

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1545
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES WILLIE DUKE,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3-93-CR-028-D
- - - - -
(January 6, 1994)

Before GARWOOD, JOLLY, and BARKSDALE, Circuit Judges.

PER CURIAM:*

James Willie Duke appeals his sentence for carjacking and using a firearm during a crime of violence, contending that there was no factual basis for a two-point adjustment for reckless endangerment. Upon review of a district court's findings in applying the guidelines, we "shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts." 18 U.S.C. § 3742(e); see United States

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

v. Otero, 868 F.2d 1412, 1413-14 (5th Cir. 1989). In making findings pursuant to the guidelines, the district court applies the preponderance of the evidence standard. United States v. Casto, 889 F.2d 562, 570 (5th Cir. 1989), cert. denied, 493 U.S. 1092 (1990).

A two-level adjustment for reckless endangerment during flight pursuant to § 3C1.2 is called for where the defendant, "recklessly created a risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer." U.S.S.G. § 3C1.2. Weighing the conflicting testimony of Officer Bray and Duke, the court determined that Duke's conduct during flight constituted reckless endangerment. Credibility determinations relative to sentencing "are peculiarly within the province of the trier-of-fact." United States v. Sarasti, 869 F.2d 805, 807 (5th Cir. 1989).

"Leading police officers on a high-speed chase" can alone create "substantial risk of serious injury." United States v. Lee, 989 F.2d 180, 183 (5th Cir. 1993). In the instant case, the district court adopted the factual findings in the PSR. These findings include that Duke "immediately sped up" after the police activated their emergency lights; that the chase was a "high speed chase"; that Duke drove his vehicle back and forth across the median; and, that the erratic driving placed both the officers and other motorists at risk of having an accident. The record in this case provides ample evidence that Duke recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from law enforcement

officers; thus, the district court's finding was not clearly erroneous.

AFFIRMED.