

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-5295  
(Summary Calendar)

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CARL ALLEN SHAY,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Western District of Louisiana  
(92 CR 20031 (2))

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August 18, 1993

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:\*

Carl Allen Shay appeals the sentence imposed by the district court after he pleaded guilty to one count of conspiring to transport a stolen vehicle in interstate commerce in violation of 18 U.S.C. §§ 371 and 2312. Because we conclude that the district

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

court correctly applied the United States Sentencing Guidelines (the Guidelines),<sup>1</sup> we affirm the sentence.

I.

On May 8, 1992, David Benavides stole a 1988 Chevrolet pickup truck belonging to Lawrence Williams from a post-office parking lot in Dallas, Texas. Benavides subsequently offered to sell the pickup to Carl Shay and his nephew for three-hundred dollars. Shay and his nephew had come to Dallas from Kelly, Louisiana, to purchase drugs from Benavides.

After conferring by telephone with Willbe Fruge, in Sulphur, Louisiana, who said he would give around \$2000 for the truck, Shay and his nephew agreed to buy the stolen truck. Shay's nephew then drove the truck from Dallas to Sulphur, with Shay following in the "trail" vehicle. Once in Sulphur, the nephew turned the truck over to Fruge, who partially "stripped" the vehicle. On May 15, 1992, Fruge delivered the stolen truck to an undercover FBI agent in exchange for \$1200.

Thereafter, on August 8, 1992, while cooperating with law enforcement officers, Fruge sold approximately two ounces of cocaine to Shay and his nephew. Following the transaction, the two tried to escape, and a high-speed car chase ensued, during

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<sup>1</sup> United States Sentencing Commission, Guidelines Manual (Nov. 1992) [hereinafter cited as U.S.S.G.]. Although the conduct for which Shay was convicted occurred in May 1992, the sentence from which he appeals was imposed on December 16, 1992. Because the 1992 amendments effected no substantive change that disadvantages Shay, we apply the version of the Guidelines in effect on the date of sentencing. See United States v. Woolford, 896 F.2d 99, 102 (5th Cir. 1990).

which the cocaine was thrown out of the Shays' car and recovered by the officers. Shay and his nephew ultimately were apprehended, and both made signed statements "pertaining" to the purchase of cocaine from Fruge. They also admitted to their involvement in the theft of the pickup from Dallas.

Shay and his nephew were charged in a two-count information with conspiracy to transport a stolen vehicle in interstate commerce in violation of 18 U.S.C. §§ 371 and 2312, and with the substantive offense of transporting a stolen vehicle in violation of 18 U.S.C. § 2312. Shay pleaded guilty to the conspiracy count in exchange for the dismissal of the substantive count. The Government also agreed not to pursue any federal charges arising from the cocaine purchase.

The Presentence Investigation Report (PIR) recommended a total offense level of eight. The offense level calculation was based upon a base offense level of four,<sup>2</sup> a four-level upward adjustment for the value of the stolen pickup,<sup>3</sup> and a two-level upward adjustment for "more than minimal planning."<sup>4</sup> The PIR also recommended a two-level reduction for acceptance of responsibility.<sup>5</sup> Finally, the report included within its description of the "offense conduct" Shay's purchase of two ounces of cocaine from Fruge.

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<sup>2</sup> See U.S.S.G. §§ 2X1.1(a) and 2B1.2(a).

<sup>3</sup> See U.S.S.G. § 2B1.1(b)(1)(E).

<sup>4</sup> See U.S.S.G. § 2B1.2(b)(4)(B).

<sup>5</sup> See U.S.S.G. § 3E1.1.

The report next recommended a criminal history category of III. In calculating Shay's criminal history category, the PIR determined that Shay had four criminal history points based upon a 1982 state-court conviction for receiving stolen goods and a 1984 federal-court conviction for receiving a stolen vehicle. The PIR also listed ten prior convictions not counted for Guidelines purposes and ten arrests occurring between 1964 and 1990 that did not lead to convictions. The report further noted that Shay was out on bond pending trial on a possession of stolen goods charge and subject to a bench warrant for failure to appear when arrested for the instant offense. Finally, the PIR noted that, while out on bond for the instant offense, Shay had been arrested and charged with possession with intent to distribute cocaine and marijuana. The report offered no details of the conduct that led to these most recent charges.

The PIR thus arrived at a guideline sentencing range of six to twelve months. The report noted, however, that, pursuant to the plea agreement, Shay had not been charged with possession of the two grams of cocaine he admitted purchasing from Fruge. The report also stated that the probation office believed an upward departure from the guideline sentencing range might be warranted in Shay's case because his criminal history category was "under-represented."

Shay filed objections to the PIR. Specifically, Shay challenged the two-offense-level increase for more than minimal planning, the criminal history category calculation, and the

recommendation for an upward departure. Shay argued that his participation in the offense was "purely opportune." He also asserted that the probation office had double-counted criminal conduct that had been the subject of prosecutions in both federal and state court. Finally, Shay argued that his uncharged cocaine possession was not a proper ground for an upward departure. The probation office agreed that it had double-counted a prior conviction and reduced the recommended criminal history category to II, which resulted in a revised sentencing range of four to ten months. In all other respects, the probation office stood by its original recommendations.

Prior to sentencing, the district court notified Shay that it was considering an upward departure on the grounds that his criminal history category did not adequately reflect the seriousness of his past criminal conduct or his propensity for future criminal conduct. The court also noted that the assigned offense level may not adequately have reflected the "risk to the community" posed by Shay's possession of two grams of cocaine.

At the sentencing hearing, Shay reasserted his objections to the amended PIR. The district court overruled Shay's objections and expressly adopted the factual findings of the report. The court then departed upward from the applicable guideline sentencing range of four to ten months and sentenced Shay to twenty-four months imprisonment, followed by a three-year period of supervised release. The court also ordered Shay to make restitution and pay a fifty-dollar special assessment.

The district court articulated its reasons for departing upward in its written "Reasons for Ruling." There, the court stated that it had departed upward because Shay's criminal history category did not reflect the seriousness of his past criminal conduct. Specifically, the court observed that Shay had a criminal history dating back to 1964 and that the lapse of time had prevented the PIR from counting several prior convictions, including convictions for theft from an interstate shipment, theft by check, and concealing mortgaged property. The court also noted that Shay had not been charged in connection with the purchase of cocaine from Fruge and that, while awaiting trial on the instant charges, he had been arrested and charged with possession with intent to distribute cocaine and marijuana. According to the district court, "[t]he criminal history category determined by Probation in this case is deceptively low, and there is great risk of recidivism which had already been demonstrated by this defendant."

The court also specifically observed that the seriousness of Shay's criminal history did not closely resemble that of most defendants in the next category. The court noted that a move into category III would increase the maximum sentence by only two months. The court further noted that moving up to categories IV and V would increase the maximum sentence to only sixteen and twenty-one months, respectively. For these reasons, the district court determined that, with an offense level of eight, the sentences corresponding to criminal history categories II, III,

IV, and V were too lenient. According to the district court, "nothing less than 24 months imprisonment would be appropriate in this case . . . ." The court therefore departed upward from the guideline range of four to ten months and sentenced Shay to twenty-four months imprisonment--the equivalent of the maximum sentence corresponding to a criminal history category VI. Shay timely appealed.

## II.

On appeal, Shay challenges his sentence on two grounds. Specifically, he argues (1) that the district court erred in applying a two-level upward adjustment in his offense level for more than minimal planning and (2) that the district court erred in departing upward from the guideline sentencing range. We address each of these arguments, in turn.

### A.

Shay first challenges the district court's conclusion that the offense for which he was convicted involved "more than minimal planning." See U.S.S.G. § 2B1.2(b)(4)(B). He argues that his crime was merely a crime of opportunity, that he did not travel to Dallas to steal the truck, and that he had no prior knowledge of the truck. According to Shay, Benavides sold the truck to Shay's nephew and Shay merely followed his nephew on the return trip to Louisiana. Shay argues that he had no part in the stripping of the vehicle and he received no compensation for his role in the conspiracy.

Under the Guidelines, "more than minimal planning" means more planning than is typical for commission of the offense in a simple form. U.S.S.G. § 1B1.1 comment. (n.1(f)). It also exists if significant affirmative steps were taken to conceal the offense. Id. Whether a defendant engages in more than minimal planning is a fact question, which we review under the clearly erroneous standard. United States v. Barndt, 913 F.2d 201, 204 (5th Cir. 1990). Under this standard, we must affirm the district court's finding if it is plausible in light of the record viewed in its entirety, notwithstanding the fact that we might have reached a different conclusion had we been sitting as the trier of fact. Anderson v. Bessemer City, 470 U.S. 564, 573-74 (1985).

In this case, the record indicates that Shay, together with his co-conspirators,<sup>6</sup> received a stolen truck in Dallas, Texas, made plans to transport the truck to Sulphur, Louisiana, transported the truck to Sulphur, with Shay following in a "trail" vehicle, partially disassembled or "stripped" the truck, and sold the truck to an undercover agent. The offense thus involved considerably more planning than would the mere transportation of a stolen vehicle across the state line. Moreover, the use of a trail vehicle and the stripping of the truck at least suggest that efforts were made to conceal the

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<sup>6</sup> As the district court correctly noted in overruling Shay's objection at the sentencing hearing, Shay, as a member of a conspiracy, may be held responsible for all reasonably foreseeable acts of the conspiracy. See U.S.S.G. § 1B1.3 (a)(1)(B) (Relevant Conduct).



offense. In light of these facts, we cannot say that the district court's finding that the offense involved more than minimal planning was clearly erroneous. The district court therefore correctly increased Shay's offense level by two levels. See U.S.S.G. § 2B1.2 (b)(4)(B).

B.

Shay next argues that the district court erred in departing upward from the guideline sentencing range. Shay argues that the district court based its upward departure upon factors that were invalid or already taken into account under the Guidelines. He also complains that the district court failed to articulate adequately its reasons for the upward departure.

We will affirm a district court's departure from the guideline sentencing range if the court offers acceptable reasons for the departure and the departure is reasonable. United States v. Lambert, 984 F.2d 658, 663 (5th Cir. 1993) (en banc). If, however, the district court relies upon an invalid factor, or otherwise misapplies the Guidelines at sentencing, we must remand unless we conclude that 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 (1992); United States v. Lara, 975 F.2d 1120, 1123 (5th Cir. 1992). In conducting our inquiry, we must accept the factual findings of the district court unless they are clearly erroneous, but we review de novo the application of the Guidelines. Lara, 975 F.2d at 1123.

Under the Guidelines, a district court may depart upward or downward from the guideline sentencing range when it finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the [G]uidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b); Lambert, 984 F.2d at 660. In determining whether a departure sentence is warranted, "the court may consider, without limitation, any information concerning the background, character, and conduct of the defendant, unless otherwise prohibited by law." U.S.S.G. § 1B1.4 (Information to be Used in Imposing Sentence). Should the sentencing court determine that a sentence outside of the range prescribed by the Guidelines is warranted, however, the court must state "the specific reason for the imposition of a sentence different from that described." 18 U.S.C. § 3553(c); Lambert, 984 F.2d at 660.

In the case before us, the district court specifically stated that it had departed upward because Shay's criminal history category did not reflect the seriousness of his past criminal conduct or the likelihood that he would commit future crimes. In reaching this conclusion, the court pointed to three factors reflected in the PIR: (1) that Shay had a criminal history dating back to 1964 and that the lapse of time had prevented the PIR from counting several prior convictions, including convictions for theft from an interstate shipment, theft by check, and concealing mortgaged property; (2) that,

pursuant to his plea agreement, Shay had not been charged in connection with the purchase of cocaine from Fruge; and (3) that, while awaiting trial on the instant charges, Shay had been arrested and charged with possession with intent to distribute cocaine and marijuana.

Section 4A1.3 of the Guidelines expressly authorizes an upward departure "when the criminal history category significantly under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit further crimes." U.S.S.G § 4A1.3; Lambert, 984 F.2d at 660. This court has recognized that the exclusion of convictions from the criminal history score due to staleness, the similarity of past offenses with the current offense, extreme leniency due to cooperation with the authorities, and continued criminal activity while free on bail are among the factors properly taken into account by a sentencing court. See United States v. Jones, 905 F.2d 867, 869 (5th Cir. 1990). The district court therefore properly considered Shay's stale theft convictions and the fact that, pursuant to his plea agreement, he was not charged for his admitted purchase of cocaine from Fruge. See also U.S.S.G. § 1B1.4 comment. (using criminal conduct not prosecuted due to a plea bargain as an example of information not taken into account by the Guidelines but which is properly considered in determining whether to depart).

However, to the extent that the district court considered Shay's most recent arrest, we do think the district court

misapplied the Guidelines. The Guidelines expressly reject a prior arrest record as an appropriate grounds for departure. See U.S.S.G. § 4A1.3 (Policy Statement). It is, therefore, a misapplication of the Guidelines to depart from the guideline sentencing range based upon an prior arrest record. See Williams, 112 S.Ct. at 1119. We can think of no reason that it would not also be inappropriate to depart based upon an arrest that occurs after the offense of conviction.

Nevertheless, because we find that the district court's error was harmless, i.e., that it did not affect the district court's selection of the sentence imposed, we conclude that remand is not required. See id. at 1120-21. The district court explained in great detail its reasons for departing upward from the guideline sentencing range. It is clear from the record that Shay's uncharged cocaine possession was of particular concern to the court. As noted, supra, when the district court notified Shay of its intention to depart upwards, the court noted that the assigned offense level may not adequately have reflected the "risk to the community" posed by Shay's admitted possession of two grams of cocaine. In overruling Shay's objections to the PIR, the court again noted the uncharged cocaine possession and observed that "[i]f [Shay] had been charged and convicted of theft of the vehicle and possession of cocaine, the appropriate guidelines [sic] would have been 24 - 30 months." Finally, in setting forth its "Reasons for Ruling," the district court again made reference to the uncharged cocaine possession before

concluding that "nothing less than 24 months imprisonment would be appropriate in this case . . . ."

The court's focus upon the uncharged cocaine possession, which would have increased Shay's minimum guideline sentence to twenty-four months, viewed in light of the court's concern that Shay's extensive criminal record was not adequately reflected in his criminal history category, leads us to conclude that the district court would have imposed a twenty-four month sentence, even absent its improper consideration of Shay's subsequent arrest. Furthermore, based on Shay's extensive criminal history, and the fact that twenty-four months would have been the minimum sentence had Shay been charged and convicted of the cocaine possession, we conclude that the twenty-four month departure sentence imposed by the district court was reasonable.

Finally, we find that the district court did adequately articulate its reasons for departing upward. As noted, supra, the district court explained in detail the facts upon which it based its decision to depart. This court has recently affirmed that, where a sentencing court departs upward with respect to a defendant's criminal history category, it also "should consider each intermediate criminal history category before arriving at the sentence it settles upon" and "state for the record that it has considered each intermediate adjustment." Lambert, 984 F.2d at 662. "[I]t should explain why the criminal history category as calculated under the [G]uidelines is inappropriate and why the category it chooses is appropriate." Id. at 662-63. This does

not mean, however, that the district court is required to perform "a ritualistic exercise in which it mechanistically discusses each criminal history category it rejects en route to the category it selects." Id. at 663. In most cases, "the district court's reasons for rejecting intermediate categories will clearly be implicit, if not explicit, in the court's explanation for its departure from the category calculated under the [G]uidelines and its explanation for the category it has chosen as appropriate." Id.

Here, the district court explained in detail why it thought that "nothing less than 24 months imprisonment would be appropriate in this case." The court then explained that with an offense level of eight, criminal history categories II, III, IV, and V yielded sentences that were "too lenient." We conclude, therefore, that the district court's explanation of its reasons for departure satisfies the requirement set forth in Lambert.

### III.

For the foregoing reasons, we AFFIRM the sentence imposed by the district court.