

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2191

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ROBERT BURROS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(92-CR-231-1)

(December 15, 1993)

Before VAN GRAAFEILAND*, SMITH, and WIENER, Circuit Judges.

JERRY E. SMITH, Circuit Judge:**

Robert Burros appeals both the two-level enhancement of his Sentencing Guidelines base offense level for the sale of contraband within 1,000 feet of a school and the upward departure from the guidelines range for his conviction of distribution of cocaine

* Circuit Judge of the Second Circuit, sitting by designation.

** Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

base. Finding no error in the district court's application of the guidelines, we affirm the sentence.

I.

Burros was found guilty of distributing 1.3 grams of cocaine base. The district court added two levels to Burros's base offense level of 18 pursuant to U.S.S.G. § 2D1.2(a), as the offense occurred near a protected location involving underage individuals. For an offense level of 20 and a criminal history category of VI, the guidelines prescribe a range of 70-87 months' imprisonment. The court then departed from the guidelines range, pursuant to U.S.S.G. § 4A1.3, based upon Burros's prior convictions not included in the criminal history category calculation, his 17 criminal history points, and his previously lenient sentences. The court sentenced Burros to 125 months' imprisonment followed by six years of supervised release.¹

II.

A.

Burros first claims that the district court erred in enhancing his base offense level by two points pursuant to § 2D1.2(a) for distributing cocaine base within 1,000 feet of a protected location without a showing of anything more than a spatial connection between the location and the crime. We review the findings

¹ The final sentence corresponds to a base offense level of 24, which carries a sentencing range of 100-125 months; thus, the sentence represented a four-point increase in offense level.

of fact under the "clearly erroneous" standard, but legal application of the guidelines is reviewed de novo. United States v. Barbontin, 907 F.2d 1494 (5th Cir. 1990).

As Burros's counsel admitted at oral argument, his contention is based upon an opinion withdrawn and replaced by United States v. Echevaria, 995 F.2d 562 (5th Cir. 1993). Under the earlier authority, a two-level increase was permissible only if the sale of drugs "directly involved" the school. Under the revised opinion, however, the court reached the opposite conclusion: A two-level increase is appropriate if drugs are merely present within 1,000 feet of the school. Consequently, we reject Burros's first claim.

B.

Burros further contends that the district court erred in several ways in upwardly departing from the guidelines range. First, the four-level departure was an error because it was unreasonable; second, the court considered certain impermissible factors such as a twenty-two-year-old felony conviction; and third, the court failed to explain its reasons for rejecting the three intermediate offense levels it implicitly bypassed. We review a district court's decision to depart from the guidelines for abuse of discretion. United States v. McKenzie, 991 F.2d 203, 204 (5th Cir. 1993) ("A departure from the guidelines will be upheld if the district court provided acceptable reasons for the departure and the departure was reasonable.").

1.

Burros's first and second contentions can be addressed together. Burros challenges the four-level upward departure because the court did not explain itself and based the upward departure upon inappropriate factors. These claims are incompatible: The court thoroughly explained its reasons for departing. The court adopted the presentence investigation report, which based its recommendation upon the following factors: (1) prior convictions, including one for armed robbery, not included in the criminal history category calculation (permissible ground for upward departure under United States v. Ford, 996 F.2d 83 (5th Cir.) (unpublished), petition for cert. filed (Oct. 12, 1993)); (2) Burros's 17 criminal history points (permissible ground under United States v. Rogers, 917 F.2d 165, 169 (5th Cir. 1990) (upward departure for 21 criminal history points), cert. denied, 499 U.S. 924 (1991); see also United States v. Christoph, 904 F.2d 1036, 1042 (6th Cir. 1990) (17 points), cert. denied, 498 U.S. 1041 (1991)); and (3) the leniency of earlier sentences (permissible ground under United States v. Carpenter, 963 F.2d 736, 744 (5th Cir.), cert. denied, 113 S. Ct. 355 (1992); United States v. Jones, 905 F.2d 867, 869 (5th Cir. 1990)).

In sentencing Burros to 125 months' imprisonment, the district court relied upon these permissible factors; the end sentence was reasonable, given the totality of the factors. Thus, Burros's claim that the sentence was unreasonable is meritless;

moreover, he cannot complain that the court used impermissible factors in upwardly departing.

2.

Burros also raises a challenge to his sentence based upon the new Lambert methodology for upwardly departing past criminal history category VI. See United States v. Lambert, 984 F.2d 658, 663 (5th Cir. 1993) (en banc). Lambert instructs district courts to "consider[] sentencing ranges for higher base offense levels" when departing past category VI.

An upward departure past level VI is accomplished by moving down the base offense levels until an appropriate range is reached. There is no evidence that the district court used any other method in this case. As the court stated at sentencing, "The Court will structure its upward departure by moving incrementally down the sentencing table to the next higher offense level in criminal history category 6[] [u]ntil it finds a Guideline range appropriate to this case." (Emphasis added.)

Burros contends that the court did not give explicit reasons why it moved down four levels instead of, say, two. Although some explanation is usually required for skipping intermediate offense levels when departing past category VI, Lambert itself is "one of those cases in which the district court's explanation for its sentence also explains why it rejected a lesser departure." Id. at 664. A sentencing judge must strike a balance between

ritualistic formalism in explaining the rejection of intermediate offense levels and arbitrariness in guidelines departures.

We conclude that the reasons for rejecting the intermediate base offense levels were implicit in the district court's decision to depart upwardly in the first place. The court's assurance that it did in fact move incrementally down the table convinces us that the requirements of Lambert were satisfied in this case, while avoiding the pitfall of ritualistic formalism.

AFFIRMED.