

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-9512
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

JAN BOLNER,

Defendant-Appellee.

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Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. CR 92 265 K

- - - - -
August 20, 1993

Before JOLLY, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:*

Jan Bolner appeals the district court's refusal to hear evidence which she believes would have convinced the court to depart downward pursuant to U.S.S.G. § 5K2.10. As a general rule, this Court will not disturb the sentencing court's discretionary decision not to depart downward from the guidelines. United States v. Soliman, 954 F.2d 1012, 1014 (5th Cir. 1992). However, no deference is given to the sentencing court's exercise of discretion if the court mistakenly believed

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

that departure was not permitted. Id.

The district court did note that § 5K2.10 contemplated a downward departure for the physical and sexual abuse Bolner and her children allegedly had suffered. See United States v. Whitetail, 956 F.2d 857, 862-864 (8th Cir. 1992) (sentencing court can consider battered-woman syndrome when departing under § 5K2.10); United States v. Desormeaux, 952 F.2d 182, 185 (8th Cir. 1991) (although not applicable in this case, spouse abuse could constitute an unusual case that might warrant a departure). However, the district court concluded that the premeditated nature of Bolner's offense of solicitation to commit murder in violation of 18 U.S.C. § 373 did not warrant a downward departure based upon the victim's allegedly abusive conduct. Whether Bolner should have been granted an evidentiary hearing to present evidence of her husband's abuse lies within the discretion of the district court. See United States v. Pologruto, 914 F.2d 67, 69 (5th Cir. 1990). When a district court is faced with specifically disputed facts, it must resolve them if they are used to determine the sentence. Id.

The district court was aware of the facts of the alleged abuse and did not dispute them. The court was not persuaded that the evidence pertaining to the abuse was convincing as to whether Bolner deserved a downward departure based on relevant victim conduct, given the planned and deliberate nature of her crime and the remoteness of the abuse in relation to the commission of the crime. Bolner has failed to demonstrate the need for a hearing. Bolner's conviction and sentence are AFFIRMED.