

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-1311  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

NATIVIDAD SILVA, JR.,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Northern District of Texas  
(3:92-CR-342-G)

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(November 3, 1993)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:<sup>1</sup>

Natividad Silva challenges his sentence, imposed following a guilty plea. We **AFFIRM**.

I.

Silva pled guilty to a six-count indictment, charging him with four counts of robbery affecting interstate commerce and two counts of using a firearm during the commission of a violent crime. The charges were the result of four separate robberies of armored cars.

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<sup>1</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 Pursuant to that Rule, the court has determined that this opinion should not be published.

The district court sentenced Silva, *inter alia*, to 397 months incarceration.

II.

We will uphold a district court's sentence unless it was imposed in violation of the law, was imposed as a result of an incorrect application of the guidelines, or was unreasonable and outside the range of the applicable guidelines. 18 U.S.C. § 3742(e); *e.g.*, ***United States v. Maseratti***, 1 F.3d 330, 339 (5th Cir. 1993). Findings of fact will not be set aside unless they are clearly erroneous, with particular deference being given the district court's assessment of the credibility of witnesses. 18 U.S.C. § 3742(d); *e.g.*, ***Maseratti***, 1 F.3d at 339.

A.

Silva contends that the district court "misapplied the guidelines" by failing to authorize a downward departure, pursuant to U.S.S.G. § 5K2.12, for duress and coercion. That section reads in part: "If the defendant committed the offense because of serious coercion, blackmail or duress, under circumstances not amounting to a complete defense, the court may decrease the sentence below the applicable guideline range." ***Id.***

Silva objected to the presentence report's (PSR) failure to recommend the downward departure, contending that he committed the crime "in order to avoid a perceived greater harm, namely, injury to himself or his family." The district court adopted the factual findings of the PSR, in which the probation officer reported that Silva "told an unrealistic, grandiose story about how he was

pressured into committing the offenses because of threats made by well known international drug dealers." In addition, a psychological evaluation of Silva contained in the PSR suggested that "Mr. Silva may be in the early stages of forming a delusional system not necessarily grounded in reality"; but, the examining clinical psychologist could not say with certainty that Silva was delusional.

The only other evidence adduced to support Silva's assertion of duress was the testimony of his two sisters at the sentencing hearing. Each testified that someone called her and threatened her life.<sup>2</sup> One said that she told the FBI about the threat right after her brother was arrested; however, the FBI agent who investigated Silva stated that the sisters made no mention after his arrest "that they had received death threats themselves".

Silva maintains that the district court misapprehended the relevant guideline, noting that the district court expressed some uncertainty regarding his objection to the failure to recommend the downward departure. At the sentencing hearing, the district court stated that

there is one issue that I am not clear about and I'll confess that I have not had an opportunity to review these cases that you [defense counsel] cite in your sentencing memorandum from the other circuits, because I don't know if the Fifth Circuit would follow them anyway. These cases, which

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<sup>2</sup> One sister did not know who the caller, a woman, was; in fact, she assumed "somebody had just picked up my telephone from somewhere and just dialed it", and she testified that she "didn't think anything of it." The other stated that she knew who the man who called her was because she "[knew] his voice", but she never identified the caller.

according to your memorandum, recognize a partial duress or partial coercion factor in the sentencing guidelines.

I don't really understand how that works.

Characterizing this statement as an admission of "unfamiliarity with § 5K2.12", Silva now claims that the district court "ultimately failed to distinguish between duress as a defense and 'incomplete duress' as a mitigating factor to be considered at sentencing."

Silva fails to mention, however, that, after expressing uncertainty regarding § 5K2.12, the district court listened to a lengthy explanation of Silva's views on the section, in which Silva made the same points he makes now. After listening to that explanation, with which neither the government nor the court disagreed, the court stated:

Having heard the defendant's evidence and the explanation for his conduct given by both himself and his counsel, I'm afraid that I wind up where I began at the beginning of this hearing, in that I am still not persuaded that the defendant was acting out of duress and do not find that he has satisfied his burden of showing that he was so acting.

The testimony that was offered by his two sisters was really so nonspecific as to be unhelpful altogether in making a decision on the defendant's claim of duress.

. . .

It seems to me that the evidence that has been presented is so flimsy that it just will not satisfy the defendant's burden of proof on the duress contention.

This statement demonstrates that "the district judge chose not to depart from the Sentencing Guidelines because he did not think

the circumstances warranted a departure, rather than because he believed his hands were tied by the law." **United States v. McKnight**, 953 F.2d 898, 906 (5th Cir.), *cert. denied*, 112 S.Ct. 2975 (1992); *see also United States v. Mitchell*, 964 F.2d 454, 462 (5th Cir. 1992) (holding that since the "judge's refusal to depart downward was based not on his view that the guidelines precluded him from doing so as a matter of law, but because he did not believe departure was warranted under the facts of this case", the court would "not review" the refusal to depart). Simply stated, the district court did not credit Silva's assertion of duress, and it was this credibility determination and evaluation of the evidence that guided the court. There was no error.

B.

Silva challenges next the district court's refusal to authorize a downward departure for acceptance of responsibility. The guidelines provide for a two-level reduction in the offense level "[i]f the defendant clearly demonstrates acceptance of responsibility for his offense ... ". U.S.S.G. § 3E1.1.

A district court's determination as to whether there has been an acceptance of responsibility is entitled to particularly great deference; more than clear error must be proven. **Maseratti**, 1 F.3d at 341; *see also United States v. Sherbak*, 950 F.2d 1095, 1102 (5th Cir. 1992) ("Because the trial court's assessment of a defendant's contrition depends heavily on credibility assessments, this standard of review will nearly always sustain the judgment of the district court.") (citation omitted). We find no such error. The

district court concluded that Silva had not demonstrated an acceptance of responsibility because "he attempt[ed] to lay all or some of the blame on the shoulders of his other unnamed drug dealers who were allegedly threatening him."

1.

Silva contends that the district court improperly penalized him for simultaneously seeking downward departures for both duress and acceptance of responsibility. See **United States v. Johnson**, 956 F.2d 894, 905 (9th Cir. 1992) (holding that it is not inconsistent to award departures on both bases). The district court could well have determined that Silva's fanciful, if not delusional, assertion of duress reflected on the sincerity of his contrition. Silva has not demonstrated clear error, let alone more than clear error.

2.

Silva also makes much of the fact that he pled guilty; but that plea does not entitle him to an acceptance of responsibility departure. See U.S.S.G. § 3E1.1 comment. (n.3); **Sherbak**, 950 F.2d at 1101-02.

C.

Finally, Silva asserts that the district court denied him "the opportunity to present testimony to support his claims", charging that the district court has "adopted a *blanket* policy of denying evidentiary hearings" prior to sentencing. (Emphasis in brief.) According to Silva, the district court "has abdicated its responsibility under § 6A1.3 to make a reasoned determination of

whether an evidentiary hearing is necessary." See U.S.S.G. § 6A1.3.

At the sentencing hearing, Silva asked to present evidence to support a duress departure, stating that he could "present all of this evidence within five or seven minutes. It would be very short." The district court allowed Silva to do so, thereby disproving his "blanket policy" assertion. After presenting two witnesses and speaking directly to the court, Silva stated that "that's all the testimony and evidence that we have to present." At no time did he state that he had other, relevant evidence to present, or that he was being denied a full and fair hearing.<sup>3</sup>

Silva received the hearing that he sought, and successfully adduced all the relevant evidence that he had. His claim is baseless.

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<sup>3</sup> In his Reply Brief, Silva appears to alter his contention slightly, concluding:

The [c]ourt ... had used this same justification to deny the defendant in the preceding case an evidentiary hearing. Contrary to the Government's rationalizations, the [d]istrict [c]ourt has indeed adopted a policy of denying evidentiary hearings. Moreover, this policy is the result of a misinterpretation of Fifth Circuit case law.

Needless to say, Silva lacks standing to defend the rights of the preceding, or any other, defendant allegedly affected by this "policy". *E.g.*, **Duke Power Co. v. Carolina Env'tl. Study Group, Inc.**, 438 U.S. 59, 80 (1978) ("plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties") (citation and internal quotations omitted).

III.

For the foregoing reasons, the sentence is

**AFFIRMED.**