

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4832
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHRISTOPHER ZEMER,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 6:93-CR-11-ALL
- - - - -
(October 27, 1993)

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

PER CURIAM:*

Christopher Zemer argues that the district court erroneously determined that it could not depart downward in imposing his sentence.

This Court may vacate a district court's decision not to depart downward if the district court mistakenly believed it was not permitted to depart. United States v. Soliman, 954 F.2d 1012, 1014 (5th Cir. 1992). The burden of demonstrating a factual predicate justifying a downward departure is on the

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

defendant. See United States v. Alfaro, 919 F.2d 962, 965 (5th Cir. 1990).

A departure is permitted where "the court finds `that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines[.]'" U.S.S.G. § 5K2.0, p.s. (quoting 18 U.S.C. § 3553(b)). The introductory comments to the guidelines dealing with departures state that "[w]hen a court finds an atypical case, one to which a particular guideline linguistically applies but where the conduct significantly differs from the norm, the court may consider whether a departure is warranted." U.S.S.G. Chapter 1, Part A, ¶ 4(b).

The district court expressed its opinion that the guideline sentencing range was harsh under the circumstances of the case. A district court's disagreement with the guidelines does not support a departure. United States v. Jones, 905 F.2d 867, 870 (5th Cir. 1990). The district court rejected the defendant's legal challenge to the sentence because it found that there was evidence that Zemer sold some of the marijuana which he grew in his yard. The record does not reflect that Zemer disputed this finding with any evidence other than his self-serving statement that the \$1600 payment from the individual reporting the marijuana purchase was a loan. The district court is not bound by the self-serving statement of a defendant as to his participation in an offense. United States v. Badger, 925 F.2d 101, 105 (5th Cir. 1991). Zemer did not carry his burden of

showing the evidence in the PSR was materially untrue or unreliable. See United States v. Kinder, 946 F.2d 362, 366 (5th Cir. 1991), cert. denied, 112 S.Ct. 1677 (1992).

The district court's denial of the departure reflected its determination that Zemer's limited distribution of marijuana fell within the realm of conduct Congress sought to penalize for producing and distributing marijuana. The district court's ruling indicated that it was aware of its authority to depart downward under certain circumstances, but it determined that the facts of this case did not legally justify the departure. The record does not reflect that the district court acted under an incorrect assumption in denying the departure.

Nor did the finding of the district court reflect an application of the guidelines in violation of the law. Even if this Court would agree that the conversion method was intended to apply to large-scale manufacturers and even though Zemer's distribution activities may have been on a smaller scale than those of most manufacturers, his conduct was not so significantly different from the norm as to mandate a departure. See United States v. Buenrostro, 868 F.2d 135, 136 (5th Cir. 1989), cert. denied, 495 U.S. 923 (1990) (a refusal to depart will be vacated if it violates law).

AFFIRMED.