

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-8133
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ROBERTO URIAS,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(P 91 CR 101 3)

November 18, 1992

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:¹

Urias pleaded guilty to the superseding indictment charging him with misprision of a felony, 18 U.S.C. § 4. At sentencing, the district court dismissed the original four-count indictment charging Urias with violations of 21 U.S.C. §§ 841(a)(1), 846, 952(a), 960(a)(1), and 963. The district court sentenced Urias to

¹Local 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

36 months imprisonment, one year supervised release, and \$50 special assessment.

According to the preliminary sentence report (PSR), Urias and his co-defendant Ornelas-Mora participated in the importation of narcotics with another co-defendant, Torres-Gonzalez. Torres-Gonzalez was arrested while driving a pick-up truck containing 151.05 kilograms of marijuana. Urias was arrested fourteen miles away while walking with Ornelas-Mora along U.S. Highway 90. Urias admitted to his involvement in loading and transporting marijuana during his interview with the United States Probation Officer.

The PSR did not propose that the court depart upwards from the sentencing guidelines. The Addendum to the PSR suggested an upward departure, however, and noted that the applicable guideline (§ 2X4.1) did not adequately reflect the seriousness of the offense. At allocution, Urias's counsel argued that the facts did not support the proposed departure. At sentencing, the district court rejected Urias's argument and departed twelve months upward from the guideline range to give Urias the maximum sentence under 18 U.S.C. § 4.

Urias argues on appeal that the guidelines do not authorize an upward departure on the basis of the facts of his case, that he was not provided notice that the district court was considering a departure, and that the district court failed to give adequate reasons for its upward departure.

I.

First, Urias argues that the district court failed to state

adequate, specific reasons for the upward departure from the sentencing guideline range, in violation of 18 U.S.C.

§ 3553(c)(2). Further, Urias argues that there were insufficient facts to support the district court's reasons.

The district court gave its reasons for upward departure when it imposed its sentence. The district court stated that the bases for departure consisted of the seriousness of the offense, the fact that the co-defendant, Rene Torres, received 48 months of imprisonment, the fact that the amount of marijuana exceeded 150 kilograms, and the fact that Urias was an active participant in drug activities. This court has held that "[i]t is enough that . . . the sentencing judge addresses the defendant's arguments and complies with applicable legal limits in a manner that is comprehensible when the sentencing hearing is viewed in the context of the record." **United States v. Lopez-Escobar**, 884 F.2d 170, 173 (5th Cir. 1989). We agree with the government that the district court gave specific, adequate reasons for its upward departure and that these reasons are supported by the record.

II.

Second, Urias argues that the district court impermissibly departed upward from the guideline range by focusing on the underlying felony, a felony already factored into the range for misprision.

[T]he reviewing court is obliged to conduct two separate inquiries. First, was the sentence imposed either in violation of law or as a result of an incorrect application of the Guidelines? If so, a remand is required under [18 U.S.C.] § 3742(f)(1). If the court

concludes that the departure is not the result of an error in interpreting the Guidelines, it should proceed to the second step: is the resulting sentence an unreasonably high or low departure from the relevant guideline range? If so, a remand is required under § 3742(f)(2).

Williams v. United States, 112 S. Ct. 1112, 1120 (1992).

To calculate the base offense level for misprision of a felony, one drops 9 levels lower than the offense level for the underlying offense. Although the guidelines account for the underlying offense in the calculation for misprision, the sentencing court may depart from the guideline range if "there exists an aggravating . . . circumstance of a kind . . . not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." § 5K2.0, p.s. The offense of misprision normally contemplates that the accused is not a party to the underlying offense. **United States v. Warters**, 885 F.2d 1266, 1274 (5th Cir. 1989).

Among the district court's reasons for departing upward was the fact that Urias admitted to more than mere knowledge, but active participation in drug activities. We find that the district court correctly applied the guidelines and that the court's departure was reasonable. **See United States v. Pridgen**, 898 F.2d 1003, 1005 (5th Cir. 1990).

III.

Finally, Urias argues that the district court failed to give him reasonable notice of its intention to depart upward and that by receiving this notice, the PSR addendum, on the day of sentencing,

he was denied the opportunity to rebut the PSR. The Supreme Court recently held in **Burns v. United States**, 111 S.Ct. 2182 (1991) that

before a district court can depart upward on a ground not identified . . . either in the presentence report or in a prehearing submission by the Government, Rule 32 requires that the district court give the parties reasonable notice that it is contemplating such a ruling. This notice must specifically identify the ground on which the district court is contemplating an upward departure.

Id. at 2187. The question we must resolve therefore is whether Urias received reasonable notice of a possible upward departure.

The original PSR stated the facts relating to Urias's participation in the conspiracy. The addendum added no new facts; it proposed that the judge upwardly depart because of these facts.

Except for his statement that he did not receive the PSR addendum until the day of the hearing, Urias has not specified when he received it. Also, Urias does not assert what additional evidence he would have presented in opposition to the upward departure, or how much time he needed to muster that evidence. **See United States v. Bachynsky**, 949 F.2d 722, 734 (5th Cir. 1991), **cert. denied**, 61 U.S.L.W. 3259 (U.S. October 5, 1992) (No. 91-8600). Under these circumstances, we can not say that the notice Urias received of the proposed departure was unreasonable or inadequate.

AFFIRMED.