

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1985
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOE MCKINLEY,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(4:92-CR-106-A)

(August 1, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:*

Joe McKinley, a/k/a McKinley Joe, pleaded guilty to one count of wire fraud. In his written objections to the Presentence Report (PSR), McKinley argued, inter alia, that the sentencing guidelines did not adequately take into account his cultural background and therefore the district court should depart from the guidelines on this basis, or alternatively should consider this

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

factor when determining the amount of a downward departure under U.S.S.G. § 5K1.1. At the sentencing hearing, however, he withdrew these objections because the district court suggested that it might not award him the three-level decrease for acceptance of responsibility if he maintained the objections.

The Government filed a § 5K1.1 motion for a downward departure because McKinley had offered substantial assistance. The district court granted the Government's motion and departed forty percent below the minimum sentence within the guideline range. The court indicated that it considered McKinley's cultural background to determine the starting point for the downward departure, and considered the degree of cooperation relative to other individuals involved in the case to determine the extent of the departure. McKinley was sentenced to 18 months imprisonment, three years supervised release, and a \$50 special assessment.

On appeal McKinley argues that his sentence is the result of an incorrect application of the guidelines because the district court stated that it would consider his cultural background to determine the extent of the § 5K1.1 departure but failed to consider this factor when calculating McKinley's sentence. As noted above, the district court said that he considered McKinley's cultural background, consequently, McKinley is actually attempting to challenge the extent of the downward departure.

In Williams v. U.S., ___ U.S. ___, 112 S.Ct. 1112, 117 L.Ed.2d 341 (1992), the Supreme Court held that a reviewing court may affirm a sentence in which the district court's upward

departure was based on valid and invalid factors if the error did not affect the district court's selection of a sentence. Williams also generally reaffirmed that the sentencing guidelines did not alter the traditional deference accorded to a district court's sentencing decision. The district court has the discretion to choose the appropriate sentence within the applicable guideline range and to determine the appropriate extent of a downward departure, and the court of appeals may not substitute its judgment for the district court. Williams appears to have implicitly overruled this court's precedent in United States v. Damer, 910 F.2d 1239, 1241 (5th Cir.), cert. denied, 111 S.Ct. 535 (1990), holding that the district court's application of § 5K1.1 is reviewed for an abuse of discretion.

Assuming that Williams overruled Damer, this court would have jurisdiction to review a defendant's challenge to a sentence only if it was imposed in violation of law; was imposed as a result of a misapplication of the sentencing guidelines; was the result of an upward departure; or was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable. 18 U.S.C. § 3742(a). Because McKinley's challenge to his sentence appears to be dissatisfaction with the extent of the departure and not a legal error or misapplication of the guidelines, none of the Williams factors applies, and this court lacks jurisdiction over his appeal. Even if Damer still governs, the district court did not abuse his discretion in deciding the amount of downward departure for williams.

The judgment of the district court is AFFIRMED.