

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-7502  
(Summary Calendar)

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LEWIS MILTON HOUSTON,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Mississippi  
(CR 93-13-W-C)

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(May 4, 1994)

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

PER CURIAM:\*

Defendant-Appellant Lewis Milton Houston was convicted on his guilty plea of violating 18 U.S.C. § 922(g), felon in possession of a firearm. He appeals the sentence imposed by the district court,

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

claiming error by the district court in its assessment of a three-level increase under Guidelines § 3A1.2 and a two-level increase under § 3C1. As our review of the case reveals no reversible sentencing error, we affirm.

## I

### FACTS AND PROCEEDINGS

After responding to a call about a domestic dispute at a health clinic in Jackson, Mississippi, a police officer eventually pursued Houston as he fled the scene and finally apprehended him. During the chase a fully-loaded .25 caliber semi-automatic handgun fell to the ground from Houston's jacket pocket.

Houston pleaded guilty to a one-count indictment charging him with possession of a firearm by a convicted felon. At sentencing, the district court accepted the recommendation in the PSR (which calculated the recommended sentence range on the bases of, inter alia, a three-level increase under § 3A1.2(b) and a two-level increase under § 3C1), overruled Houston's objections, and sentenced Houston to 120 months incarceration, three-years supervised release, and a mandatory \$50 fine. Houston timely appealed.

## II

### ANALYSIS

#### A. Official Victim

Houston argues that the three-point enhancement under § 3A1.2(b), the "official victim" guideline provision, should not have been applied to his case because there is no evidence that he

either pointed or fired the gun at the officer. Houston challenges the district court's determination that his pulling the gun from his jacket pocket was tantamount to an aggravated assault.

We review challenges to the district court's interpretation of the sentencing guidelines de novo. United States v. Rodriguez, 942 F.2d 899, 901 (5th Cir. 1991), cert. denied, 112 S.Ct. 990 (1992). A defendant's base offense level is increased by three levels if

during the course of the offense or immediate flight therefrom, the defendant . . . , knowing or having reasonable cause to believe that a person was a law enforcement or corrections officer, assaulted such officer in a manner creating a substantial risk of serious bodily injury[.]

§ 3A1.2(b). Houston relies on application note 1 that states, "[t]his guideline applies when specified individuals are victims of the offense. This guideline does not apply when the only victim is an organization, agency, or the government." § 3A1.2, comment. (n.1). We have determined that application note 5, not application note 1, governs § 3A1.2(b). See United States v. Ortiz-Granados, 12 F.3d 39, 43 (5th Cir. 1994). Application note 5 to § 3A1.2 provides that § 3A1.2(b)

applies in circumstances tantamount to aggravated assault against a law enforcement or corrections officer, committed in the course of, or in immediate flight following, another offense, such as bank robbery. While this subdivision may apply in connection with a variety of offenses that are not by nature targeted against official victims, its applicability is limited to assaultive conduct against law enforcement or corrections officers that is sufficiently serious to create at least a "substantial risk of serious

bodily injury" and that is proximate in time to the commission of the offense.

§ 3A1.2, comment. (n.5). Adjustments under this guideline are determined on the basis of all relevant conduct as defined by § 1B1.3. United States v. Gonzales, 996 F.2d 88, 93 (5th Cir. 1993).

We are satisfied by our review of all of the relevant conduct surrounding this offense that the three-point adjustment to Houston's offense level is justified. Theresa Wilson called the local ATF office on behalf of her friend, Victoria Pate. Ms. Wilson met the responding officer, Steve Sansom, and told him that Ms. Pate was being harassed by Houston inside the clinic. Sansom found Ms. Pate sitting next to Houston, looking visibly shaken. In his report the police officer noted that Houston stood up and informed the officer that he (Houston) had served 6 years in prison and that he was not being taken anywhere for anything. Houston then ran from the building and Sansom followed in pursuit. The police officer's report described the subsequent events as follows:

After he was outside, the suspect put his left hand inside his jacket pocket. The suspect was still running and at the same time, began turning his upper body to his left. He then started pulling his left hand out of his pocket. He produced a chrome plated handgun. From his actions, there was no doubt that he was going to shoot at this officer. It was obvious that the handgun became snagged on the linings of the jacket pocket. The lining came out of the pocket. The suspect had the gun completely out of his pocket as he was turning. Then the handgun fell. It was obvious that the suspect's gun was snatched from his grip as it snagged on the pocket

lining. The suspect then turned away and started running away.

The PSR contains the same account of these events.

Ms. Pate was interviewed by ATF officers following the incident at the clinic, and she subsequently testified at the sentencing hearing as well. She confirmed that she had sworn out a misdemeanor warrant for assault and a peace bond against Houston, her former boyfriend, and that on the day at issue Houston appeared at the clinic threatening to "blow her brains out" and to kill Ms. Wilson. Ms. Pate also indicated that the reason she did not advise the responding officer that Houston was armed was that she feared the possible consequences. She stated that at the clinic she was fearful of Houston and that he "acted like he was going off, losing it or something, [by] the way he was talking."

The court properly considered all of Houston's relevant conduct before applying § 3A1.2(b). After Houston's attorney suggested that the officer could have been apprehensive about what Houston intended to do with the gun without being in a substantial risk of serious bodily injury, the court responded:

THE COURT: But what about the rest of the circumstances that the officer mentions in his report and that are mentioned also in the presentence investigation report that at the time he initially approached this defendant, that the defendant told him he wasn't going anywhere and appeared to be surly and combative.

MR. KIRKSEY: I don't really think that has any bearing on whether or not he, at that point in time, thereas -- he was not under any substantial risk of bodily injury. He stated to me, Your Honor, he didn't even realize Mr. Houston had a weapon until he dropped it.

THE COURT: I understand that. But I'm looking at the big picture as to what your client's attitude was at that time and during the circumstance.

. . . that your client was threatening someone and saying he was going to blow her brains out.

. . .

THE COURT: All right. And then the police officer claimed that your client made a statement that he wasn't going anywhere. And thereafter was the chase, and thereafter was the apprehension on the part of the police officer.

What I'm asking, then, is aren't you sort of isolating just the chase and not looking at the entire circumstance to see what your client's disposition was at the time?

In light of all of the circumstances, we reject Houston's argument that, as he never reached the point of actually brandishing the gun or aiming it at the officer, Houston did not present a substantial risk of serious bodily injury to the officer.

B. Obstruction of Justice

Houston also asserts that the district court erred by imposing a two-level increase under § 3C1.1 for obstructing or impeding the administration of justice, based on a statement that he asked Ms. Pate to make to the prosecutor. Houston urges that the statement does not support a § 3C1.1 adjustment because he was not under indictment at the time of the purported conversation.

We review the finding that Houston obstructed justice under the clearly erroneous standard. United States v. McDonald, 964 F.2d 390, 392 (5th Cir. 1992).

U.S.S.G. § 3C1.1 authorizes a two-level increase if the defendant "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense. . . ." See § 3C1.1. Application note three to § 3C1.1 provides examples of what constitutes obstruction of justice, including:

3(b) committing, suborning, or attempting to suborn perjury.

With regard to obstruction of justice, the PSR states in pertinent part:

. . . On March 3, 1993, after Houston was arrested on the federal charges, Pate called AUSA May and advised her [that] the gun Houston was charged with possessing was actually one he took from her at the Health Department on the day of the incident. Pate reported she bought the gun from a person on the street for \$30 several days prior to the incident. She asked the AUSA how this information would effect [sic] the Federal case against Houston. She was told it would have no effect on the felon in possession of a firearm charge. Pate later recanted this statement and told AUSA May that Houston appealed to her to give that information to officials because she was the only one who could help him in this matter.

Ms. Pate similarly testified at the sentencing hearing that Houston had made the request regarding the gun. Houston's argument that he was not under federal indictment at the time of his alleged request to Pate is both factually inaccurate (as he had been indicted on February 2) and inconsequential. Although Ms. Pate was advised that her statement would not assist Houston, his solicitation of her assistance in proffering such a false explanation of the presence of the firearm was directly related to the offense charged

and was obviously made with the hope that it would affect the case. The district court did not err in imposing a two-level enhancement for obstruction of justice. McDonald, 964 F.2d at 392.

For the foregoing reasons, Houston's sentence is  
AFFIRMED.