.S.S.G. § 2M5.2 provided for a base offense level of 22 if a defendant was convicted of dealing in "sophisticated weaponry." We have held that the old and new versions of § 2M5.2 are substantively the same. **United States v. Nissan**, 928 F.2d 690, 694 (5th Cir. 1991). The lower base offense level of 14 "is reserved for truly minor exports of military equipment." **Id.** (quoting **United States v. Nissan**, 928 F.2d 690, 695 (5th Cir.

Pursuant to that Rule, the Court has determined that this opinion should not be published.

1991). The determination that the export of night vision goggles requires application of the higher level is a finding of fact that we review under the clearly erroneous standard. The district court found that the planned sale of $500,000 worth of night vision goggles is not a "truly minor export[]." This finding is not clearly erroneous.

Broussard argues next that he was entitled to a downward departure because the base offense level "assumes that the offense conduct was harmful or had the potential to be harmful to a security or foreign policy interest of the United States." U.S.S.G. § 2M5.2, Application Note 1. Broussard contends that the Customs Agents with whom he was dealing had no intention of exporting these night vision goggles to any foreign power that would harm the United States. "A claim that the court improperly failed to reduce a sentence will succeed only if the court's failure to depart violated the law." **Peters**, 978 F.2d at 170.

Broussard's arguments have no merit. Application Note 1 to U.S.S.G. § 2M5.2 provides that "[i]n the unusual case where the offense conduct posed no such risk [to a security or foreign policy interest of the United States], a downward departure may be warranted." Night vision goggles facilitate nighttime military operations. They are listed on the United States Munitions List, and export of the goggles is tightly controlled. Broussard and Langley were arranging to sell the goggles to North Korea, which was hostile to the United States at that time. At one point, Langley explained to a government agent that shipment of the

goggles was delayed because the government had requisitioned the equipment for the Persian Gulf War. Based on these facts, the district court's refusal to grant a downward departure is not a violation of the law.

Langley's arguments are also meritless. Langley received a downward departure pursuant to a § 5K1.1 motion filed by the government. He argues that the district court should have departed further downward because there was no risk to a security or foreign policy interest of the United States, only one pair of goggles was sold, the goggles were legally obtained from a domestic supplier, and Langley was not present when Broussard sold the goggles to the undercover agent.

As described above, the district court's finding that the goggles triggered the higher offense level because the sale had the potential to harm a U.S. security or foreign policy interest is not a violation of the law.

Whether or not the goggles were legally obtained is irrelevant considering that they were included on the United States Munitions List, had military applications, and were to be sold to a terrorist country without an export license. Likewise, the fact that only one pair of goggles was exchanged is immaterial considering that the scope of the transaction was $500,000 and Langley did not object to this finding in the PSR. Langley's contention that he was not present at the hotel when the agent received the goggles is irrelevant considering he pled guilty to conspiracy. Even if it were true, it is a new claim at odds with the uncontested version

of events in the PSR. We decline to consider this argument for the first time on appeal.

Finally, this Court will not review the district court's refusal to depart from the guidelines unless the refusal was in violation of the law. **United States v. Mitchell**, 964 F.2d 454, 462 (5th Cir. 1992). In this case, the district court refused to depart downward beyond its departure based on the § 5K1.1 motion, not because it was under a mistaken impression it could not legally do so, but because it believed a further departure was inappropriate. **See Mitchell**, 964 F.2d at 462.

AFFIRMED.