IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-8609

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LUIS ANGEL VELEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(A-92-CR-115)

(November 30, 1993)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

Luis Angel Velez pled guilty to three counts of making false statements to a firearms dealer[1] and one count of receipt and possession of a firearm by a convicted felon.[2] He appeals the district court's decision to make an upward departure from the

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1]18 U.S.C. § 922(a)(6).

[2]18 U.S.C. § 922(g)(1).

sentencing range. We find no reversible error and affirm the district court.

Velez received concurrent 60-month sentences on each count. The district court calculated the guideline sentence range for Velez as 33-41 months, based on Velez's criminal history of 9 and offense level of 16.[3] See U.S.S.G. § 5A (sentencing table). The court based its departure decision on the combined effect of the number of weapons involved in the offense, the dangerous nature of the weapons, and the fact that Velez had reason to know that the weapons would be used illegally. See generally United States v. Davidson, 984 F.2d 651, 656 n.9 (5th Cir. 1993).

We review for plain error as no timely objections were made to departure at sentencing. United States v. Brunson, 915 F.2d 942, 944 (5th Cir. 1990). We see no such error in the district court's characterization of the case as one unanticipated by the Guidelines. See 18 U.S.C. § 3553(b); U.S.S.G. § 5K2.0. But see United Statez v. Lopez, 875 F.2d 1124, 1128 (5th Cir. 1989). The fifteen weapons that the trial judge found had direct links to Velez would not ordinarily justify upward departure. See U.S.S.G. § 2K2.1. cmt. 16. However, the trial judge concluded from the sentencing testimony of a BATF special agent that Velez's guns entered a distribution network carrying them to New York, that Velez had reason to know of the guns' destination, and that the

[3]It set the offense level by taking the base of 14 for the offense given by § 2K2.1(a)(6), increasing the base by 4 levels pursuant to § 2K2.1(b)(1)(E), and then subtracting 2 levels for acceptance of responsibility.

total scope of the network involved over a hundred guns and several military-style assault rifles. The Guidelines do not speak to the interaction of these factors with such clarity that we can find plain error in the district court's decision. See United States v. Medina-Gutierrez, 980 F.2d 980, 983-84 (5th Cir. 1992); United States v. Brunson, 915 F.2d 942, 944 (1990). See generally United States v. Lara, 975 F.2d 1120, 1124 (5th Cir. 1992). See also Williams v. United States, 112 S.Ct. 1112, 1121 (1992); Davidson, 984 F.2d at 657 (both stating that reliance on invalid factors in sentencing is harmless error if it did not affect the district court's selection of the sentence imposed).

We also find no plain error in the judge's decision to act by departure rather than by raising the base offense level. The Guidelines mandate a 4-level enhancement of the base offense level if a defendant has reason to know of another felony offense related to his illegal gun possession. U.S.S.G. § 2K2.1(b)(5). Despite the judge's finding that Velez had reason to know that his guns would enter interstate commerce for unlawful purposes, he made no such enhancement. However, the upward departure had the same effect. A base level enhancement would have established an offense level of 20, which for Velez meant a sentence of 51-63 months. U.S.S.G. § 5A (sentencing table). The 60-month sentence the district court imposed falls within that range. We thus find no plain error. See United States v. Olano, 113 S.Ct. 1770, 1776 (1993) (plain error "seriously affect[s] the fairness, integrity or

public reputation of judicial proceedings"). See also Williams, 112 S.Ct. at 1121; Davidson, 984 F.2d at 657.

Velez argues alternatively that the district court either should have sentenced him within the guideline sentencing range or rejected the plea agreement. The absence of objection again leads us to review for plain error. See United States v. Vontsteen, 950 F.2d 1086, 1089 (5th Cir. 1992) (en banc). Paragraph 8(a) of the plea agreement recognized the district court's authority to impose any sentence within the statutory limits for Velez's offenses. The false statement sentences were the maximum allowable under 18 U.S.C. § 924(a)(1), and the 60-month possession violation was less than the maximum allowable under 18 U.S.C. § 924(a)(2). No plain error appears in the court's decision to accept the plea.

AFFIRMED