

UNITED STATES COURT OF APPEALS  
For the Fifth Circuit

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No. 93-2207  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

RAY ANTHONY ROMAN,

Defendant-Appellant.

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Appeal from the United States District Court  
For the Southern District of Texas

(CR H 92 0160)

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(September 24, 1993)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:\*

**BACKGROUND**

The grand jury indicted Ray Anthony Roman for possession of a firearm by a convicted felon. At trial, two Houston police officers, Paul Zavalla and Kenneth Burk, testified that, on October

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

20, 1991, at approximately 4 p.m., they were attempting to execute an arrest warrant on a person residing at 7006 Bonham. They parked their patrol car away from the address and approached the home on foot, Zavalla heading for the front door and Burk walking toward the back.

Burk returned to the front and informed Zavalla that he observed a vehicle parked in the driveway on the side of the house with two men in the car. The officers approached the vehicle undetected by the vehicle's occupants, Zavalla heading toward the passenger side and Burk going toward the driver side. Zavalla observed a dark plastic bag containing a white powdery substance on the lap of the passenger, Mark Madrano. Zavalla reached his arm into the open car window and grabbed the bag. He directed Madrano out of the vehicle.

Zavalla testified that as Madrano exited the vehicle, Zavalla observed the driver, Roman, place his right hand underneath his right thigh and begin to pull a gun out from underneath. Zavalla yelled out "got a gun" or "man's got a pistol." Roman threw down the weapon onto the passenger side floorboard. Burk directed Roman out of the vehicle, cuffed him, and took possession of the gun.

The gun and the rounds found within it were admitted into evidence. ATF Special Agent George Taylor testified that the weapon was in working condition and had traveled in interstate commerce. The parties stipulated that Roman was a convicted felon. The defense presented no evidence. The jury found Roman guilty of the charge.

Prior to the trial, the Government filed notice to enhance Roman's sentence under 18 U.S.C. § 924(e), for being a career armed felon in possession of a firearm. The probation officer calculated the sentencing range based upon the enhanced offense level of 33 and a criminal history category of VI, with the resulting sentencing range of 235 to 293 months.<sup>1</sup> The Government moved for an upward departure.

The district court adopted the presentence report (PSR) and granted the Government's motion for departure, giving two alternative reasons for departing. The district court sentenced Roman to 360 months imprisonment, five years supervised release, and a \$50 special assessment.

#### **OPINION**

##### Sufficiency of the Evidence

Roman argues that evidence was insufficient to prove that he possessed the firearm. See United States v. Dancy, 861 F.2d 77, 81 (5th Cir. 1988) (listing knowing possession as an element of § 922(g)).

When the sufficiency of the evidence to support a conviction is challenged on appeal, it is not necessary that the evidence exclude every reasonable hypothesis of innocence; [this Court] review[s] the evidence in the light most favorable to the [G]overnment, drawing all reasonable inferences in support of the verdict, and will affirm the conviction if a rational trier of fact could have found that the evidence established each essential element of the offense beyond a reasonable doubt.

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<sup>1</sup>The 1991 edition of the Guidelines was used.

United States v. Stone, 960 F.2d 426, 430-31 (5th Cir. 1992).

As stated earlier, Zavalla testified that he observed Roman reach down and pull the firearm out from underneath his thigh. He also testified that he saw Roman toss the weapon toward the floorboard. Burk's testimony did not conflict with Zavalla's. Based upon this evidence, the jury could find beyond a reasonable doubt that Roman knowingly possessed the firearm.

#### Upward Departure

Roman argues that the district court erred by departing from the applicable guideline range. He argues that the district court failed to give acceptable reasons for departure and that the departure was unreasonable. A district "court's decision to depart from the guidelines [is reviewed] for abuse of discretion. A departure from the guidelines will be upheld if the district court provided acceptable reasons for the departure and the departure was reasonable." United States v. McKenzie, 991 F.2d 203, 204 (5th Cir. 1993) (citation omitted).

The district court prefaced the departure upon U.S.S.G. § 4A1.3, p.s., which permits departure when the defendant's criminal history category inadequately "reflect[s] the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes." U.S.S.G. § 4A1.3, p.s. The district court used both facets of § 4A1.3 as alternative reasons.

First, the district court found that Roman's criminal history category, VI, under-represented his criminal past. This finding was based upon two convictions not used in determining Roman's 20

criminal-history points and upon category VI beginning with 13 criminal-history points, seven points below Roman's. The second reason for departure was that the criminal history category failed to account for Roman's violent behavior while incarcerated, thus evidencing the likelihood of recidivist tendencies in the future. These specific reasons are adequate for departure. See United States v. Laury, 985 F.2d 1293, 1310 (5th Cir. 1993).

Roman argues that the district court improperly departed because the court granted the motion to depart after it adopted the PSR which did not find any factors warranting departure. Roman takes the district court's adoption out of context. After hearing argument on the motion for departure, the court adopted the PSR and found the offense level and criminal history category creating the range of 235 to 293 months. It immediately began to discuss its reasoning for granting the pending motion. By adopting the PSR, the district court did not deny impliedly the motion.

Roman argues that the district court's analysis on the extent of departure was reversible error. The district court, noting that VI was the highest criminal history category, considered the change to the guideline range by increasing the offense level from 33 to 34. It found that this range failed to take into account the seriousness of Roman's past and future criminal conduct. See United States v. Lambert, 984 F.2d 658, 663 (5th Cir. 1993) (en banc) (noting that the 1992 Guidelines indicate that a departure above category VI should consider incremental increases to the offense level). The court departed by increasing the offense level to 35,

with the resulting sentencing range from 292 to 365 months. The court found that 360 months was adequate to protect the public. See 18 U.S.C. § 3553(a)(2)(C).

This Court does not "require the district court to go through a ritualistic exercise in which it mechanically discusses each" resulting range it considers when departing upward. Lambert, 984 F.2d at 663. In light of the district court's detailed reasons for departure, and in light of a potential life sentence under 18 U.S.C. § 924(e), the district court did not abuse its discretion in departing upward by 67 months. See McKenzie, 991 F.2d at 205-06.

We AFFIRM.