

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-3743  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

MORNARD JACKSON,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Middle District of Louisiana  
(CR-93-38-A-M1)

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(June 30, 1994)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:\*

Mornard Jackson appeals an upward departure in the sentence he received following a plea of guilty of possession of crack cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). Finding no reversible error, we affirm.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

The presentence report (PSR) established that Jackson's base offense level was 10 and his criminal history category was V. Under the sentencing guidelines, the range for sentencing Jackson was 21 to 27 months. The district court determined that under U.S.S.G. § 4A1.3, an upward departure was appropriate because Jackson's criminal history category did not adequately reflect the seriousness of his past criminal conduct. The court increased Jackson's base offense level from 10 to 12 and his criminal history category from V to VI. These increases in turn resulted in an increase in the sentencing range to 30 to 37 months.

The court sentenced Jackson to 36 months' imprisonment, followed by three years' supervised release, and ordered Jackson to pay a \$50 special assessment. Although Jackson's counsel did not specifically object to the upward departure, he did argue that the district court should consider that Jackson's offenses were minor and all primarily drug-related and that Jackson had no convictions for violent offenses within the last ten years. Jackson declined to make a statement at the sentencing hearing.

II.

Jackson contends that the district court did not provide adequate reasons to support its upward departure. In particular, he argues that the court failed to provide adequate reasons for its upward departure to base offense level 12. Jackson also contends that the court erred in finding that he has a violent criminal

history, as he committed only two prior violent offenses over ten years before the instant offense.

The decision to depart from the sentencing guidelines is reviewed for abuse of discretion. United States v. McKenzie, 991 F.2d 203, 204 (5th Cir. 1993). The reasons for the upward departure articulated by the district court are findings of fact that this court reviews for clear error. United States v. Pennington, 9 F.3d 1116, 1118 (5th Cir. 1993). A finding of fact is clearly erroneous only "when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. Fitzhugh, 984 F.2d 143, 146 n.12 (5th Cir.) (internal quotation and citation omitted), cert. denied, 114 S. Ct. 259 (1993).

The district court may depart from the sentencing guidelines because of aggravating or mitigating circumstances not considered or inadequately considered by the sentencing guidelines. United States v. Jones, 905 F.2d 867, 869 (5th Cir. 1990); 18 U.S.C. § 353(b). "If reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes, the court may consider imposing a sentence departing from the otherwise applicable guideline range." U.S.S.G. § 4A1.3.

An upward departure will be affirmed on appeal if (1) the district court provides acceptable reasons for the departure and

(2) the departure is reasonable. United States v. Lambert, 984 F.2d 658, 663 (5th Cir. 1993) (en banc) (citations omitted). When making such an upward departure, the court should consider each intermediate criminal history category and explain why the applicable guideline category is inappropriate and why the chosen category is appropriate. Id. at 662-63. When departing above criminal history category VI, the court should still stay within the guidelines by considering the sentencing ranges for each intermediate base offense level. Id. It is uncertain whether the court must explain its rejection of each intermediate base offense level as well, although it appears that the court should do so. Id. As we stated, however, "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." Id. The court noted that in most cases the reasons for the district court's rejection of intermediate categories will be implicit, if not explicit, in its explanation of its upward departure. Id.

The district court gave numerous reasons for its upward departure: (1) that Jackson had four prior sentences that were not included in computing his criminal history because they occurred over ten years before the conviction at issue; (2) that Jackson had a long history of similar adult criminal conduct, including theft, violence and drug dealings; (3) that Jackson would have been considered a career offender if he had not previously received a reduction of a state distribution of pentazocine charge to a

possession charge; and (4) that Jackson had a history of drug dependency that contributed to his violent conduct. The district court also noted that Jackson had thirty-six prior arrests.

Upward departures based upon the inadequacy of a defendant's criminal history category are acceptable, United States v. Laury, 985 F.2d 1293, 1310 (5th Cir. 1993), as well as upward departures based upon repeated acts of similar adult criminal activity, United States v. Medina-Gutierrez, 980 F.2d 980, 984 (5th Cir. 1992). We also have upheld upward departures based upon prior lenient sentences received by a defendant. United States v. Carpenter, 963 F.2d 736, 744-45 (5th Cir.), cert. denied, 113 S. Ct. 355 (1992). Alcohol dependency that is directly linked to repeated dangerous criminal activity can also serve as a valid reason for an upward departure. United States v. Ramos-Serna, No. 93-5479 (5th Cir. May 18, 1994) (unpublished).

The district court's articulated reasons for its upward departure in sentencing Jackson were not clearly erroneous based upon Jackson's criminal history as outlined in the PSR and the above Fifth Circuit precedent. In particular, the finding that Jackson's criminal history was in part violent is not clearly erroneous, in view of his five prior convictions for violent offenses, including two counts of resisting arrest, two batteries, and aggravated assault with a shotgun. The district court also properly linked Jackson's drug dependency to his criminal behavior. Cf. United States v. Williams, 937 F.2d 979, 983 (5th Cir. 1991) (holding that prior drug use will not justify departure in absence

of "extraordinary aspects"), overruled on other grounds by Lambert, 984 F.2d at 662.

The district court also followed the proper procedure for upward departure as outlined in Lambert. The reasons articulated by the district court adequately support the court's upward departure in the criminal history category. The articulated reasons also adequately support its upward departure in the base offense level, as well as its rejection of the intermediate base offense level. The court's upward departure was particularly appropriate in view of the fact that Jackson would have been considered a career offender if the state charge of distribution of pentazocine had not been reduced to possession. This is not a case in which the district court's departure is "so great that, in order to survive . . . review, it will need to explain in careful detail why lesser adjustments in the defendant's criminal history score would be inadequate." Lambert, 984 F.2d at 663.

Jackson did not assert that the district court erred in considering his prior arrest record in its upward departure. Section 4A1.3 expressly states, however, that "a prior arrest record itself shall not be considered under § 4A1.3." United States v. Cantu-Dominquez, 898 F.2d 968, 970-71 (5th Cir. 1990). Although the district court erred in considering Jackson's prior arrest record, the error appears harmless, as the district court's remaining reasons were valid and sufficient to support its upward departure. See Williams v. United States, 112 S. Ct. 1112, 1120-21 (1992) (applying harmless error to court's misapplication of

sentencing guidelines).

### III.

Jackson also contends that the district court's upward departure in sentencing him was unreasonable. "The reasonableness determination looks to the amount and extent of the departure in light of the grounds for departing." Williams, 112 S. Ct. at 1121. "A sentence . . . can be 'reasonable' even if some of the reasons given by the district court to justify the departure from the presumptive guideline range are invalid, provided that the remaining reasons are sufficient to justify the magnitude of the departure." Id. The reviewing court generally defers to the sentencing court's superior "feel" for the case in making this determination. United States v. Lara, 975 F.2d 1120, 1125 n.3 (5th Cir. 1992) (citation omitted).

The district court's nine-month upward departure in sentencing Jackson was not unreasonable in view of his serious, lengthy, and violent criminal history. Further, the sentence was appropriate given that Jackson would have been considered a career offender under the guidelines if he had not received a reduction of the state distribution of pentazocine charge to a possession charge. Finally, the sentence is well below the statutory maximum sentence of twenty years. In view of the district court's detailed reasons for its upward departure and in view of the potential sentence of twenty years under 21 U.S.C. § 841(b)(1)(C), the district court's nine-month upward departure in sentencing Jackson was not error.

AFFIRMED.