UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2782
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

TERRY LYNN MALBROUGH,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-H-93-139-ALL)

(July 6, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

After pleading guilty to a two-count indictment on firearms charges, Terry Lynn Malbrough appeals his sentence, relying only on issues that were not raised in district court. Finding no plain error, we **AFFIRM**.

I.

Malbrough was indicted in May 1993, on charges stemming from his possession, in 1991, of firearms in violation of 18 U.S.C. § 922(g)(1) (proscribing possession of a firearm by a convicted

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[1] 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 Pursuant to that rule, the court has determined that this opinion should not be published.

felon) and 26 U.S.C. §§ 5841, 5861(d) and 5871 (proscribing possession of an unregistered sawed-off shotgun). He pleaded guilty, reserving the right to appeal an upward departure from the sentencing guideline range. In exchange for his guilty plea, the government agreed not to seek an upward departure at sentencing; not to oppose a downward adjustment for acceptance of responsibility; and not to seek a superseding indictment for additional firearms seized when Malbrough was arrested.

The presentence investigation report (PSR) calculated Malbrough's offense level as 18 and his criminal history category as V, resulting in a guideline range, using the Sentencing Guidelines effective November 1, 1990, of 51-63 months.[2] Despite the plea agreement, the PSR recommended against a downward adjustment for acceptance of responsibility, citing U.S.S.G. § 3E1.1, comment. (n.1) (1990) (providing that sentencing court should consider, *inter alia*, defendant's voluntary termination or withdrawal from criminal conduct or association). Because of the

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[2] The statutory maximum penalty for the offenses charged in both counts was 10 years. 18 U.S.C. § 924(a)(2); 26 U.S.C. § 5871. The PSR does not state why Malbrough's sentence was calculated under the 1990 Guidelines (in effect when his offenses were committed), rather than, as is usual, those effective at sentencing. *See* ***United States v. Mills***, 9 F.3d 1132, 1136 & n.5 (5th Cir. 1993) (Guidelines version effective at sentencing is to be applied, unless doing so would violate "the Constitution's prohibition of ex post facto laws"; *i.e.*, unless a prior version is more lenient). Based on the other prior convictions contained in the PSR, however, it appears that, under the 1992 Guidelines (those effective at sentencing), Malbrough's offense level under § 2K2.1 would have been higher than the 18 points assessed under the 1990 version of that section. (In any event, Malbrough doesn't challenge use of the 1990 version.) Therefore, Malbrough's range would also have been higher than the 51-63 months determined in the PSR. Thus, the 1990 Guidelines were properly used.

additional firearms found at Malbrough's arrest, the PSR concluded he had not voluntarily ended his criminal conduct.

The PSR also listed two grounds to warrant an upward departure: the additional firearms had been found at Malbrough's home; and, pursuant to U.S.S.G. § 4A1.3, his criminal history category of V significantly understated the seriousness of his past criminal conduct. *See* U.S.S.G. § 4A1.3 (1990) (providing for upward departure where reliable information indicates that defendant's past criminal conduct, or likelihood of recidivism, is not adequately reflected in criminal history score). The PSR referred to Malbrough's having been arrested on several occasions for violent conduct involving "imminent danger to victims and also the use and threatened use of physical force".

Malbrough filed objections to the PSR, contesting the recommendations for denial of an acceptance of responsibility adjustment and for an upward departure. The upward departure objection was based only on the plea agreement's provision that the government would not recommend one.

At sentencing on October 15, 1993, the court sustained Malbrough's acceptance of responsibility objection, and reduced his offense level from 18 to 15, as provided by § 3E1.1 of the 1992 Guidelines. *See* ***United States v. Tello***, 9 F.3d 1119, 1123-24 (5th Cir. 1993) (discussing § 3E1.1). With this reduction, the applicable range was 37-46 months.

The court overruled Malbrough's upward departure objection (at sentencing, Malbrough contended he needed the weapons for protection), stating:

> Mr. Malbrough, if you had a 22 rifle or a 410 shotgun under your bed to protect your family, or a 12 gauge shotgun, or a pistol, I could buy your story. But that's too many weapons, unless you were protecting your family from an invading army. I'm looking at a .41 caliber revolver, a 9mm pistol, a 30.30 rifle, a 12 gauge shotgun, and 104 rounds of assorted ammunition.
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> I do not believe that your criminal history and this offense are adequately represented by these guidelines.... [Y]ou are richly deserving an upward departure. The question is how much upward departure? What I'm going to look at is what would likely have happened to you had you been convicted for the additional firearms. I'm not punishing you for those, I'm merely just considering those; what the guidelines would call for.

The court sentenced Malbrough, *inter alia*, to 60 months imprisonment (from the 37-46 month range).

II.

We review a Guidelines sentence to "determin[e] whether [it] was imposed in violation of law or as a result of an incorrect application" of the Guidelines. ***United States v. Ashburn***, 20 F.3d 1336, 1339-40 (5th Cir. 1994) (citations and internal quotation marks omitted). The application of the Guidelines is reviewed de novo; findings of fact, for clear error. ***Id.*** at 1340 (citing ***United States v. Brown***, 7 F.3d 1155, 1159 (5th Cir. 1993)). An upward departure, reviewed only for abuse of discretion, ***United States v. McKenzie***, 991 F.2d 203, 204 (5th Cir. 1993), "will be affirmed if the district court offers `acceptable reasons' for the departure and the departure is `reasonable.'" ***United States v.***

Lambert, 984 F.2d 658, 663 (5th Cir. 1993) (*en banc*) (quoting ***United States v. Velasquez-Mercado***, 872 F.2d 632 (5th Cir.), *cert. denied*, 493 U.S. 866 (1989)). Where a challenge on appeal to a sentence was not first raised before the district court, however, our review is only for plain error; such review is discretionary. ***United States v. Rodriguez***, 15 F.3d 408, 414-16 (5th Cir. 1994) (citing cases).

On appeal, Malbrough raises only one issue: that the district court improperly applied the 1993 version of the Sentencing Guidelines to his case, thus violating the ex post facto clause of the Constitution. The crux of his argument is that the court improperly calculated his sentence based on the guidelines that would have applied if he had been convicted in 1993 of offenses involving his possession of the additional firearms. Because this was not raised before the district court, we review only for plain error.[3] ***Rodriguez***, 15 F.3d at 414.

Our power to conduct such a review is "limited", ***United States v. Olano***, ___ U.S. ___, ___, 113 S. Ct. 1770, 1776 (1993), *quoted in* ***Rodriguez***, 15 F.3d at 415: the error must be "plain", *i.e.*, clear or obvious; it must affect substantial rights (and the defendant normally must show substantial prejudice); and, finally, as noted, this court has discretion whether to conduct such a

[3] Neither Malbrough's objections to the PSR nor his request for lenity at sentencing mentioned an ex post facto argument, despite the fact the PSR recommending an upward departure. This issue also was not raised after the district court imposed sentence, despite its statement (challenged here) that it would consider "what the guidelines would call for" had Malbrough been "convicted for the additional firearms".

review.[4] ***Rodriguez***, 15 F.3d at 415-16 (citing and quoting ***Olano***, ___ U.S. at ___, 113 S. Ct. at 1777-79).

Malbrough asserts that the district court improperly relied on the 1993 Guidelines because of its statement (reiterated in the written judgment) that it would consider the guidelines applicable had Malbrough been convicted of the additional firearms offenses. This statement, however, is not an assertion that the court had abandoned the 1990 Guidelines calculation. Nor was it the only reason given for the upward departure. Rather, the court, after rejecting Malbrough's theory that he needed the firearms for protection, concluded that the guidelines range significantly under-represented Malbrough's criminal history. As well, it adopted the reasoning of the PSR, including that a departure was warranted because of Malbrough's prior violent conduct, including his unscored convictions and arrests for conduct in which a firearm was used.

There is no indication from the record, aside from the single statement on which Malbrough hangs his appeal, that the district court actually calculated Malbrough's sentence, or the departure,

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[4] Malbrough did not file a reply brief to counter the government's assertion that the plain error standard should apply.

> Needless to say, a reply brief... should have been filed. Although a reply brief is not mandatory, *see* Fed. R. App. P. 28(c), it is the best vehicle for narrowing the true issues, and is especially important -- and called for -- when a new point or issue (such as application of the narrow plain error standard) is raised in the appellee's brief.

Rodriguez, 15 F.3d at 414-15 n.7.

using the 1993 Guidelines. Even assuming, *arguendo*, that it did so, this error was neither "clear" nor "obvious". ***Rodriguez***, 15 F.3d at 415.[5] Accordingly, there was no plain error.[6]

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[5] Further, Malbrough does not assert that substantial prejudice resulted from this claimed erroneous application of 1993 Guidelines. *See* ***Rodriguez***, 15 F.3d at 415 (quoting ***Olano***, ___ U.S. at ___, 113 S. Ct. at 1778((footnote omitted). Rather, Malbrough states only that this court "cannot say with assurance that the district court would have departed upward to the same degree without violating the Ex Post Facto Clause".

[6] Although it was neither raised before or at sentencing, nor specifically noticed as an issue in his brief, Malbrough also contends that, to the extent that the upward departure was otherwise proper, his sentence nevertheless must be vacated, and his case remanded, because the district court did not follow ***United States v. Lambert***, 984 F.2d at 663. Because this objection is before us for the first time on appeal, it, too, is subject only to plain error review. ***Lambert*** ordinarily contemplates that the district court explicitly state its reasons for an upward departure under U.S.S.G. § 4A1.3 (such as that recommended by the PSR and adopted by the district court). 984 F.2d at 662-63. But,

> recognizing the complexities inherent in setting a sentence appropriate to every defendant, "we do not ... require the district court to go through a ritualistic exercise in which it mechanically discusses each criminal history category it rejects en route to the category that it selects."

Ashburn, 20 F.3d at 1344 (quoting ***Lambert***, 984 F.2d at 663; ellipsis in ***Ashburn***).

The district court cited several reasons for its departure; and, the total departure of 14 months (approximately 25% of the prior guidelines range) hardly falls into the "`very narrow class of cases'" of "drastic departures" for which ***Lambert*** requires remand. ***Ashburn***, 20 F.3d at 1344-45 (remanding for re-sentencing, where sentence given was 230% of maximum guideline range, and where district court did not make explicit its reasons for skipping two intermediate criminal history categories and increasing offense level by 4) (quoting ***Lambert***, 984 F.2d at 663). There was no plain error.

III.

For the foregoing reasons, the sentence is

AFFIRMED.