

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3024
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LAMAR BARNES,

Defendant-Appellant.

Appeal from the United States District Court
For the Eastern District of Louisiana
(CR 92 47 A 5)

(July 6, 1993)

Before POLITZ, Chief Judge, GARWOOD and SMITH, Circuit Judges.

POLITZ, Chief Judge:*

Convicted of assault with a deadly weapon and use of a firearm in relation to a crime of violence, Lamar Barnes appeals his conviction and sentence. For the reasons assigned, we affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Background

After spending the evening of February 1, 1992 drinking and fighting with his girlfriend, Barnes, a former Marine, entered the Veterans Administration Hospital in New Orleans at about 3:30 a.m. carrying a hidden semi-automatic handgun, a knife, and 41 rounds of ammunition. Demanding immediate psychiatric attention he was interviewed by Margaret Cassidy, a 71-year-old nurse. Barnes initially refused to answer when asked why he felt the need to see a psychiatrist but then erupted into a tirade of verbal abuse, expressing extreme displeasure at the VA's inability to cure his mental problems.

Tension among the VA staff turned to terror when Barnes drew his gun and jabbed its muzzle into Nurse Cassidy's face with force sufficient to break her glasses and cause serious eye injury. He then grabbed Audie Collison, a male nurse, threw him against a wall, put the gun to Collison's head, and held him in that position for 15 minutes while continuing his invectives. With Collison in tow, Barnes then moved into an adjacent room where he continued to hold Collison hostage for another 45 minutes. Collison acted with extraordinary composure, did as he was told, and eventually calmed Barnes by engaging him in conversation. With arrival of the SWAT team, prepared to put a decisive end to the situation, Barnes gave Collison his weapons and surrendered.

Barnes was indicted and convicted of assault with a deadly weapon, 18 U.S.C. §§ 7(3) and 113(c), and the knowing use of a firearm during and in relation to a crime of violence, 18 U.S.C.

§ 924(c)(1). During the voir dire of the jury panel the court excused, on the government's motion, a venireman who reported several family members with a history of severe mental illness. The court departed upward 19 months and sentenced Barnes to 120 months incarceration. Barnes appeals the release of the prospective juror and the sentence.

Analysis

Excused Juror

Barnes first challenges the excusal for cause of the prospective juror with the family members who had experienced mental disorders. Barnes acknowledges that the trial court has broad discretion to excuse jurors for cause.¹ The issue need not long detain us for the record amply supports the trial judge's action. The court asked members of the venire panel to approach the bench if they, or any member of their immediate family, had suffered any serious mental illness or emotional problems. The challenged venireman approached the bench and stated that his mother, great aunt, and sister-in-law had all experienced mental breakdowns. In response to questions by the court, prosecutor, and defense counsel, he indicated uncertainty about how he would handle evidence relating to Barnes's mental competence, an issue in the case, convincing the trial judge that an excusal for cause was in

¹ See **United States v. Jones**, 712 F.2d 115 (5th Cir. 1983).

order.² This decision was well within the trial court's broad

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THE COURT: All right, in other words, you couldn't put aside your family's mental problems completely in deciding this case then?

PROSPECTIVE JUROR: Oh, I could probably, you know.

THE COURT: What?

PROSPECTIVE JUROR: I could probably, you know.

THE COURT: Probably is a bad word. You have to be certain.

PROSECUTION: If I may ask a question: Would you be tending to think of your family members who have had mental problems in judging this case if those kinds of issues came up?

PROSPECTIVE JUROR: I would tend to maybe drift back and think about it.

DEFENSE COUNSEL: Let me ask you a question: The Judge may instruct you that you are not to be biased in any way or to base your verdict on sympathy or prejudice or anything of that nature. If he gave you that instruction, could you base your verdict strictly on the evidence taken from the witness stand?

PROSPECTIVE JUROR: I believe so.

THE COURT: But are you certain, absolutely certain? You can't believe so.

PROSECUTION: It would be harder for you?

PROSPECTIVE JUROR: It would probably be a little harder. It would be a little harder because I had a lot of --

THE COURT: Probably a little harder. I'm going to excuse you.

DEFENSE COUNSEL: [objects]

THE COURT: I will ask you another question: If you felt that there is a probability that this defendant acted the way he acted because of some mental problems, would you be more inclined to excuse him than if you did not have

discretion.

Application of the Sentencing Guidelines

Barnes first argues that the court erred in denying him a two-point reduction for acceptance of responsibility under U.S.S.G. § 3E1.1. The sentencing court, pursuant to that provision, may reduce the offense level by two points if "the defendant clearly demonstrates acceptance of responsibility for his offense." Barnes maintains that his mental problems prevented him from making a clear expression of acceptance even though those problems are not so severe as to absolve him of criminal responsibility.

In considering trial court applications of the Sentencing Guidelines we review findings of fact under the clearly erroneous standard and review application of the guidelines *de novo*.³ As credibility assessments play a central role in ascertaining a defendant's acceptance of responsibility for offense conduct, such determinations merit special deference from a reviewing court.

The trial court was acutely aware of the extent and degree of Barnes's mental problems and expressly considered that evidence in finding that Barnes did not adequately accept responsibility. Evidence of his refusal to accept responsibility was substantial. Rather than acknowledging his acts or his accountability therefor,

your knowledge of what is involved insofar as mental disease is concerned, because you have to be convinced?

PROSPECTIVE JUROR: I believe I would be more lenient.

³ 18 U.S.C. § 3742(e).

Barnes blamed his conduct malefactions on the VA system. The court's finding that Barnes did not accept responsibility to the extent he was capable of doing so was well founded;⁴ we are not wont to disturb it.

Barnes finally argues that the court erred in departing upward from the guideline range because of the nature and extent of the injuries he inflicted.

The trial court may depart from the guideline range when the guidelines do not adequately address circumstances which call for a more severe sentence.⁵ An upward departure will not be reversed unless the court failed to provide acceptable reasons for the departure or the extent of the departure is unreasonable.⁶

The guidelines do not take into account extraordinary psychological stress to a victim and expressly provide for upward departure where "a victim suffered psychological injury far more serious than that normally resulting from the offense."⁷ The court gave the following reasons for the 19-month departure: (1) the guideline sentence "did not take into consideration the tremendous potential for multiple victims, given that the offense occurred in

⁴ **United States v. Robertson**, 872 F.2d 597 (5th Cir.), cert. denied, 493 U.S. 861 (1989).

⁵ 18 U.S.C. § 3553(b).

⁶ **United States v. Fields**, 923 F.2d 358, 361 (5th Cir.), cert. denied, 111 S.Ct. 2066 (1991).

⁷ U.S.S.G. § 5K2.3 (Policy Statement).

a public area of a public hospital; (2) Collison suffered severe psychological injury."

Incorporated in the PSR was Collison's affidavit in which he recounts his resulting depression, withdrawal, and suicidal tendencies. Collison's trial testimony was to the same effect.⁸ Since Barnes took him hostage and threatened to kill him, Collison has experienced marital discord, lost 35 pounds, and been forced to seek professional counseling. He also encountered difficulty at work that eventually led to his taking workmen's compensation. We conclude that the sentencing departure was appropriate and reasonable.

The conviction and sentence are AFFIRMED.

⁸ Collison testified that he broke down and cried after the incident and initially was euphoric to be alive. Ultimately, however, "the reality of the situation set in, and [he] found [him]self withdrawing from [his] family."