

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-5618
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

SIXTO CARDENAS,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(SA-91-CR-359-1)

(January 18, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Sixto Cardenas challenges his sentence following a plea of guilty of distribution of heroin in violation of 21 U.S.C. § 841(a)(1). Finding no error, we affirm.

I.

* Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

Prior to his rearraignment, Cardenas was examined by a court-appointed clinical psychologist. While the psychologist found that Cardenas was competent to stand trial, he also concluded that Cardenas "functions with intellectual abilities in the range of Mild Mental Retardation" and that his "Full Scale IQ of 59 ranks below the 1st percentile." On the issue of diminished capacity, the psychologist concluded as follows:

Sixto's test results indicate Mild Mental Retardation, complicated by other variables. Furthermore, there are times when this client's capacity to be oriented to his environment is severely impaired. These factors contribute to his mental confusion. The severity of his brain impairment restricts his capacity to use adequate judgement and to full comprehend consequences of behavior. It is recommended that his diminished capacity be considered during defense counsel, court proceedings, and in sentencing.

Cardenas moved for a downward departure from the guideline sentencing range because of his diminished mental capacity, arguing that his impairments restricted "his capacity to use adequate judgement and fully comprehend the consequence of his behavior. [His] condition affected his interaction with others to such an extent that it cannot be separated from his conduct." In the presentence investigation report ("PSI"), the probation officer advised the district court that it could depart downward because of Cardenas's diminished mental capacity if it found that Cardenas's condition had contributed to the commission of the offense and had not resulted from voluntary use of drugs or other intoxicants and that Cardenas's criminal history did not indicate a need for incarceration to protect the public. See U.S.S.G. § 5K2.13 (policy statement). The probation officer also reported that Cardenas had

abused heroin and inhalants and that he consumed six quarts of beer per day. Cardenas did not object to the PSI.

At sentencing, Cardenas's lawyer argued that Cardenas's diminished mental capacity "restricts his capacity to use adequate judgment." The government's lawyer countered that the cause of Cardenas's diminished mental capacity was his history of voluntary inhalant and drug use. The district court denied the motion for downward departure and adopted the factual findings in the PSI.

II.

Under the sentencing guidelines, "[m]ental and emotional conditions are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range except as provided [in U.S.S.G. § 5K2.13]" U.S.S.G. § 5H1.3. Under section 5K2.13,

[i]f the defendant committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants, a lower sentence may be warranted to reflect the extent to which reduced mental capacity contributed to the commission of the offense, provided that the defendant's criminal history does not indicate a need for incarceration to protect the public.

U.S.S.G. § 5K2.13 (policy statement). Cardenas argues that the district court failed to make an express finding whether "Cardenas suffered from diminished capacity of the type warranting a lesser sentence."

Under Fed. R. Crim. P. 32(c)(3)(D), when a defendant asserts with specificity and clarity that anything within the PSI is factually incorrect, the district court must make findings

regarding the controverted matter or determine that no finding is necessary because the controverted matter will not be taken into account in sentencing. United States v. Piazza, 959 F.2d 33, 36 (5th Cir. 1992); see rule 32(c)(3)(D). Cardenas failed to object to the fact findings in the PSI; therefore, rule 32(c)(3)(D) was not triggered.

Citing U.S.S.G. § 6A1.3(b) (policy statement), Cardenas argues that the guidelines require the sentencing court to resolve disputed sentencing factors in accordance with rule 32(a)(1). See Fed. R. Crim. P. 32(a)(1). In other words, he asserts that the guidelines require the district court to resolve issues disputed at sentencing as well as those arising out of disputed findings in the PSI. He does not argue, however, that the district court failed to comply with rule 32(a)(1). Moreover, by its terms, section 6A1.3 applies only to sentencing factors that are "reasonably in dispute." The record reveals that Cardenas's voluntary abuse of intoxicants was not reasonably in dispute, and the district court adopted the probation officer's factual findings on this issue.

In United States v. Sherbak, 950 F.2d 1095, 1099 (5th Cir. 1992), we refused to remand for factual findings where the district court had adopted the factual findings expressed in the PSI. We reasoned that, by adopting the PSI, the district court had implicitly "weighed the positions of the probation department and the defense and credited the probation department's facts. Rule 32 does not require a catechismic regurgitation of each fact . . . the court has adopted by reference." Id. Cardenas's disagreement with

the government was really over the application of the undisputed facts recited in the PSI to the question of whether the district court could exercise its discretion to depart downward, i.e., whether Cardenas's voluntary drug and alcohol abuse caused his mental deficit.

We need not consider whether section 6A1.3 requires the district court to resolve issues that arise at sentencing. The only issue reasonably in dispute -- whether Cardenas's voluntary use of intoxicants caused his mental deficit -- was resolved by the district court when it expressly concluded that the facts did not warrant a downward departure. Read in context, the district court's statement that "the facts as found are the kind contemplated by the Sentencing Commission" is an implicit acceptance of the government's argument that Cardenas's diminished mental capacity had resulted from his voluntary use of drugs or other intoxicants.

"As a general rule, [this court] will not disturb the sentencing court's discretionary decision not to depart downward from the guidelines." United States v. Soliman, 954 F.2d 1012, 1014 (5th Cir. 1992). There is no reason to do so in this case.

AFFIRMED.