

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-5690
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALBERT GONZALES RODRIGUEZ, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
SA 92 CR 106 1

March 22, 1993

Before POLITZ, Chief Judge, JONES, and EMILIO M. GARZA, Circuit
Judges.

PER CURIAM:*

Appellant Rodriguez was sentenced to 14 years imprisonment as a career offender after he was arrested for attempting to sell .133 grams of cocaine to an undercover officer in San Antonio, Texas. On appeal, he contends that the district court erred in failing to acknowledge that he could receive a

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

downward departure for his "minor role" in the offense. We find no error and affirm.

From the colloquy at sentencing, it is far from clear that the district court felt himself legally unable to grant an adjustment to career offender status for a minor participant in a drug crime. Nevertheless, even if Judge Prado misunderstood the scope of the Guidelines, no reversible error occurred in this case. Whether or not the court had legal authority to depart downward on the basis urged by appellant, there was no factual reason for doing so on this record. The presentence report indicates that when Rodriguez approached the undercover officer, he asked the officer what he needed, and upon being given an order for two "dimes of soda," Rodriguez stated that he was on his way to get some cocaine and would obtain some for the officer if he could have a ride. The officer drove Rodriguez to a nearby residence and gave him some money. Rodriguez went inside the residence and returned with two packages of cocaine, which he gave to the officer. Given Rodriguez' aggressive role in carrying out this transaction, small as it was, there would be no basis to characterize him as a minor participant. The case he cites is distinguishable, because there, the court simply said that a downward departure is legally permissible; the court then remanded for a determination whether the defendant could receive such a departure in the particular case. United States v. Bierley, 922 f.2d 1061 (3d Cir. 1990).

Because there was no ground to award a departure, even if one is arguendo permissible, the judgment and sentence of the trial court are AFFIRMED.