

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-8678  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

TRAVIS HOMER KEY,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Western District of Texas  
W92 CR 078

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June 11, 1993

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:\*

Travis Key appeals the sentence he received following a plea of guilty of second degree murder on government property in violation of 18 U.S.C. § 1111(a) and (b). Finding no error, we affirm.

I.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

Travis's presentence report (PSR) stated that his crime carried a base offense level of 33 under U.S.S.G. § 2A1.2(a). The PSR recommended a 2-level increase under U.S.S.G. § 3A1.1, the "vulnerable victim" enhancement provision, because the target of Key's beating and strangulation was seventy years old. The PSR placed Key's total offense level at 35 and his criminal history category at VI; the applicable guideline range was imprisonment for 292-365 months. Chap. 5, sentencing table. The PSR further suggested that an upward departure might be appropriate, because Key's criminal history category did not adequately reflect the seriousness of his past criminal conduct and because "the instant offense conduct is similar to the robbery conduct" for which Key was convicted in 1990.

At the sentencing hearing, Key objected to enhancement under section 3A1.1 and to the upward departure suggestion. He also objected to the PSR's recommendation that he not be granted a two-level reduction for acceptance of responsibility. The district court overruled Key's objections and sentenced him to a term of imprisonment for 480 months, a five-year term of supervised release, and a \$50 special assessment.

## II.

### A.

Key first argues that the district court "upwardly departed in violation of law and in an unreasonable manner," contending that the court based departure upon the fact that he had committed a

homicide, even though the Sentencing Commission took that very conduct into account in setting the base offense level for second-degree murder. Because Key mischaracterizes the basis for the departure, his argument lacks merit.

A sentencing court may depart upward from the range of imprisonment provided by the guidelines whenever the court finds that an aggravating circumstance exists that was not adequately taken into consideration by the Commission. 18 U.S.C. § 3553(b). We will affirm an upward departure that is within statutory limits and does not constitute a "gross abuse of discretion." United States v. Murillo, 902 F.2d 1169, 1171 (5th Cir. 1990) (citation omitted). "When departing from the guidelines, however, the district court must articulate reasons justifying the upward departure. If the reasons are 'acceptable' and 'reasonable,' this Court will affirm." Id. at 1172. (citations omitted).

An acceptable reason for upward departure is that the calculated "criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes . . . [.]" U.S.S.G. § 4A1.3, p.s. Furthermore,

[i]n determining whether an upward departure from Criminal History Category VI is warranted, the court should consider that the nature of the prior offenses rather than simply their number is often more indicative of the seriousness of the defendant's criminal record . . . . Where the court determines that the extent and nature of the defendant's criminal history, taken together, are sufficient to warrant an upward departure from Criminal History Category VI, the court should structure the departure by moving incrementally down the sentencing table to the next higher offense level in Criminal History Category VI until it finds a guideline

range appropriate to the case.

Id.

When explaining an upward departure under section 4A1.3. p.s., the court need not "incant the specific language used in the guidelines . . . ." United States v. De Luna-Trujillo, 868 F.2d 122, 124 (5th Cir. 1989). It is desirable, however, "that the court identify clearly the aggravating factors and its reasons for connecting them to the permissible grounds for departure under section 4A1.3." Id.

The district court, in explaining the reason for its departure, noted that Key had twenty criminal history category points<sup>1</sup> and that the instant offense was similar to a prior offense committed by Key. The PSR reflects that in July 1989, Key robbed and beat a man. The PSR, in finding this prior conviction to be similar to the murder, pointed to evidence indicating that "the instant offense may have been committed for money and thus may have started out as a robbery." The essential similarity between the two crimes of violence was a factor omitted from the criminal history calculus and, thus, provided an appropriate basis for enhancement under section 4A1.3, p.s. See De Luna-Trujillo, 868 F.2d at 124-25.

The extent of the court's departure also was reasonable. The court used the guidelines sentencing table to extrapolate a formula. The court reasoned that Key's twenty criminal history

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<sup>1</sup> Criminal History Category VI, the highest category, applies to defendants with 13 or more criminal history points. Chap. 5, sentencing table.

points would place him in the equivalent of criminal history category VIII and that this criminal history category corresponded to a base offense level of 37 at criminal history category VI. Because Key pleaded guilty to second degree murder, the court chose a sentence of 480 months within the new guideline range of 360 months to life.

Although the court could have explained in greater detail why it deemed the bypassed category inadequate, we do not "require the district court to ritualistically discuss each criminal history category it rejects." United States v. Lambert, 984 F.2d 658, 664 (5th Cir. 1993). Only in "a very narrow class of cases" will the district court's departure be so great that it will be required to "explain in careful detail" why a lesser adjustment would be inadequate. Id. at 663. While the standard for identifying this "very narrow class" has not yet been developed, the 115-month upward departure in this case, to a 480-month sentence for a crime with a maximum statutory sentence of life, is not so great as to trigger the "careful detail" requirement. See 18 U.S.C. § 1111(b).

B.

Key also contends that the district court erred by not granting him a two-level reduction for acceptance of responsibility. See U.S.S.G. § 3E1.1. To warrant the reduction under section 3E1.1, a defendant must demonstrate sincere contrition. United States v. Beard, 913 F.2d 193, 199 (5th Cir. 1990). A sentencing court's determination that the defendant lacked contrition is

entitled to great deference. Id. Moreover, the determination of acceptance of responsibility is a factual one to which this court accords even more deference than under a pure "clearly erroneous" standard. United States v. Brigman, 953 F.2d 906, 909 (5th Cir.), cert. denied, 113 S. Ct. 49 (1992).

At sentencing, the district court stated that "Mr. Key has now appeared before the Court twice and neither expresses nor demonstrates by attitude any remorse or contrition whatsoever." Noting that the PSR also had reported that Key never exhibited any remorse for killing the victim, the court concluded that Key had not affirmatively accepted responsibility for his offense. Even though Key entered a guilty plea, the court was justified in using his lack of remorse to deny the adjustment.

C.

Key also contends that the enhancement of his base offense level under section 3A1.1 was improper. That provision authorizes a two-level increase "[i]f the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition[.]" U.S.S.G. § 3A1.1. The district court's determination about what should have been known, as well as about what was known of the victim's vulnerability, is entitled to due deference." United States v. Mejia-Orosco, 868 F.2d 807, 810 (5th Cir.), cert. denied, 492 U.S. 924 (1989).

Key correctly states that the vulnerable victim adjustment does not apply if the victim's condition was "a necessary prerequi-

site" to the crime's commission. See United States v. Moree, 897 F.2d 1329, 1335 (5th Cir. 1990). He is also correct in stating that the vulnerability must be unusual, in that it "is present in only some victims of that type of crime." Id.; see Moree, 897 F.2d at 1335. The victim's old age, in this case, however, was not a necessary prerequisite to the commission of the crime and did make him particularly susceptible to physical attack. As this court recognized in Moree, 897 F.2d at 1335-36, the armed robbery of an elderly victim normally would trigger section 3A1.1, "because the additional vulnerability . . . has been exploited." Thus, the thirty-four-year-old Key knew or should have known that a bespectacled seventy-year-old man, returning to his home at the Veterans Administration Hospital, would be a particularly vulnerable target. Accordingly, the district court did not err by adjusting Key's sentence based upon the vulnerability of the victim.

AFFIRMED.