

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4944
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TERRY WAYNE TOWNLEY,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana
(CR-91-20008-01)

(December 28, 1993)

Before JOLLY, WIENER and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

In this criminal sentencing case, Defendant-Appellant Terry Wayne Townley appeals the sentence imposed, following remand from this court for resentencing, for his conviction on a guilty plea to

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

conspiracy to kidnap, in violation of 18 U.S.C. § 1201. His challenges and assignments of error arise from the sentencing court's determination that an upward departure was in order. Finding no reversible error, we affirm.

I

FACTS AND PROCEEDINGS

Pursuant to a plea agreement, Townley pleaded guilty to one count of conspiracy to kidnap, under a superseding indictment, in exchange for the dismissal of the remaining three counts. The district court upwardly departed from the guideline range of 121-151 months imprisonment and sentenced Townley to a 25-year (300 month) term of imprisonment, a five-year term of supervised release, and restitution in the amount of \$1,326.45. As the district court made insufficient findings to support the grounds upon which it based departure, and as this error was not harmless, we vacated Townley's sentence and remanded to the district court for resentencing. United States v. Townley, No. 92-4900 (5th Cir. March 9, 1993) (unpublished).

On remand, the district court found that 1) Townley's criminal history category did not take into account the seriousness of his past criminal conduct; 2) the victim suffered greater than normal psychological harm from the offense, with prolonged and enduring effects; 3) the guidelines do not adequately take into account the fact that Townley sexually exploited the victim; and 4) Townley's conduct was unusually cruel, heinous, and degrading. The court again sentenced Townley to a 25-year term of imprisonment, a five-

year term of supervised release, and restitution in the amount of \$1,326.45. Townley again timely appealed his sentence.

II

ANALYSIS

A. Extreme Psychological Harm

Townley first challenges the district court's finding that an upward departure was warranted because of the extreme psychological harm inflicted on the victim.

Findings of fact that underlie a district court's sentencing decision are reviewed under the clearly erroneous standard. United States v. Lara, 975 F.2d 1120, 1124 (5th Cir. 1992). Under U.S.S.G. § 5K2.3, p.s., an upward departure is authorized if the victim suffered a much more serious psychological injury than that normally resulting from the crime.

Normally, psychological injury would be sufficiently severe to warrant application of this adjustment only when there is a substantial impairment of the intellectual, psychological, emotional, or behavioral functioning of a victim, when the impairment is likely to be of an extended or continuous duration, and when the impairment manifests itself by physical or psychological symptoms or by changes in behavior patterns[.]

§ 5K2.3, p.s.

In determining the psychological effect on the victim, the district court relied on the testimony of the psychiatrist who had treated her for six months following the kidnapping. At the resentencing hearing, Dr. Rathmell testified that the victim sought treatment because she was reluctant to go out anywhere and feared driving home by herself, was unable to concentrate at work, had difficulty sleeping, and suffered from flashbacks of the

kidnapping. Dr. Rathmell was of the opinion that the victim's psychological harm was greater than that suffered by most kidnapping victims in that the victim feared both for her own safety and for the safety of her child. The victim also expressed the fear that Townley would never leave her alone, and that eventually he would kill her. According to Dr. Rathmell, the victim's psychological "scarring" that resulted from her ordeal will continue throughout her life.

The district court also had before it the testimony of Steven Ek, a Special Agent with the Federal Bureau of Investigation assigned to the victim's case. Ek testified at the resentencing hearing that the victim was hysterical, fearful, and depressed after Townley telephoned her twice from prison. She told Ek "that she felt that she would never be able to break contact with [Townley]."

The record supports the district court's finding that the victim suffered greater than normal psychological harm from the offense, and that such harm is likely to be of extended duration. Thus, the court did not clearly err in upwardly departing under § 5K2.3, p.s.

B. Extreme Conduct

Townley next argues that the district court erred in departing from the guidelines on the basis of his extreme conduct.

Townley's challenge to the factual basis for departure under § 5K2.8, p.s., is reviewed for clear error. See Lara, 975 F.2d at 124. Section 5K2.8, p.s., provides that:

If the defendant's conduct was unusually heinous, cruel, brutal, or degrading to the victim, the court may increase the sentence above the guideline range to reflect the nature of the conduct. Examples of extreme conduct include torture of a victim, gratuitous infliction of injury, or prolonging of pain or humiliation.

The district court discussed Townley's "extreme and unrelenting" conduct, noting that Townley had stalked his victim prior to the kidnapping and "that despite this court's warning him not to do so, he has continued to telephone his victim up to almost the day of re-sentencing." With respect to the kidnapping, itself, the court stated:

[T]he defendant . . . kidnapped [the victim] at knife and gun point, held her for nearly ten days against her will, and forced her to have sex with him. He treated the victim in an extremely degrading and cruel manner, including denying her the use of proper facilities and making her relieve herself in the woods while he watched. She was in constant fear of her life for the ten days that she was held captive.

As the record before us on appeal evinces extreme conduct of the kind described in § 5K2.8, p.s., we conclude that the court did not clearly err in departing upward based upon Townley's extreme conduct.

C. Criminal History: Adequacy of Portrayal

Townley also contends that the district court abused its discretion in finding that his criminal history score did not adequately portray his criminal past.

We review for clear error a district court's finding that a defendant's score inadequately reflects his criminal history. United States v. Lopez, 871 F.2d 513, 514-15 (5th Cir. 1989). Section 4A1.3, p.s., explicitly authorizes departure if "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." When explaining an upward departure under § 4A1.3, p.s., the district court need not "incant the specific language used in the guidelines" United States v. De Luna-Trullijo, 868 F.2d 122, 124 (5th Cir. 1989). However, it is desirable "that the court identify clearly the aggravating factors and its reasons for connecting them to the permissible grounds for departure under section 4A1.3." Id.

Relying on the Presentence Investigation Report (PSR), the district court explained that a juvenile adjudication for aggravated battery was not counted against Townley because it was outside the limitations period. Had this offense counted, Townley would have been classified as a career offender under § 4B1.1 and he would have faced a sentencing range of 360 months to life imprisonment. The district court also noted that the guidelines did not account for the fact that Townley had been arrested numerous times for offenses of a violent nature. Under § 4A1.3, p.s., "a prior arrest record itself shall not be considered." The PSR reflects, however, that Townley pleaded guilty to several crimes involving acts of violence that were unaccounted for by the guidelines. Thus, given Townley's criminal history, the district court did not clearly err in finding that Townley's criminal history category inadequately reflected the seriousness of Townley's past criminal conduct.

D. Sexual Exploitation

Townley also contends that the district court erred in departing on the basis that the victim was sexually exploited. He argues that because, at the time of sentencing, the offense-conduct guideline for kidnapping provided for a three-level increase for sexual exploitation, the court should have included this specific offense characteristic in calculating the appropriate guideline sentence.

Courts apply the version of the guidelines in effect at the time of sentencing unless to do so would cause an ex post facto problem. United States v. Ihegworu, 959 F.2d 26, 29 n.7 (5th Cir. 1992). The ex post facto prohibition is violated by the retrospective application of a law that disadvantages the offender it affects in a substantial manner. United States v. Suarez, 911 F.2d 1016, 1021-22 (5th Cir. 1990). When this kidnapping took place January 1991 the 1990 guidelines were in effect, and they did not include an enhancement for sexual exploitation of the victim. Effective November 1, 1991, however, § 2A4.1(b)(5) was amended to provide for a three-level increase to the base offense level for kidnapping if the victim was sexually exploited. Thus, to avoid any ex post facto problems, the district court properly applied the version of the guidelines in place at the time the offense occurred. The court further found that "sexual exploitation of the victim was not adequately taken into consideration by the applicable (1990) guidelines and is therefore a valid ground for departure." Townley does not challenge this

finding. But even if he had it would have been to no avail, as we find no error in the district court's analysis and application of the guidelines in consideration of the potential ex post facto problems.

E. Reasonableness of the Departure

Townley also argues that the extent of the departure was unreasonable in that the 300-month sentence ultimately imposed was nearly twice the maximum guideline sentence of 151 months. When a sentence falls within the statutory limits, we will review it only for a "gross abuse of discretion." United States v. Huddleston, 929 F.2d 1030, 1031 (5th Cir. 1991) (internal quotation and citation omitted). The 300-month term of incarceration was well within the statutory limit of life imprisonment for this crime. See 18 U.S.C. § 1201. Furthermore, "the mere fact that a departure sentence exceeds by several times the maximum recommended under the Guidelines is of no independent consequence in determining whether the sentence is reasonable." United States v. Roberson, 872 F.2d 597, 606 n.7 (5th Cir.), cert. denied, 493 U.S. 861 (1989). In Roberson, we upheld a sentence more than three times the guideline maximum and departures of even greater multiples have been upheld. Roberson, 872 F.2d at 600; see also Lara, 975 F.2d at 1127 n.6.

Here, the district court relied on §§ 5K2.3, p.s., 5K2.8, p.s., 5K2.0, p.s., and 4A1.3, p.s., as the bases for its upward departure. Departures under §§ 5K2.3, p.s., 5K2.8, p.s., 5K2.0, p.s., are "unguided" in that the guidelines do not provide explicit direction as to the extent of the adjustment to be imposed. See

Lara, 975 F.2d at 1125 n.4. Furthermore, the district court need not give reasons for the extent of its § 5K2.0 departure. See United States v. Lee, 989 F.2d 180, 183-84 (5th Cir. 1993). Under the requirements set forth in United States v. Lambert, 984 F.2d 658, 662-63 (5th Cir. 1993) (en banc), however, for a sentencing court to depart under § 4A1.3, it must "explain why the criminal history category as calculated under the guidelines is inappropriate and why the category it chooses is appropriate. If the district court finds that it is necessary to go beyond the guidelines, the court must give adequate reasons why the guideline calculation is inadequate and why the sentence it imposes is appropriate."

In the instant case the district court explained that an upward departure to criminal history category VI would have increased Townley's maximum sentence by only 37 months. In light of the factors in Townley's criminal history for which the guidelines did not account, the court concluded that this additional period of incarceration would be inadequate. Id. We do not "require the district court to ritualistically discuss each criminal history category it rejects." Lambert, 984 F.2d at 664. The district court gave acceptable reasons for its upward departure and the extent of that departure was not a gross abuse of discretion.

AFFIRMED.