

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-8449

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CLYDE HAWKINS,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas
EP 92 CR 60 B

June 2, 1993

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Clyde Hawkins was convicted, pursuant to his guilty plea, of one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1) (1988). Hawkins was sentenced to 40 months imprisonment. He appeals his sentence, contending that the district court erred in applying § 2K2.1(c)(2) of 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

sentencing guidelines and failing to comply with Fed. R. Crim. P. 32(c)(3)(d). Finding no error, we affirm.

I

Hawkins was indicted on four counts of being a felon in possession of a firearm. He agreed to enter a guilty plea to count one of the indictment in exchange for the government's dismissal of the remaining counts. The district court accepted Hawkins's guilty plea, and thereafter ordered a probation officer to prepare a Presentence Report ("PSR").

In calculating Hawkins's base offense level, the probation officer began at U.S.S.G. § 2K2.1(a)(2), which mandates a base offense level of 12 for defendants convicted for being a felon in possession of a firearm.¹ This section states that "[i]f the defendant used or possessed the firearm in connection with [the] commission or attempted commission of another offense, apply § 2X1.1 [directing courts to calculate the base offense level "from the guideline for the object offense"] . . . in respect to that other offense, if the resulting offense level is greater than that determined above." U.S.S.G. § 2K2.1(c)(2) (cross-referencing to § 2X1.1). Based upon Hawkins's use of the firearm

¹ United States Sentencing Commission, *Guidelines Manual*, § 2K2.1(a)(2) (Nov. 1989). The probation officer apparently applied the guidelines in effect at the time of the offense, rather than at the time of sentencing, due to an ex post facto problem. See U.S.S.G. § 2K2.1(a)(6) (Nov. 1991) (specifying that the base offense level is 14, rather than 12, for a defendant convicted of being a felon in possession of a firearm).

to "pistol-whip" his common-law wife,² the court applied the guideline for aggravated assault, see U.S.S.G. § 2A2.2, and calculated Hawkins's base offense level to be 15. The probation officer increased the base offense level for aggravated assault by four levels for the use of a dangerous weapon, see U.S.S.G. § 2A2.2(b)(2)(B), and by another two levels for bodily injury to Hawkins's common-law wife. See U.S.S.G. § 2A2.2(b)(3). These calculations produced a final offense level of 21, which together with a criminal history score of 1, yielded a sentencing range of 37 to 46 months imprisonment.

Hawkins filed objections to the PSR, contending, *inter alia*, that he never assaulted his common-law wife with a gun, and therefore, his offense level calculations should not be cross-referenced to the guideline dealing with aggravated assault. Hawkins also objected to the probation officer's finding that his common-law wife sustained bodily injury in the alleged assault, which formed the basis for a two-level upward adjustment. After hearing testimony, the district court overruled these objections and adopted the factual findings contained in the PSR. Hawkins was subsequently sentenced to 40 months of imprisonment, followed by 3 years of supervised release, and assessed a \$1000.00 fine. Hawkins filed a timely notice of appeal.

II

A

² Hawkins challenges this factual finding on appeal. See Brief for Hawkins at 8-12.

Hawkins first argues that the district court clearly erred in finding that he had assaulted his common-law wife with a firearm, a finding which formed the basis for the court's application of U.S.S.G. § 2K2.1(c)(2) to upwardly adjust his base offense level. See Brief for Hawkins at 8-12. "While we review the application of the guidelines fully for errors of law, we accept the fact findings of the district court absent clear error." *United States v. Otero*, 868 F.2d 1412, 1414 (5th Cir. 1989).

In addition to the information contained in the PSR,³ the district court heard testimony from Agent Victor Maldonado of the Bureau of Alcohol, Tobacco, and Firearms ("ATF"). See Record on Appeal, vol. 3, at 15-55. Agent Maldonado testified that while interviewing Hawkins in October 1991, Hawkins confessed to having struck his common-law wife with a gun approximately a year and a half earlier. See *id.* at 19. Agent Maldonado further testified that Hawkins's statement was reduced to writing, and signed by Hawkins. See *id.* at 18-20. This statement was tendered to the court as Government's Exhibit No. 1. See *id.* at 19. Hawkins testified that he hit his common-law wife, but that he did so with his hand and that it was his ring, not a gun, that caused her head to start bleeding. See *id.* at 35-37. Based upon Agent

³ "A defendant who objects to the use of information [in a PSR] bears the burden of proving that it is "`materially untrue, inaccurate[,] or unreliable.'" *U.S. v. Kinder*, 946 F.2d 362, 366 (5th Cir. 1991) (quoting *United States v. Angulo*, 827 F.2d 202, 205 (5th Cir. 1991)), *cert. denied*, ___ U.S. ___, 112 S.Ct. 2290, 119 L. Ed. 2d 214 (1992).

Maldonado's sworn testimony, Hawkins's written confession,⁴ and Hawkins's admission at the sentencing hearing that he did hit his common-law wife (albeit without a gun), we cannot conclude that the district court clearly erred in finding that Hawkins struck his common-law wife with a gun.

Hawkins maintains that the government's proffered evidence was insufficient to support the district court's factual finding, because a state grand jury, when considering assault charges against Hawkins, failed to return an indictment. See Brief for Hawkins at 10-11. We cannot find any authority for the proposition that a state grand jury's decision not to return an indictment binds federal courts in making sentencing determinations. Therefore, even if we were to assume that the assault charges were "thrown out" for lack of evidence, we find Hawkins's argument without merit.⁵

⁴ Although arguably hearsay, Hawkins's written statement was nevertheless admissible at the sentencing hearing because it had "sufficient indicia of reliability to support its probable accuracy." *United States v. Cuellar-Flores*, 891 F.2d 92, 93 (5th Cir. 1989).

⁵ Hawkins further argues that he was prosecuted in bad faith because the government misled him "to believe that his guideline sentence would be a fraction of what the Government would seek." See Brief for Hawkins at 11. Hawkins has alleged no specific facts concerning this charge, other than his allegation that the government provided him with an erroneous estimate of his sentence under the guidelines. This information was contained in the letter to Hawkins's counsel transmitting the plea agreement. See Record on Appeal, vol. 1, at 24. The agreement itself stated that since Hawkins's sentence has not yet been determined, any predictions as to his sentence were not promises of that sentence, and would not be binding. See *id.* at 36. It appears from the record that the PSR revealed relevant conduct which was unknown to the prosecutor at the time he prepared the transmittal letter. We therefore find Hawkins's

B

Hawkins next argues that the district court failed to comply with Fed. R. Crim. P. 32(c)(3)(d), by not specifically ruling on his objection to the PSR's finding that his common-law wife had suffered a bodily injury as the result of the assault. See Brief for Hawkins at 12-14. We review this issue of law de novo. See *United States v. Stouffer*, 986 F.2d 916, 926-27 (5th Cir. 1993); *United States v. Hurtado*, 846 F.2d 995, 998 (5th Cir.), cert. denied, 488 U.S. 863, 109 S. Ct. 163, 102 L. Ed. 2d 133 (1988).

Rule 32(c)(3)(D) requires courts to "resolve specifically disputed issues of fact if it intends to use those facts as a basis for its sentence." *United States v. Rodriguez*, 897 F.2d 1324, 1327 (5th Cir.), cert. denied, 498 U.S. 857, 111 S. Ct. 158, 112 L. Ed. 2d 124 (1990); see Fed. R. Crim. P. 32(c)(3)(D). Here, the district court specifically overruled Hawkins's objections to the PSR, numbered 4 and 20, pertaining to the probation officer's finding that Hawkins had struck his common-law wife with a gun, cutting her at the temple. See Record on Appeal, vol. 3, at 57 ("I will adopt as proper the presentence report guidelines, and I will also accept as true the facts as set out by [the probation officer]. The objections 1 through 16, . . . [and] 20, . . . will be disallowed."). The court's actions addressed the factual controversy raised by Hawkins, and disposed of it. See *United States v. Puma*, 937 F.2d 151, 155 (5th Cir. 1991) (holding that trial court's express rejection of

claim of prosecutorial bad faith without merit.

defendant's challenge to PSR satisfied Rule 32(c)(3)(D)), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1165, 117 L. Ed. 2d 412 (1992). Consequently, we hold that the district court complied with Fed. R. Crim. P. 32(c)(3)(D).

III

For the foregoing reasons, we **AFFIRM**.