

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-9093  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MICHAEL ANTHONY BLAKEY,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Northern District of Texas  
(4:92 CR 133 (Y))

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July 29, 1993

Before GARWOOD, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:\*

Appellant Blakey, co-defendant in an indictment charging him with several robberies that affected interstate commerce, has appealed the district court's 70 to 100-month upward departure in his sentence, resulting in 240 months imprisonment. We find no error and affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

The factual resume to Blakey's guilty plea and the PSR indicate that during the robbery of a dress shop in Arlington, Texas, Blakey approached the manager, Ewing, with a hidden object which appeared to be a gun and demanded the money from the cash register. The other robber, Gonzales, ordered all of the customers and Ewing to kneel on the floor and to give him their purses and jewelry. While ordering Ewing, who was 4½ to 6½ months pregnant, to the floor, Gonzales kicked her in the stomach causing her to go into premature labor. Ewing was hospitalized and released the next day; her baby was born a few months after the incident with spinal meningitis.

Blakey's PSR calculated a total combined offense level of 34. Ruling on objections by Blakey, the district court modified the PSR. The court granted Blakey a reduction for acceptance of responsibility, sustained the objection to the addition of 2 points for the making of death threats, and reduced the loss in one robbery, decreasing the total offense level to 29 and the guideline range to 140-175 months. The district court let stand a six-level adjustment based on the injury to Ewing. The district court also departed upward from the guidelines based on the injuries to Ewing and her baby, and sentenced Blakey, with a criminal history category of V, to serve 240 months concurrently on each count and concurrent three-year terms of supervised release, and assessed a mandatory \$250 assessment.

Blakey contends that there is insufficient evidence that

the actions of his co-defendant, Gonzales, caused permanent life-threatening injury to either Ewing or to her infant sufficient to warrant an increase under U.S.S.G. § 2B3.1(b)(3)(C) or an upward departure. He argues that the evidence upon which the district court relied did not bear sufficient indicia of reliability and that there was no causal connection between the robbery and the premature delivery of Ewing's baby more than three and one-half months after the offense.

Although the court did not make a specific finding regarding foreseeability of the injuries caused by Gonzales, the court adopted the modified PSR which contained a statement regarding the cause of the injuries to Ewing and her baby. Therefore, the court implicitly found that the injuries suffered by Ewing and her baby were attributed to the robbery and reasonably foreseeable to Blakey.

The district court's findings of fact relative to sentencing must be accepted by this court unless they are clearly erroneous. See United States v. Soliman, 954 F.2d 1012, 1014 (5th Cir. 1992). In sentencing determinations, the court is not bound by the rules of evidence and may consider any relevant evidence without regard to its admissibility provided it has sufficient indicia of reliability to support its probable accuracy. See § 6A1.3(a); United States v. Sherbak, 950 F.2d 1095, 1100 (5th Cir. 1992). The court may consider hearsay evidence relevant to sentencing determinations. United States v. Billingsley, 978 F.2d 861, 866 (5th Cir. 1992), cert. denied, 113 S.Ct. 1661 (1993).

"The defendant bears the burden of demonstrating that information the district court relied on in sentencing is materially untrue." United States v. Vela, 927 F.2d 197, 201 (5th Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 112 S.Ct. 214 (1991) (internal quotations and citation omitted).

During the sentencing hearing, the district court heard testimony from Ewing regarding her injuries. Ewing also described her baby's birth with spinal meningitis and said that her pediatrician felt its illness could have been caused by Gonzales' actions.

Given the relaxed evidentiary standards for sentencing determinations, the district court was not required to have expert testimony on causation. Because the district court heard evidence during the sentencing hearing regarding Ewing's injuries, and Blakey failed to rebut her testimony with any other reliable evidence, the district court's finding that her injuries during the robbery were the cause for her child's injuries is not clearly erroneous. Soliman, 954 F.2d at 1014; Vela, 927 F.2d at 201.

Blakey also argues that even if Ewing's testimony regarding the cause of her injuries is reliable or that the actions of his co-defendant were reasonably foreseeable by him, the injuries sustained by her child were not.<sup>1</sup> This argument misconstrues the guideline. Section 1B1.3(a)(1)(B) provides that

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<sup>1</sup> A district court is entitled to consider the conduct of others in furtherance of the jointly-undertaken criminal activity that was reasonably foreseeable by the defendant. United States v. Kinder, 946 F.2d 362, 366 (5th Cir. 1991), cert. denied, \_\_\_ U.S. \_\_\_, 112 S.Ct. 1677 (1992).

factors determining the guideline range include "all reasonably foreseeable acts . . . of others" (emphasis added) in furtherance of the joint activity, not the foreseeable harm caused by those acts. Section 1B1.3(a)(3) provides that all harm resulting from the acts falling under § 1B1.3(a)(2) is considered in determining the guideline range. There is no mention that the harm itself must be foreseeable.

Blakey finally contends that the court's upward departure under § 5K2.2 was improper because the offense characteristics regarding the degree of bodily injury was addressed in § 2B3.1(b)(3). Blakey argues that the permanent or life-threatening injuries suffered by Ewing were classified as offense characteristics in the robbery category under § 2B3.1. Although this is a close question, we do not disagree with the trial court's decision to depart.

Aggravating circumstances not adequately considered by the guidelines will support an upward departure, and district courts have wide discretion in deciding whether such aggravating circumstances exist. United States v. Hatch, 926 F.2d 387, 396-97 (5th Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 111 S.Ct. 2239 (1991); 18 U.S.C. § 3553(b). In reviewing a departure from the guidelines, this court examines two issues: (1) was the departure based on acceptable reasons and (2) was the departure reasonable. United States v. Webb, 950 F.2d 226, 231 (5th Cir. 1991), cert. denied, \_\_\_ U.S. \_\_\_, 112 S.Ct. 2316 (1992).

The Fifth Circuit has affirmed an upward departure from the guidelines in cases where the court concludes the egregious facts of the case were not adequately considered even with adjustments to the offense level. United States v. Wade, 931 F.2d 300, 306 (5th Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 112 S.Ct. 247 (1991). "[W]here the applicable guidelines, specific offense characteristics, and adjustments do take into consideration a factor listed in this part, departure from the guideline is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense of conviction." United States v. Garcia, 900 F.2d 45, 49 (5th Cir. 1990) (quoting U.S.S.G. § 5K2.0).

In ruling on whether these factors were adequately addressed in the guidelines, the district court concluded:

The Court finds pursuant to guideline policy statements 5K2 and 5K2.2, that the intentional traumatic injuries inflicted upon Mrs. Ewing and her unborn child were major injuries that caused substantial risks of death. The Court further finds that the pain and anguish inflicted upon Mrs. Ewing was unnecessary, and the amount of force exhibited far exceeded the limit of force normally used to commit a robbery.

The Court further finds the victim, Mrs. Ewing, was six-and-one-half months pregnant, perhaps five-and-a-half, at the time of the robbery, and was not in a position of size, strength, or physical condition that would have provoked such senseless violence by the offenders. That senseless violence would include as well the violence inflicted directly by this defendant upon others in what appears to be a random and senseless manner.

These aggravat[ing] factors are of the kind or to the degree not adequately taken

into consideration by the sentencing commission in formulating the guideline. In making these findings, the Court has determined that the offense level of 29, described in what is now amended Paragraph 34 of the presentence report, does not adequately reflect the seriousness of the robbery which occurred at Special Occasion Dresses.

Section 2B3.1(b)(3) provides that "[i]f any victim sustained bodily injury, increase the offense level according to the seriousness of the injury" and a scale denoting the permissible increase in the offense level for the type of injury inflicted is provided. Six points are added for "permanent or life-threatening bodily injury." § 2B1.3(b)(3)(C). The Commission did consider the possibility of injuries to the victim but the injuries inflicted in this instance were characterized by the sentencing court as traumatic, unnecessary, and causing the possibility of "permanent serious injury" or death. The court determined that these factors were not adequately considered by Commission in formulating the guidelines.

Moreover, because the district court clearly determined that Ewing's injuries were permanent or life-threatening, inflicted randomly and unnecessarily, and suffered by both Ewing and her unborn child, they were substantially in excess of the factors considered by the Commission in formulating the guidelines. Garcia, 900 F.2d at 48. Section 5K2.0, p.s., specifically refers to the robbery guidelines, stating that "physical injury would not warrant departure . . . because the robbery guideline includes a specific adjustment based on the extent of any injury." However, § 5K2.0 would permit departure if "several persons" were injured.

Also, § 5K2.8, p.s., supports the departure in this case as it regards conduct that is unusually heinous, cruel, and brutal as deserving of an upward departure. The court described Gonzales' assault in such terms. Consequently, the upward departure was permissible.

The court must also evaluate whether the upward departure was reasonable. Webb, 950 F.2d at 231-32. In this instance, the sentencing court departed from a guideline sentencing range of 140-175 months to impose a sentence of 240 months. A similar departure in number of months, but greater proportionality, has been upheld by this court. United States v. Geiger, 891 F.2d 512, 513 (5th Cir.), cert. denied, 494 U.S. 1087 (1990) (upward departure from guideline range 18-21 months to sentence of 120 months). Therefore, the departure was reasonable and did not reflect a gross abuse of the court's discretion. United States v. Murillo, 902 F.2d 1169, 1171 (5th Cir. 1990).

For these reasons, the sentence imposed by the district court is AFFIRMED.