IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-8248

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

KIRK THOMAS MORROW,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
MO 91 CR 022

June 21, 1993

Before SMITH, DUHÉ, and WIENER, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

Kirk Morrow appeals, for the second time, his sentence arising from a guilty plea to one count of the use of a telephone to facilitate the commission of a drug offense under 21 U.S.C. § 843(b). Finding no error, we affirm.

I.

On September 21, 1990, Morrow used a telephone to arrange the

---

[*] 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 Pursuant to that rule, the court has determined that this opinion should not be published.

purchase of a one-way airline ticket from Albuquerque, New Mexico, to Midland, Texas, for one Kyle Harris. The ticket was purchased under the fictitious name Kirk Thomas, for the use of another fictitious personage, James Hatfield. The following day, Morrow, Chris Davidson, and Mike Wallace met Harris's plane in Midland.

The Midland Police and Permian Basin Drug Task Force officers, who had initiated surveillance of the three upon their entry into the airport terminal building, confronted the four men as they left the terminal and ultimately placed Harris under arrest. The officers found the ticket made out to James Hatfield in Harris's possession, as well as a plastic bag containing perforated sheets of paper, laced with LSD. Tests later showed the bag to contain 5.78 grams of LSD, the equivalent of 389 dosage units.

II.

Morrow was indicted on one count of conspiracy to possess with the intent to distribute more than one gram of LSD in violation of 21 U.S.C. § 846 and one count of possession with intent to distribute more than one gram of LSD in violation of 21 U.S.C. § 841(a)(1). He pleaded guilty to a superseding information charging him with use of a communication facility in facilitating the commission of a felony in violation of 21 U.S.C. § 843(b), in exchange for which the government agreed to drop the indictment and recommend a reduction in sentence for acceptance of responsibility.

The district court originally sentenced Morrow to forty-eight months' imprisonment, based upon a total offense level of 26 and a

criminal history category of IV, which the probation officer arrived at by applying both the offense level for use of a communication facility under U.S.S.G. § 2D1.6 and the conduct relevant to Morrow's offense under U.S.S.G. § 1B1.3. Morrow appealed the sentence, and this court reversed, because the factors set out in section 1B1.3 do not apply in the case of an offense sentenced pursuant to section 2D1.6. United States v. Morrow, No. 91-8287, slip op. at 6 (5th Cir. Jan. 17, 1992) (unpublished).

In resentencing Morrow, the district court again applied section 2D1.6 and determined his total offense level (after the two-level adjustment for acceptance of responsibility) to be 10 with a criminal history category of IV, yielding a guideline sentencing range of 15-21 months. The district court then departed upward to a sentence of forty-eight months under U.S.S.G. § 5K2.0, citing as factors the large amount of drugs involved, the nature of the drug itself, Morrow's willful participation in the venture with others to traffick in the LSD, and the seriousness of the offense, which the district court did not believe was adequately reflected by the application of section 2D1.6.

III.

Although the balance of Morrow's brief contends that the departure improperly assumed Morrow's guilt of the underlying conspiracy without the benefit of trial or specific findings on the record of the elements of conspiracy, this argument misapprehends the court's actions and the structure of the guidelines. See,

e.g., United States v. Byrd, 898 F.2d 450, 452 (5th Cir. 1990); United States v. Taplette, 872 F.2d 101, 103-05 (5th Cir), cert. denied, 493 U.S. 841 (1989). The guidelines place no restriction on the relevant conduct a court may consider in weighing its decision to depart from the guideline range in a particular case. See U.S.S.G. § 1B1.4; United States v. Warters, 885 F.2d 1266, 1274 (5th Cir. 1989).[1]

Properly framed, then, Morrow's argument on appeal reduces to the contention that his sentence constitutes an unreasonable upward departure. We previously have stated that "sentences which fall within the statutory limits, but which constitute an upward departure from the guidelines, will not be disturbed absent a gross abuse of discretion." United States v. Murillo, 902 F.2d 1169, 1171 (5th Cir. 1990) (citation omitted). The guidelines permit departure when the sentencing court finds an aggravating or mitigating circumstance exists that was not adequately considered by the Sentencing Commission in formulating the guidelines. 18 U.S.C. § 3553(b); United States v. Lara, 975 F.2d 1120, 1123 (5th Cir. 1992). While the sentencing court must provide acceptable reasons for the departure, and the resulting sentence must be

[1] Morrow's qualms about the manner in which the district court took cognizance of the underlying conspiracy, despite the fact that he neither pled to nor was convicted of the charge is addressed by the background commentary to U.S.S.G. § 1B1.4, which states in part:

> A court is not precluded from considering information that the guidelines do not take into account. For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range. In addition, information that does not enter into the determination of the applicable guideline sentencing range may be considered in determining whether and to what extent to depart from the guidelines.

reasonable in light of the court's proffered rationale, United States v. Carpenter, 963 F.2d 736, 744 (5th Cir.), cert. denied, 113 U.S. 355 (1992); Murillo, 902 F.2d at 1172, the court need not articulate its reasons for the extent of the departure. United States v. Huddleston, 929 F.2d 1030, 1031 (5th Cir. 1991).

Here, the district court departed upward to a sentence matching the statutory maximum provided in section 843(b). We therefore apply the "gross abuse of discretion" standard of Murillo in reviewing the departure.

In Warters, we held that a sentencing court may depart from the misprision guideline range, set out in U.S.S.G. § 2X4.1, on the basis that the defendant was guilty of the underlying conspiracy itself, so long as the court makes a specific and express finding of guilt. Warters, 885 F.2d at 1275 & n.7. This we believe the district court did, relying upon the presentence investigation report and Morrow's admissions contained therein, as well as the admissions and his stipulation to the court at rearraignment. Here, unlike in Warters, the district court made the proper findings as to Morrow's participation in, and guilt of, the underlying and uncharged drug conspiracy.

As for the acceptability of the reasons offered for the departure, other circuits have upheld departures predicated upon the unusually large quantity of drugs involved in a section 2D1.6 conviction. See United States v. Bennett, 900 F.2d 204, 206 (9th Cir. 1990) (involving three kilograms of cocaine); United States v. Correa-Vargas, 860 F.2d 35, 37-38 (2d Cir. 1988) (twenty kilo-

grams). The almost 400 doses of LSD likewise constitutes, we believe, an amount substantially in excess of that contemplated by the Commission for the average section 2D1.6 facilitation offense.

Nor can we say the district court abused its discretion in departing on the basis that guideline section 2D1.6 failed adequately to reflect the actual seriousness of his conduct. Had Morrow pled to the originally charged conspiracy count, his offense level and sentencing range would have been fixed with reference to section 2D1.4, which in turn refers to section 2D1.1(a)(3) where the object of the conspiracy is possession with intent to distribute. That section establishes a base offense level of 28 for 5.78 grams of LSD; factoring in a two-point reduction for acceptance of responsibility yields an offense level of 26 and a sentencing range of 92-115 months. Plainly, Morrow's initial sentencing range of 15-21 months, calculated by reference to section 2D1.6, understated the seriousness of his actual conduct, which also provides an aggravating factor "present to a degree substantially in excess of that which ordinarily is involved in the offense of conviction." U.S.S.G. § 5K2.0 (policy statement). See United States v. Perez, 915 F.2d 947, 948-49 (5th Cir. 1990) (upholding departure from section 2D1.6 for facilitating conspiracy to manufacture 100 pounds of methamphetamine).

The factors relied upon by the district court therefore were reasonable bases for departure. Nor is the extent of the departure unreasonable; while Morrow complains that the 228% increase over his initial guidelines sentence is "far and away the largest

departure found in the cases reviewed," and that a twenty-seven month increase in sentence is excessive per se, our own review apparently was more extensive. The caselaw reveals far greater departures, in both absolute and relative terms, than is presented in the instant case. See, e.g., United States v. Geiger, 891 F.2d 512, 513 (5th Cir. 1989) (upholding sentence 93 months greater than and 4½ times initial guideline maximum), cert. denied, 494 U.S. 1087 (1990), overruled on other grounds, United States v. Lambert, 984 F.2d 658, 659 (5th Cir. 1993) (en banc); Juarez-Ortega, 866 F.2d at 748-49 (sentence 58 months and more than four times initial maximum); United States v. Guerrero, 863 F.2d 245, 247 (2d Cir. 1988) (53 months and more than five times initial maximum). We cannot say that the extent of the court's departure in Morrow's case exceeded its discretion.

We therefore AFFIRM the judgment of sentence.