UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-8349
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JAY BRADLEY WILLIAMS,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(W 91 CR 119)

(March 11, 1993)

Before JOLLY, DUHÉ and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Appellant pleaded guilty to being a felon in possession of a firearm. In imposing sentence the district court departed upward and Appellant appeals his sentence. We affirm.

Appellant first argues that the use of United States Sentencing Guideline § 2K2.1(c)(1) was improper. We disagree. That guideline provides that when a defendant uses a firearm in the commission of another offense, the court should apply the guideline for the other offense if the resulting offense level is higher. All relevant conduct is to be considered. U.S.S.G. § 1B1.3(a).

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

The district court found that Appellant had used the gun in a drive-by shooting. He therefore correctly applied the guideline for aggravated assault in determining the base offense level. See United States v. Harris, 932 F.2d 1529, 1537 (5th Cir.), cert. denied, ___ U.S. ___, 112 S.Ct. 270 (1991); United States v. Pologruto, 914 F.2d 67, 70-71 (5th Cir. 1990).

Appellant next contends that the district court's determination that he was involved in the drive-by shooting is not supported by a preponderance of the evidence. We will not detail here all of the information contained in the presentence report. Suffice it to say that we are more than convinced that the district court did not commit clear error in this finding. 18 U.S.C. § 3742(e). A presentence report is generally sufficiently reliable to be considered as evidence by the court in making the factual determinations required by the guidelines. United States v. Sherbak, 950 F.2d 1095, 1100 (5th Cir. 1992). In response to the wealth of information in the presentence report concerning his involvement in the shooting, Appellant simply responds that he is not guilty of the assault offense. Such general denial of the evidence does not constitute adequate rebuttal. United States v. Rodriguez, 897 F.2d 1324, 1327 (5th Cir.), cert. denied, ___ U.S. ___, 111 S.Ct. 158 (1990). Likewise, Appellant's contention that the district court could not rely on hearsay statements in determining his sentence is incorrect. U.S.S.G. § 6A1.3(a); Rodriguez, 897 F.2d at 1328.

Next Appellant argues that it was improper for the district

court to base its departure on unadjudicated offenses where there was only a prior arrest record. U.S.S.G. § 4A1.3. The district court did consider seven "unadjudicated offenses" but at least two of them ended with a conviction. This indicates that the sentencing court had more than simply "a prior arrest record" to consider. Additionally, upward criminal history category departure may be justified by numerous pending criminal charges and previously dismissed charges. United States v. Lee, 955 F.2d 14, 16 (5th Cir.), cert. denied, ___ U.S. ___, 112 S.Ct. 3010 (1992). Here the "other criminal conduct" included two convictions, several dismissed criminal charges and two charges with unknown conclusions.

Finally, Appellant complains that the sentencing court erred by departing beyond the guideline range for his criminal history category of VI without explaining why his criminal history was significantly more serious than that of others in the same category. One of the reasons the sentencing court gave was that Appellant's criminal history score was double the maximum provided by the guideline. Appellant complains that this statement does not adequately explain the departure and contends that the sentencing court was required to articulate the reason that Appellant's criminal record was more egregious and more serious in nature than other category VI defendants. Precedent of this Court is to the contrary. United States v. Rogers, 917 F.2d 165, 169 (5th Cir. 1990), cert. denied, ___ U.S. ___, 111 S.Ct. 1318 (1991).

AFFIRMED.