

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1209
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

THAYER DEWANE LAWSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(4:92-CR-131-Y)

(November 15, 1993)

Before POLITZ, Chief Judge, DAVIS and SMITH, Circuit Judges.

POLITZ, Chief Judge:*

Convicted on a guilty plea of two counts of making a false statement in the acquisition of a firearm in violation of 18 U.S.C. § 922(a)(6), Thayer Dewane Lawson appeals his departure sentence of 36 months imprisonment. We affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Background

As part of the purchase of firearms Lawson signed the requisite applications in which he falsely declared that he was not under indictment for any crime punishable by more than a year of imprisonment. In fact Lawson was under indictment by a Texas grand jury for murder and for the delivery of a controlled substance. He obtained six firearms by signing false statements on four separate occasions.¹

Indicted for four counts of making a false statement, pursuant to a plea agreement Lawson pled guilty to two of the counts. The PSR computation resulted in a guideline sentence of 12 to 18 months imprisonment. The district court departed upwards and imposed concurrent 36-month sentences to run consecutively to the sentences imposed by the Texas court. The departure was based on the seriousness of the offensive conduct and the dangerous nature of the weapons purchased. Those weapons were described as heavy offensive weapons typically used in drug transactions and were purchased by Lawson while under indictment for murder and a serious drug violation. Lawson timely appealed.

Analysis

Acknowledging the general rule that upward departures are permitted where "there exists an aggravating . . . circumstance of

¹The weapons included an Israeli Military Desert Eagle Model .44 caliber pistol; a Cobrey .12 gauge Street Sweeper shotgun; a Springfield Model 1911 .45 caliber pistol; a Glock Model 22 .40 caliber pistol; a Ruger Mini 14 .223 caliber rifle; and a Winchester Model 94 30/30 rifle.

a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines,"² Lawson contends that in departing the district court double counted several factors. We will affirm if "(1) the district court provided acceptable reasons for departure, and (2) the extent of the departure was reasonable."³ We review the first prong of this analysis *de novo*,⁴ rejecting a judge's reason for departing as "double-counting" if the Commission "has already fully considered" a factor "in establishing the guidelines range."⁵

Lawson contends that the factors relied on by the sentencing court -- the caliber of the weapons, the threat he presented to the community, and the seriousness of the state indictments⁶ -- were taken into account by the Sentencing Commission in framing the guidelines.

As respects the nature of the weapons, Lawson maintains that

²18 U.S.C. § 3553(b).

³989 F.2d 180, 182 (5th Cir. 1993).

⁴**United States v. Caldwell**, 985 F.2d 763 (5th Cir. 1993).

⁵**Williams v. United States**, _____ U.S. _____, 112 S.Ct. 1112, 1119 (1992).

⁶The district court explained its departure thusly:

[T]he defendant's sentencing guideline range does not reflect the seriousness of his offense conduct. The defendant by his criminal history poses more of a threat to the community than the counts of conviction would reflect; and therefore a sentence above the guideline range is warranted; particularly taken into account by the Court is the fact that the defendant bought the guns which are of impressive and substantial caliber and usage while under indictment for murder and while under indictment for delivery of a controlled substance.

an application note to the 1989 version of Guideline § 2K2.2 and a decision by our Second Circuit⁷ colleagues proscribe an upward adjustment on this basis. The note provided that "[a]n upward departure especially may be warranted in the case of large numbers of military type weapons (e.g., machine guns, automatic weapons, assault rifles)."⁸ This note does not bar departures based on the power and likely illegitimate uses of heavy caliber weapons.⁹ The danger associated with particular weapons is an aggravating factor not considered in the Guidelines. That factor may justify an upward departure.¹⁰

There is little to dispute the court's finding of the enhanced danger Lawson posed to the community because of his possession of the subject firearms. This is a valid factor upon which to base an upward departure.

Nor is there any merit to Lawson's claim of double counting based on the trial court's consideration of the severity of the indicted crimes. The federal offense is based on the existence of felony indictments. Other than the fact of the felony characterization, the severity of the charged offenses is not an

⁷**United States v. Schular** 907 F.2d 294, 297 (2d Cir. 1990).

⁸Sentencing Guidelines § 2K2.2 application note 2 (November 1989) (emphasis added).

⁹Indeed, the application note merely reflects the Guidelines' tolerance for weapons purchased for a sporting or other legitimate purpose.

¹⁰Contrary to Lawson's assertion, this is not a departure based upon section 5K2.6 which covers the use of a weapon in the commission of an offense. The district court did not rely on that rationale nor do we.

element of the federal violation.

Because the two state offenses were included in the computation of Lawson's criminal history category, he contends that to depart on the basis of their severity amounts to double counting. This argument is not without persuasive force; however in this case we must deem it harmless. The district court made very clear that it was departing because of the nature of the firearms and the demonstrable danger Lawson posed to the community when so armed. The judge stated that absent a departure to 36 months he would reject the plea agreement. Consistent with the Supreme Court's teachings in **Williams**, we will affirm departures despite potential error where we are persuaded that "the error did not affect the district court's selection of the sentence imposed."¹¹ Such is the case at bar.

Lawson further argues that the 36-month sentence amounts to an *ex post facto* violation because the departure placed the sentence in the range of the subsequently-adopted, more stringent 1992 Guidelines. The district court specifically rejected this objection at sentencing, stating "That may be the effect, but that wasn't the intent." This objection is without merit.

Finally, Lawson challenges as unreasonable a departure which doubles the high side of the guideline range from 18 to 36 months. That very doubling occurred and recently was approved by this court

¹¹**Williams**, 112 S.Ct. at 1120-211 see also **United States v. Davidson**, 984 F.2d 651 (5th Cir. 1993).

sitting *en banc* in **United States v. Lambert**.¹²

The sentence is AFFIRMED.

¹²984 F.2d 658 (5th Cir. 1993) (*en banc*).