

UNITED STATES COURT OF APPEALS  
for the Fifth Circuit

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No. 92-9113

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

OTIS MAJOR JOHNSON,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Northern District of Texas  
(4:91 CR 77 A)

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December 3, 1993

Before DUHÉ and EMILIO M. GARZA, Circuit Judges and BLACK<sup>1</sup>,  
District Judge.

PER CURIAM:<sup>2</sup>

BACKGROUND

Appellant, Otis Johnson, pled guilty to being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1). The district court first sentenced Johnson under the Career Criminal Provisions of 18 U.S.C. § 924(e), in part, because of a prior conviction for attempted burglary under Texas law. Johnson was sentenced to a

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<sup>1</sup> Chief Judge of the Southern District of Texas, sitting by designation.

<sup>2</sup> 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

200-month term of imprisonment, a 5-year term of supervised release, and a \$50 special assessment. Based on our holding in United States v. Martinez, 954 F.2d 1050 (5th Cir. 1992), that attempted burglary was not "violent felony" under § 924(e) and therefore cannot be used for enhancement purposes, we vacated his sentence and remanded the judgment of the district court. United States v. Johnson, No. 92-1064 (5th Cir. filed Sept. 8, 1992) (per curiam).

On remand, the district court ordered that a new presentence report (PSR) be prepared. In it the probation officer placed Johnson's total offense level at 10 and his criminal history category at VI. The applicable guideline range was imprisonment for 24 to 30 months. At the sentencing hearing, the district court adopted the findings of the PSR and found that an upward departure was warranted. The court sentenced Johnson to 120 months imprisonment, a 3-year term of supervised release, and a \$50 special assessment. Johnson appeals.

#### DISCUSSION

##### I. Upward Departure

Johnson argues that the district court erred in upwardly departing from the Sentencing Guidelines. The district court relied on both § 5K2.0 and § 4A1.3 as the basis for its upward departure. We will affirm a departure from the Guidelines if the district court offers "acceptable reasons" for the departure and the departure is "reasonable." United States v. Lambert, 984 F.2d 658, 663 (5th Cir. 1993) (en banc). Because we conclude that the

district court's upward departure is appropriate under § 4A1.3, we need not address the issues raised by Johnson under § 5K2.0.

Section 4A1.3, p.s. explicitly authorizes departure if the "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." Johnson's criminal history included the crimes of aggravated robbery with a deadly weapon, attempted burglary of a building, misdemeanor attempted burglary, and voluntary manslaughter. Johnson also violated his parole. After reviewing the circumstances surrounding these crimes, the district court detailed those factors that contributed to the seriousness of Johnson's criminal history: the nature of the previous offenses; the previous use of firearms; the leniency of the prior sentences; and Johnson's propensity for recidivism. Contrary to Johnson's argument, these reasons may justify an upward departure. See, e.g., United States v. Laury, 985 F.2d 1293, 1310 (5th Cir. 1993) (holding that the district court's reasons of "constant recidivism and displaying violent behavior" justified the finding that the criminal history category did not adequately reflect the seriousness of the defendant's past criminal conduct); Lambert, 984 F.2d at 664 (concluding that the district court gave "unimpeachable reasons for an upward departure," one of which was the defendant's previous use of weapons in his crimes); United States v. Carpenter, 963 F.2d 736, 745 (5th Cir.) (concluding that the district court was justified in relying on the fact that the defendant received especially lenient

treatment for killing a man to support upward departure), cert. denied, 113 S. Ct. 355 (1992). Given Johnson's criminal history, the district court did not err in finding that the criminal history category inadequately reflected the seriousness of Johnson's past criminal conduct.

Alternatively, Johnson argues that there is no factual basis for the district court's reasons for departure. Findings of fact that underlie a district court's sentencing decision are reviewed under the clearly erroneous standard. United States v. Paden, 908 F.2d 1229, 1233 (5th Cir. 1990), cert. denied, 498 U.S. 1039 (1991). Having reviewed the record, we conclude that the district court did not clearly err in finding facts sufficient to justify an upward departure.

We turn to whether the departure from a guideline range of 24 to 30 months to the statutory maximum of 10 years was reasonable. We conclude that it was. When a sentence falls within the statutory limits, we will review it only for a "'gross abuse of discretion.'" United States v. Huddleston, 929 F.2d 1030, 1031 (5th Cir. 1991) (quoting United States v. Juarez-Ortega, 866 F.2d 747, 748 (5th Cir. 1989)); see also Laury, 985 F.2d at 1310. Under the requirements set forth in United States v. Lambert, the district court must "explain why the criminal history category as calculated under the guidelines is inappropriate and why the category it chooses is appropriate. If the district court finds that it is necessary to go beyond the guidelines, the court must give adequate reasons why the guideline calculation is inadequate

and why the sentence it imposes is appropriate." Lambert, 984 F.2d at 662-63. In light of the defendant's extensive criminal history and the fact that in the present offense, the defendant did not merely possess the firearm, but also discharged it, we do not view the imposition of a sentence at the statutory maximum a gross abuse of discretion.

## II. Due Process Violation

Johnson argues that the upward departure violates North Carolina v. Pearce, 395 U.S. 711 (1969), which held that due process limits a trial court's discretion in imposing harsher sentences following a successful appeal. Pearce creates a presumption of judicial vindictiveness when a judge imposes a more severe sentence on a defendant during resentencing. Id. at 725-26. The necessary predicate to the invocation of the presumption is a finding that the sentence following appeal resulted in a harsher penalty. Johnson was sentenced to 200 months imprisonment at his first sentencing hearing and a 120 months at his resentencing. Johnson contends that because his resentencing included an upward departure whereas his first sentencing did not, the district court's actions were sufficient to invoke the Pearce presumption. We are unconvinced by this argument. It is undisputed that Johnson's resentencing resulted in a decrease of his imprisonment term. We find no due process violation.

## CONCLUSION

For the foregoing reasons, Johnson's sentence is AFFIRMED.