

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1713
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

NOAH BRADLEY LESTER,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(4:93-CR-33-Y)

(May 25, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.*

PER CURIAM:

Noah Bradley Lester was arrested following an investigation into a series of robberies at banks and grocery-store pharmacies in Texas during December 1992 and January 1993. Lester was indicted for four counts of bank robbery in violation of 18 U.S.C. § 2113(a), and four counts of obstructing commerce by robbery in violation of 18 U.S.C. § 1951(a). He entered a guilty

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

plea to one count of bank robbery (count seven), and stipulated to committing the other seven robberies contained in the indictment.

The district court departed upward by 65 months from the recommended guideline range and sentenced Lester to the statutory maximum sentence of 300 months in prison (25 years). The district court also sentenced Lester to three years of supervised release and imposed a \$50 special assessment.

On appeal, Lester challenges the district court's upward departure. We find no error and affirm.

An upward departure will be affirmed on appeal if (1) the district court provided "acceptable" reasons for the departure and (2) if the departure was "reasonable." U.S. v. Lambert, 984 F.2d 658, 663 (5th Cir. 1993) (en banc) (citation omitted). The district court may depart from the Sentencing Guidelines due to aggravating or mitigating circumstances not considered or inadequately considered by the Sentencing Guidelines. U.S. v. Jones, 905 F.2d 867, 869 (5th Cir. 1990); U.S.S.G. § 4A1.3. The decision to depart is reviewed for abuse of discretion. U.S. v. Laury, 985 F.2d 1293, 1310 (5th Cir. 1993).

The district court gave several reasons for its decision to depart upward: (1) that Lester's base offense level did not adequately represent the seriousness of Lester's criminal conduct because Lester committed additional robberies and crimes which the probation officer was not able to include in his sentencing calculation; (2) that he had consistently received lenient treatment in prior sentences but was not deterred from a high level

of recidivist conduct; (3) that he had, in fact, committed crimes while in custody, including his involvement in a cocaine distribution ring while in state prison; and (4) that Lester had indicated on several occasions that during the commission of his crimes he did not care whether he lived or died, and that part of his motivation was to commit the crimes in the hopes that he would not survive. The district court noted that this attitude "worries me a great deal," and that Lester had "to be separated from the public for as long as the law allows because [he] ha[s] shown no tendency whatsoever to stop committing crimes."

Upward departures based upon the likelihood of recidivist conduct are acceptable, see Laury, 985 F.2d at 1310, as are departures based repeated acts of similar criminal activity, see U.S. v. Medina-Gutierrez, 980 F.2d 980, 984 (5th Cir. 1992), or based upon the inadequacy of a defendant's criminal history category, Laury, 985 F.2d at 1310, or "prior similar adult criminal conduct not resulting in a criminal conviction." See § 4A1.3(e). This Court has also noted that an upward departure would be acceptable in cases when, as here, a defendant has received lenient sentences in the past or committed offenses while on bail, parole, or probation. U.S. v. Carpenter, 963 F.2d 736, 744 (5th Cir.), cert. denied, 113 S.Ct. 355 (1992). The district court's articulated reasons for departing upward were not clearly erroneous.

The district court also employed the correct methodology for departing above criminal history Category VI, which requires

the court to stay within the Guidelines by considering sentencing ranges for higher base offense levels. Pennington, 9 F.3d at 1118. The court did so by noting that Lester's offense level, which was calculated by applying the multiple-count adjustments outlined in Chapter 3, Part D of the Guidelines, to the eight robberies contained in the indictment, could have been at least 35, rather than 31, if the multiple-unit adjustments had been applied to the ten additional, unindicted crimes (eight robberies, one car theft, and one possession of narcotics) to which Lester had admitted, but for which there had been no indictment or conviction.

The court extrapolated to a base offense level of 35 and, applying that to Lester's criminal history category of VI, arrived at a guideline range of 292 to 365 months. Lester contends that the district court erred by departing upward based upon his other offenses because his sentence had already been enhanced under the career-offender provisions of the guidelines. As a result, he contends, the guidelines had already taken into account Lester's other criminal conduct. Lester, however, cites no authority for the proposition that enhancement under the career-offender provision of the guidelines precludes an upward departure based upon additional criminal conduct. Moreover, the application of the career-offender provisions was based upon conduct entirely distinct from the offenses relied upon by the court to justify its departure.

Lester was subject to the career offender provisions of the guidelines, § 4B1.1, because of three prior convictions for

attempted armed bank robbery, aggravated robbery with a deadly weapon, and delivery of a controlled substance. None of these offenses were related to, or considered by, the district court in its decision to depart upward. Therefore, contrary to Lester's assertion, the career offender provisions of the guidelines did not take into account the conduct relied upon by the district court to justify its upward departure.

Finally, Lester argues that the extent of the district court's departure, 65 months, was unreasonable. When, as here, the departure results in a sentence within the statutory maximum, the extent of that departure is reviewed for a gross abuse of discretion. Laury, 985 F.2d at 1310. Albeit a substantial one, the 65-month departure in the instant case is not the largest upheld by this Court.

In Fitzhugh, for example, this Court affirmed an upward departure of twenty-five years, noting that Fitzhugh's "unprecedented" criminal history score of fifty-seven was "egregious," and "fully support[ed]" the massive departure. Fitzhugh, 984 F.2d at 147. Lester's behavior, as well, supports the upward departure assessed by the district court -- twenty-two years of consistent criminal conduct including, between November 1992 and January 1993, a spree of eight armed robberies not included in his current guideline calculation. The departure was not a gross abuse of discretion.

The sentence meted out by the district court is **AFFIRMED**.