UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-1750

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHRISTOPHER MICHAEL PEARSON,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas
(3:93-CR-189-H)

(September 21, 1994)

Before GARWOOD, JOLLY and STEWART, Circuit Judges.[*]

GARWOOD, Circuit Judge:

Defendant-appellant Christopher Michael Pearson (Pearson) was arrested for the robbery of a Dallas, Texas, bank and pleaded guilty. The plea agreement stipulated that the parties had agreed that there were justifiable reasons to warrant an upward departure from the applicable Sentencing Guidelines range, that an appropriate sentence in this case was twenty-five years, and that Pearson would not be allowed to withdraw his plea if the court

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

sentenced him to twenty-five years. One day before sentencing, Pearson filed a motion to withdraw his guilty plea, claiming that the agreed sentence undermined the Sentencing Guidelines. The district court denied the motion and sentenced Pearson to twenty-five years. We now affirm.

Facts and Proceedings Below

The facts in this case are straightforward and undisputed. On the morning of April 23, 1993, Fidelity Bank branch manager Patrick Farrell (Farrell) and teller Julie Dorsey (Dorsey) were arriving for work when they were suddenly accosted by a man wearing a multi-colored ski mask and carrying a sawed-off shotgun and brown tweed duffle bag. Forcing them inside, the man ordered them to open the vault. The robber took almost $8500 in currency (including several "bait bills"), locked Farrell and Dorsey in the vault, and fled on foot.

When FBI agents arrived soon thereafter, they learned that in the week previous to the robbery, a man matching the description of the robber attempted to gain entry to the bank during working hours but drove away when bank employees refused to "buzz" him in. Several days later, a bank employee recognized the robber's car and obtained its license plate number. A car with this license plate was soon located in the parking lot of an apartment complex across the street from the bank.

Surveillance quickly connected Pearson to the car and identified his apartment. Pearson's roommate gave consent for FBI agents to search the apartment. Inside, they located a multi-colored ski mask, brown tweed duffle bag, and sawed-off shotgun

under a mattress; more than $4000 in cash was found stuffed under the cushions of a chair. Pearson was subsequently found in a local convenience store, where he had just placed more than $3500 in cash, including the bait bills, on the counter.

Pearson was taken into custody, where he was advised of and waived his rights. He then confessed to the robbery. During the course of his interview, he also confessed to six other armed robberies of dry cleaners, beauty shops, and car washes in the Dallas area. Originally indicted on one count of armed robbery (in violation of 18 U.S.C. § 2113 (a) & (d)) and one count of carrying a firearm during the commission of a robbery (18 U.S.C. § 924 (c)), Pearson subsequently waived indictment. He was charged in a superseding information with these same two counts, plus a third count for the attempted armed robbery of April 16 (18 U.S.C. § 2113 (a) & (d)).

Pearson, represented by appointed counsel, entered into a written agreement respecting the superseding information. The plea agreement stated, in relevant part,

> "The parties agree, pursuant to Rule 11(e)(1)(c) F.R.Crim.P., that an appropriate disposition of this case is that the defendant be sentenced to the custody of the Attorney General for a term of 25 years. The parties agree that, pursuant to U.S.S.G. §6B1.2, there are justifiable reasons for departure upward from this applicable guideline range and for the Court to accept this agreement. The defendant will not be allowed to withdraw his plea if the Court sentences him to 25 years imprisonment."

The agreement also reflected that the plea was "freely and voluntarily made." Having assured itself that this was the case, the district court accepted the plea on June 17, 1993.

However, on August 11, 1993, the day before sentencing, Pearson filed a motion to withdraw his guilty plea. He urged two theories in support. The first was that he "was not properly advised of the ramifications of his plea agreement" because, having accepted the plea agreement on advice of counsel, "[s]ubsequently, defendant has consulted other individuals that have indicated to defendant that this was too much time to agree to and he should not have plead [sic] guilty."[1] Second, Pearson claimed that his sentence should be that identified as the Guideline range in his Presentence Report (PSR)SQ183 to 198 months[2]SQand that the agreed sentence of 300 months undermined the Sentencing Guidelines.

The district court considered Pearson's motion to withdraw immediately before the sentencing hearing. The district court stated that it had considered the motion in connection with the PSR as well as the plea agreement and factual resume. The following colloquy then took place:

"THE COURT: All right.

Now, I think the record should show that what we had involved here, which you agreed to, were six armed robberies with a sawed off shotgun.

PEARSON: Yes, sir.

THE COURT: You admitted to those in the Factual Statement that you signed. You pleaded guilty to two of those armed robberies.

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[1] Nothing whatsoever is stated concerning the identity or qualifications of these "other individuals" or the basis of their supposed conclusions that "this was too much time" or that "he should not have plead guilty."

[2] This was calculated as follows. Based on a total offense level of 25 and a criminal history category of II, the Guideline range for the 2 robbery counts was 63 to 78 months. The firearm count carried a mandatory 10 year (120 months) consecutive sentence.

> The guidelines do reflect there would be a sentence of sixty-three to seventy-eight months based on a level of 25 and a criminal history of 2. So if I went to seventy-eight months and added the one hundred twenty months mandatory sentence required it would be one hundred and ninety-eight months. The Agreement here is three hundred months and I gather that is what you are questioning.
>
> PEARSON: Yes, sir.
>
> THE COURT: I want you to know that if the case were tried and there was a guilty finding that I would depart upward 15 levels to 40 which would be three hundred and twenty-four to four hundred and five months and I would add on top oofthat [sic] one hundred and twenty months and I think you should know that because that is what I would do considering the nature of the offense involved here which is a terribly serious offense."

Finding that Pearson had been competently advised by counsel, the district court denied his motion to withdraw his plea and sentenced him to twenty-five years' imprisonment. Pearson now appeals.

Discussion

When a plea agreement provides for a specific sentence, as contemplated by Federal Rule of Criminal Procedure 11(e)(1)(C), the Guidelines provide that

> "the [district] court may accept the agreement if the court is satisfied either that:
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> (1) the agreed sentence is within the applicable guideline range; or
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> (2) the agreed sentence departs from the applicable guideline range for justifiable reasons." U.S.S.G. § 6B1.2(c).

The commentary to this section explains that a departure for justifiable reasons is one that "is authorized by 18 U.S.C. §

3553(b)." Section 3553(b), in turn, authorizes a departure when the court finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b). We uphold a decision to depart from the applicable Guidelines range if the district court gave acceptable reasons for the departure and the extent of the departure was reasonable.[3] *United States v. McKenzie*, 991 F.2d 203, 204 (5th Cir. 1993).

Pearson based his motion to withdraw his guilty plea on two arguments. The first, that he was ill-advised of the consequences of his plea, has not been brought forward on appeal, and we therefore do not consider it.[4] The second is that his sentence undermines the Sentencing Guidelines because it is roughly fifty percent higher than the Guidelines range. We have elsewhere implied that a plea agreement for a specific sentence ordinarily should not be accepted if the district court, in its discretion, determines that it undermines the Sentencing Guidelines. *See United States v. Foy*, 28 F.3d 464, 472 (5th Cir. 1994) (noting that plea agreement may be rejected if it is unduly lenient). Pearson claims that his sentence undermines the Guidelines because no

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[3] We note, however, that there is generally no requirement that the district court give reasons for the extent of its departure, so long as it is otherwise reasonable. *United States v. Lee*, 989 F.2d 180, 183 (5th Cir. 1993).

[4] We find this contention suspect in any event. Pearson is not claiming, for example, that he was incorrectly advised concerning the potential sentencing consequences of the other six armed robberies to which he confessed. Nor is he claiming that he did not understand the consequences of the plea, i.e., that he would be sentenced to twenty-five years. His claim below in this respect was wholly conclusory (see note 1 *supra*).

justifiable reasons for the upward departure appear of record. He argues the district court should therefore have rejected his plea agreement, giving him the unconditional right to withdraw his guilty plea.[5] *See* FED.R.CRIM.P. 11(e)(4).

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[5] Because Pearson's appeal asserts the allegedly improper denial of his motion to withdraw his guilty plea, it is, to that extent, not subject to the jurisdictional limitations of the provision in 18 U.S.C. § 3742(c) that:

> "In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure…
>
> > (1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; . . . ."

Section 3742(a) provides:

> "A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence…
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> > (1) was imposed in violation of law;
> >
> > (2) was imposed as a result of an incorrect application of the sentencing guidelines; or
> >
> > (3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or
> >
> > (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable."

It has generally been held that in the case of a sentence pursuant to a plea agreement for a specific sentence, section 3742(c)(1) does not bar a defendant's sentence appeal to the extent it rests on clauses (1) or (2) of section 3742(a), as opposed to clause (3) or (4) thereof. *See United States v. Pickett*, 941 F.2d 411, 414 (6th Cir. 1991). *See also United States v. Carrozza*, 4 F.3d 70, 86-87 n.12 (1st Cir. 1993); *United States v. Rodriguez*, No. __, 1992 WL 309843 at *1 (7th Cir. _____ 1992) (unpublished opinion); *United States v. David*, No. ____, 1992 WL 159466 at *1 (9th Cir. _____ 1992) (unpublished opinion).

To the extent that the claim on a sentence appeal is not that the district court miscalculated, or failed to properly calculate, the applicable Guidelines range, or that the statutory maximum was exceeded, or that the sentencing procedure was improper, but is rather that the district court, though properly calculating the Guidelines range, erred by electing to depart

We think the record disproves the premise of Pearson's argument. The district court clearly referred to the six other armed robberies to which Pearson admitted and which were noted in the PSR. The Guidelines provide that if the criminal history category underrepresents the defendant's criminal background or likelihood of recidivism, the district court may consider as a basis for departure, *inter alia*, prior similar unconvicted criminal conduct.[6] *See* U.S.S.G. § 4A1.3(e) (policy statement). Because these crimes provide an appropriate basis for an upward departure as contemplated by the Guidelines, we cannot agree with Pearson that his sentence undermines the Guidelines.[7]

Pearson argues, however, that the record fails to reflect a sufficient nexus between his sentence and these other crimes. It is true that the district court must offer the specific reason for its decision to depart. *See United States v. Mourning*, 914 F.2d 699, 708 (5th Cir. 1990). Yet we have never required the district court to recite a particular litany to preserve the integrity of

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upwardly therefrom or by excessively so departing (though not exceeding the statutory maximum), it appears to us that section 3742(a)(3) is applicable, rather than section 3742 (a)(1) or (2). Any other result would render section 3742(c)(1) essentially meaningless. Under the foregoing analysis, so far as Pearson seeks to appeal his sentence as such, as opposed to the denial of his motion to withdraw his plea, the appeal is within clause (3), rather than either clause (1) or clause (2), of section 3742(a), and is accordingly barred by section 3742(c)(1).

[6] The criminal history category is computed with reference to prior sentences and convictions only. *See* U.S.S.G. § 4A1.1. *See also United States v. Ashburn*, 20 F.3d 1336, 1345 n.10 (5th Cir.), *reh'g en banc granted*, No. 93-1067 (July 1, 1994).

[7] In *United States v. Ashburn*, the panel held that counts that are dismissed as part of a plea agreement may not be considered as a basis for an upward departure. 20 F.3d at 1347-48. Because the panel's concern in *Ashburn* was that allowing dismissed counts to be considered at sentencing would undermine incentives to plea bargain, we think its holding fairly circumscribed. We consider the instant case distinguishable from *Ashburn*; none of the crimes considered here were part of counts dismissed pursuant to a plea bargain.

its sentencing decisions. *See United States v. Carpenter*, 963 F.2d 736, 744 (5th Cir.), *cert. denied*, 113 S.Ct. 355 (1992). As we said in *United States v. Carpenter*, "[t]his is not a case . . . in which we could not decipher why the district court concluded that `aspects of the defendant's criminal history [were] not adequately considered by the Guidelines.'" *Carpenter*, 963 F.2d at 744 (citation omitted; alteration in original). Certainly, more clarity rather than less is to be preferred, but there simply is no "nexus" requirement in the formalistic sense Pearson demands. Here we can understand from the record the district court's reasons and the defendant himself requested no further clarification.

Nor can we ignore the context in which this particular sentencing decision arose. Pearson himself, represented by competent counsel, stipulated in his plea agreement that there were justifiable (although unspecified) reasons for an upward departure. Pearson claims that, regardless of any recitations in his plea agreement, the district court was required to ascertain for itself whether departure was justified. As noted above, we believe the district court adequately fulfilled its duty in this regard. Further, nothing in the record suggests that any relevant new or different facts or legal theories came to light after the plea agreement and prior to sentencing. Given this context, we cannot agree that the plea agreement's stipulation to a departure should not influence the district court's sentencing decision.

Moreover, as previously observed (see note 5 *supra),* we are not here dealing with a sentence appeal as such, but rather with an appeal from the denial of a motion to withdraw based on the

assertion that a plea agreement's agreed sentence undermines the Guidelines. In *Foy* we faced an analogous contention in a defendant's complaint on appeal of the rejection of a plea agreement under section 6B1.2(a) of the Guidelines on the basis that "accepting the agreement will . . . undermine . . . the sentencing guidelines." 28 F.3d at 472. We stated:

> "Certainly the better practice would be for the district court to expressly state its reasons. However, we decline to adopt a hard and fast rule, and instead hold that a district court's decision to reject a plea agreement is proper as long as the record as a whole renders the basis of the decision reasonably apparent to the reviewing court and a decision on that basis is within the district court's discretion." *Id*.

Here, the record as a whole renders the basis of the district court's decision to accept, and not to allow withdrawal of, the plea agreement reasonably apparent and its decision on that basis was well within its discretion. Unlike *Foy*, a fair reading of the record does not suggest that the district court acted on an improper basis.

Conclusion

Because we find no error, the district court's judgment is

AFFIRMED.