

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7231

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JUAN JOSE ALONSO-PEREZ,
a/k/a Armando Garcia,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-L-226)

(February 4, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:*

Juan Jose Alonso-Perez (Alonso-Perez) was convicted of five counts of being a felon in possession of firearms in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1). Alonso-Perez appeals his sentence. 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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I.

On September 8, 1992, Alonso-Perez was indicted for five counts of being a felon in possession of firearms. Alonso-Perez's original trial ended in a mistrial when the jury could not reach a verdict. However, on December 22, 1992, a second jury convicted Alonso-Perez on all five counts charged in the indictment, and the district court sentenced Alonso-Perez to 235 months imprisonment on each count to run concurrently, and three years supervised release, and ordered him to pay a \$250 special assessment. Alonso-Perez appeals only the sentence imposed by the district court.

II.

The district court's sentence will be upheld on appeal so long as it results from a correct application of the guidelines to factual findings that are not clearly erroneous. United States v. McCaskey, 9 F.3d 368, 372 (5th Cir. 1993). We review issues of law de novo. United States v. Soliman, 954 F.2d 1012, 1013 (5th Cir. 1992). As a general rule, we will not disturb the sentencing court's discretionary decision not to depart downward from the guidelines. Id. at 1014. However, we need not give deference to the sentencing court's exercise of discretion if the court mistakenly believed that departure was not permitted. Id.

III.

Based on a total offense level of thirty-three and Alonso-Perez's criminal history category of VI, the district court determined that the appropriate guideline sentencing range was

235 to 293 months. Alonso-Perez scored an offense level of thirty-three because he was subject to an enhanced sentence under 18 U.S.C. § 924(e) as an armed career criminal. Pursuant to the guidelines, the minimum offense level for Alonso-Perez, as an armed career criminal, is level thirty-three. See United States Sentencing Commission, Guidelines Manual, § 4B1.4 (Nov. 1992).¹ On appeal, Alonso-Perez does not argue that the district court incorrectly determined his sentence under the guidelines. Rather, Alonso-Perez argues that the district court erroneously concluded that it did not have discretion to depart from the sentencing guidelines.

Criminal history category

At the sentencing hearing, Alonso-Perez requested that the district court depart from the applicable sentencing guideline because Alonso-Perez's criminal history category of VI overrepresented the seriousness of his criminal history. The district court can depart from the guideline range if 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 that should result in a sentence different from that described." 18 U.S.C. § 3553. In this case, the district court ultimately declined to depart from the sentencing guideline.

¹ All citations to the sentencing guidelines in this opinion are to the version effective November 1, 1992.

In response to Alonso-Perez's argument that category VI overrepresented the seriousness of his criminal history the district court stated:

and with respect to the category VI, I think the probation officer has been pretty careful about it. I mean, I think that they've scored it pretty fairly. Even on that rash of burglaries all in a row, they didn't give you nine points for that. They only gave you a total of five points. So I just don't think I can honestly say that that score is an overstatement, the category VI.

It is clear from the previous passage that the district court did not reject Alonso-Perez's request for a downward departure of his criminal history category because the district court believed that it did not have discretion to do so; rather, the district court determined that the seriousness of his criminal history was not overrepresented. Therefore, Alonso-Perez's argument is without merit.

Substantial assistance to authorities

Pursuant to U.S.S.G. § 5K1.1, the sentencing court may downwardly depart based on the defendant's substantial assistance to the government in the prosecution or investigation of another person provided that the government first files a motion stating that the defendant has provided substantial assistance. In this case, the government did not file a motion for downward departure based on Alonso-Perez's substantial assistance, and Alonso-Perez did not argue that the government's refusal was based on an unconstitutional motive. Therefore, the district court could not have erred in refusing to grant Alonso-Perez a downward departure based on substantial assistance to the government. See Wade v.

United States, 112 S. Ct. 1840, 18443-44 (1992) (noting that a defendant's claim that he provided substantial assistance, without a request by the government for a downward departure, will not entitle the defendant to a remedy unless he shows that the government's refusal to request a downward departure is based upon an unconstitutional motive); see also United States v. Urbani, 967 F.2d 106, 109 (5th Cir. 1992) (noting that under the Supreme Court's decision in Wade, "absent a substantial threshold showing of such a constitutionally improper motive, district courts lack authority to scrutinize the level of the defendant's cooperation and interpose their own assessment of its value").

Reduction of offense level

According to Alonso-Perez, the district court should have departed from the sentencing guideline range because the district court concluded that his case contained circumstances not adequately considered by the guidelines. Alonso-Perez relies on the following passages to conclude that the district court believed that mitigating factors existed in his case but that the district court believed that it did not have discretion to depart from the sentencing guidelines:

This is such an etypical [sic] case. It's not a case of a young man committing crimes within two or three months of themselves and just being on drugs. And he's not on drugs. It's not a case like the bank robber who commits several bank robberies and is arrested. It is an etypical [sic] case. He's a C.I. who is actually encouraged to commit a crime in order to help the government and then he knows how to work both sides. But he is not your typical armed career criminal. The weapons he was buying was to resell them. He was not using them in his career. He was buying and selling weapons.

. . . .

The sentence that you score is not a sentence that I would pick for you. I mean, I'm not saying you're a hero or done good things, but it just seems to me it is kind of an overkill in this situation. I just can't bring myself to say that it is. . . that it has overstated the case, because it's what the Congress is apparently prescribing, and I'm not sure that I have the authority to say that the level 33, if that's what the Congress has prescribed, is an overstatement.

However, we do not agree that the district court believed that it was without discretion to downwardly depart in this case. The quoted passage reflects the district court's personal disagreement with the fact that the sentencing guidelines gives Alonso-Perez an enhanced sentence as a career armed criminal. Apparently, the district court did not believe that Alonso-Perez was really an "armed career criminal." However, mere disagreement with the guidelines is not an adequate basis for the district court to depart. United States v. Jones, 905 F.2d 867, 869 (5th Cir. 1990). Therefore, we conclude that the district court did not err in sentencing Alonso-Perez.

IV.

For the foregoing reasons, we AFFIRM the district court's judgment of conviction and sentence.