UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-8091

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLARD LEE MCDANIEL,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(EP-92-CR-202)

(December 16, 1993)

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

PER CURIAM:[*]

Defendant Willard Lee McDaniel was tried before a jury and convicted of possessing an unregistered firearm, in violation of 26 U.S.C. § 5861(d) (1988), and causing another person to travel in interstate and foreign commerce in connection with a murder-for-hire scheme, in violation of 18 U.S.C. § 1958. The district court sentenced McDaniel to ten years imprisonment on the murder-for-hire count and a concurrent term of forty-one months on the firearm

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

count.[1] McDaniel now appeals his conviction and sentence, arguing that: (1) the government's conduct constituted outrageous conduct as a matter of law, thus barring his prosecution; (2) the government entrapped him as a matter of law; and (3) the district court's application of sentencing guideline § 2E1.4 to his murder-for-hire conviction resulted in an unconstitutional sentence. We affirm the district court's decision.

I

The Federal Bureau of Investigation ("FBI") learned from a confidential informant that McDaniel was holding several million dollars in drug-related proceeds for Charlie Lightborne, an incarcerated drug dealer. Believing that McDaniel would not voluntarily turn over the money, FBI agents looked for "a chink" in McDaniel's "armor" to convince McDaniel to release the money. The FBI learned that McDaniel had, for several years, been attempting to hire someone to murder Mario Tarin, a Mexican citizen who accidentally killed McDaniel's son several years earlier. Based on that information, the FBI assigned Agent Dan Gonzalez to contact McDaniel and pose as a hit man.

Gonzalez first contacted McDaniel in the summer of 1991 and offered to assist McDaniel with his "problem."[2] At McDaniel's suggestion, the men agreed to meet at a later date when Gonzalez

---

[1] McDaniel also received a $10,000 fine, terms of supervised release, and special assessments.

[2] Throughout the undercover operation, Gonzalez recorded each conversation he had with McDaniel with hidden tape recording equipment.

would be traveling through El Paso. McDaniel returned Gonzalez's subsequent call to set up the meeting, and McDaniel provided Gonzalez with a work number where he could be reached. At the meeting, McDaniel stated that he previously paid an individual $1,000 to kill Tarin, but the murder never occurred. McDaniel and Gonzalez then agreed that Gonzalez would kill Tarin for $9,000 and collect $1,000 from the first hired killer.[3]

Gonzalez and McDaniel met again shortly thereafter, and McDaniel related his difficulty in obtaining the money to pay Gonzalez's fee. McDaniel then told Gonzalez that he had contacted an individual who could get Gonzalez work either as a drug trafficker or money runner. The men discussed lowering the price of the murder if McDaniel could procure additional work of an unlawful nature for Gonzalez. McDaniel subsequently indicated to Gonzalez that he had collected the money to pay Gonzalez for killing Tarin. At McDaniel's suggestion, he and Gonzalez met at a business owned by Ray Forti, a friend of McDaniel, and McDaniel gave Forti $4,000 to hold as a downpayment for Tarin's murder. McDaniel then drove Gonzalez to Mexico where McDaniel identified Tarin, his residence, place of business, and his vehicle.

Approximately two weeks thereafter, Gonzalez called McDaniel and informed McDaniel that he was in Texas and ready to commit the murder. Pursuant to his agreement with McDaniel, Gonzalez then went to Forti's shop to pick up the $4,000 downpayment. Forti,

---

[3] Gonzalez also told McDaniel that he was a drug dealer and a money runner.

however, refused to release the money without McDaniel's approval, so McDaniel came to the shop to give Gonzalez the money. To prove that he killed Tarin, Gonzalez showed McDaniel pictures of the body.[4] Because McDaniel wanted to investigate whether Tarin actually was dead, Gonzalez agreed to return the next week to collect the remainder of the fee. When Gonzalez returned to Forti's shop, Forti once again refused to pay Gonzalez without McDaniel's authorization. Gonzalez then met with McDaniel, who offered to sell marijuana, hand grenades, explosives, and a sawed-off shotgun to Gonzalez. Later that same day, the two men met for McDaniel to deliver the last installment payment, and McDaniel produced the shotgun, marijuana, and explosives along with the $5,000 owed. FBI agents arrested McDaniel at this meeting.

II

McDaniel initially contends that because the government engaged in outrageous conduct as a matter of law, thus violating his right to due process, the government should be barred from prosecuting him. McDaniel specifically asserts that the government's efforts to play on his grief over his son's death in an attempt to coerce him to surrender Lightborne's money constitute outrageous conduct. Additionally, McDaniel alleges that Gonzalez introduced the subjects of weapons and drugs into their conversations to create additional offenses with which McDaniel could be charged, thereby increasing the FBI's leverage. The

[4] Tarin cooperated with the FBI by posing, as if he were dead, for the photographs shown to McDaniel. Tarin also agreed to disappear from his residence and work during the week following the "murder."

government, on the other hand, argues that it was legitimately investigating both McDaniel's murder-for-hire scheme and his money laundering activities with Lightborne. The government states that although McDaniel's motivation to kill Tarin may have originated from a tragic event, such an incentive neither justifies McDaniel's conduct nor makes the government's actions outrageous.

The outrageous conduct defense is applicable where "the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction." *United States v. Russell*, 411 U.S. 423, 431-32, 93 S. Ct. 1637, 1642-43, 36 L. Ed. 2d 366 (1973). The defense is available only in the "rarest and most outrageous circumstances"))where the conduct of law enforcement officials is so outrageous as to be fundamentally unfair or shocking to the universal sense of conscience. *United States v. Stanley*, 765 F.2d 1224, 1231-32 (5th Cir. 1985); *see also Russell*, 411 U.S. at 432, 93 S. Ct. at 1643. Furthermore, "the outrageous-conduct defense requires not only government overinvolvement in the charged crime but a passive role by the defendant as well. A defendant who actively participates in the crime may not avail himself of the defense." *United States v. Arteaga*, 807 F.2d 424, 427 (5th Cir. 1986); *see also United States v. Yater*, 756 F.2d 1058, 1066 (5th Cir.), *cert. denied*, 474 U.S. 901, 106 S. Ct. 225, 88 L. Ed. 2d. 226 (1985). We have never invalidated a conviction on this ground. *See United States v. Collins*, 972 F.2d 1385, 1396 (5th Cir. 1992), *cert. denied*, ___

U.S. ___, 113 S. Ct. 1812, 123 L. Ed. 2d 444 (1993).

Assuming *arguendo* that Gonzalez's actions constituted outrageous conduct, we find that the record evidence demonstrates that McDaniel actively participated in the murder-for-hire scheme. Once Gonzalez offered his services, McDaniel located Tarin, gathered $9,000 for Gonzalez's payment, drove Gonzalez to Mexico to identify Tarin, and arranged for Forti to hold the payment for Gonzalez's services. Moreover, when Gonzalez confided that he was involved with drug trafficking, McDaniel volunteered to introduce him to other persons in the drug business and made initial contacts with these individuals on Gonzalez's behalf. Thus, based on his active participation in facilitating the murder, McDaniel may not avail himself of the outrageous conduct defense. *See, e.g., United States v. Nissen*, 928 F.2d 690, 693 (5th Cir. 1991); *Stanley*, 765 F.2d at 1232.

III

McDaniel also contends that the government entrapped him as a matter of law into committing the offenses of which he was convicted. McDaniel asserts that Gonzalez entrapped him by contacting on eight separate occasions to induce McDaniel to commit the murder-for-hire offense. Additionally, McDaniel argues that it was Gonzalez who suggested that McDaniel become involved with weapons. The government argues that McDaniel was predisposed to commit the murder-for-hire offense because he had previously hired another individual to murder Tarin. As further evidence of McDaniel's predisposition, the government points to McDaniel's

enthusiastic participation in the murder-for-hire scheme.

"Entrapment as a matter of law is established only where a reasonable jury could not find that the government discharged its burden of proving the defendant was predisposed to commit the crime charged." *United States v. Arditti*, 955 F.2d 331, 342 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 597, 121 L. Ed. 2d 534 (1992). Where, as here, the district court gives an instruction on entrapment and the jury rejects the defense, "the standard of review is whether, when viewing the evidence in the light most favorable to the [g]overnment, a reasonable jury could find, beyond a reasonable doubt, that the defendant was predisposed to commit the offense." *United States v. Morris*, 974 F.2d 587, 588 (5th Cir. 1992); *see also Jacobson v. United States*, ___ U.S. ___, 112 S. Ct. 1535, 118 L. Ed. 2d 174 (1992). "It is well established that a defendant's enthusiasm for the crime can satisfy the predisposition requirement." *United States v. Hudson*, 982 F.2d 160, 162 (5th Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 100, 126 L. Ed. 2d 67 (1993).

The record demonstrates that McDaniel desired to have Tarin murdered, had unsuccessfully attempted to have Tarin killed on a prior occasion, was willing to pay $9,000 to have Gonzalez kill Tarin, and was willing to sell a firearm, drugs, and explosives to Gonzalez. Moreover, McDaniel actively participated in the murder-for-hire scheme by locating and identifying Tarin for Gonzalez. Furthermore, at no time did McDaniel resist participating in the

proposed scheme. *Arditti*, 955 F.2d at 343. We find that a reasonable jury could determine beyond a reasonable doubt that McDaniel had the predisposition to commit the charged crimes. *See United States v. Mora*, 994 F.2d 1129, 1137-38 (5th Cir.), *cert. denied*, ___ U.S. ___, ___ S. Ct. ___, 126 L. Ed. 2d 393 (1993).

IV

McDaniel's final contention is that the sentence imposed by the district court on the murder-for-hire count is unconstitutional under the Fifth and Eighth Amendments. He specifically contends, without citing any authority, that application of the guidelines in his case offends the Due Process Clause and results in the imposition of cruel and unusual punishment because the guidelines recommended as McDaniel's sentence the statutorily authorized maximum sentence, thereby precluding the district court from considering a range of punishment.[5]

A

The district court's imposition of the maximum statutory penalty in accord with Section 5G1.1(a) does not violate McDaniel's

---

[5] Section 2E1.4 provides that the base offense level for an offense involving the use of interstate commerce facilities in a murder-for-hire scheme is 32. The applicable sentence for McDaniel ranged from 121 to 151 months. *See* U.S.S.G. ch. 5, part A, Sentencing Table. However, the maximum statutory penalty permitted for participating in a murder-for-hire scheme in violation of 18 U.S.C. § 1958 is only 120 months. "Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence." U.S.S.G. §5G1.1 Accordingly, the district court imposed on McDaniel the maximum statutory sentence of 120 months. *See United States v. Taylor*, 868 F.2d 125, 127 (5th Cir. 1989) (noting that when the guidelines and the applicable statute conflict, the statute ultimately governs).

due process rights. McDaniel mistakenly contends that the district court judge was "precluded from giving anything less than the maximum" sentence authorized by statute. However, the district court has the authority to depart from the statutorily authorized maximum sentence, even when that sentence is below the minimum guideline sentence. *See* U.S.S.G. §5G1.1(a) comment. (backg'd) (recognizing that "a sentence of less than [the statutorily authorized maximum sentence] would be a guideline departure"); *see also United States v. Sayers*, 919 F.2d 1321, 1324 (8th Cir. 1990) (noting district court's discretion to downwardly depart from the maximum statutory penalty used as the sentence guideline under Section 5G1.1(a)). Moreover, the imposition of a mandatory maximum sentence does not violate the Due Process Clause because

> [t]he Constitution does not require individualized sentences. Congress has the power to completely divest the courts of their sentencing discretion and to establish an exact, mandatory sentence for all offenses. If Congress can remove the sentencing discretion of the district courts, it certainly may guide that discretion through the guidelines.

United States v. White, 869 F.2d 822, 825 (5th Cir.) (citations omitted), *cert. denied*, 490 U.S. 1112, 109 S. Ct. 3172, 104 L. Ed. 2d 1033 (1989); *see United States v. Woolford*, 896 F.2d 99, 101 & n.2 (5th Cir. 1990) (finding that the district court was not required to consider mitigating factors under the sentencing guidelines). Accordingly, we reject McDaniel's argument that the district court violated his right to due process by imposing the maximum sentence allowed by statute.

B

McDaniel next contends that the sentence imposed by the district court violates the Eighth Amendment's prohibition against cruel and unusual punishment. Appellate review of an alleged Eighth Amendment sentencing violation is narrow:

> The appellate court is not to substitute its judgment for that of the legislature nor of the sentencing court as to the appropriateness of a particular sentence; it should decide only if the sentence is within constitutional limitations; and it should engage rarely in analyzing whether the sentence is constitutionally disproportionate in light of deference to the sentencing court's determination.

United States v. Cardenas-Alvarez, 987 F.2d 1129, 1134 (5th Cir. 1993). "Absent impermissible motives, incorrect information, or . . . noncompliance" with the guidelines, we will not find a sentence imposed under the guidelines to violate the Eighth Amendment. *See United States v. Sullivan*, 895 F.2d 1030, 1032 (5th Cir.), *cert. denied*, 498 U.S. 877, 111 S. Ct. 207, 112 L. Ed. 2d 168 (1990).

We find that the sentence imposed by the district court does not constitute cruel and unusual punishment. The district court complied with the guidelines when sentencing McDaniel, and McDaniel has not demonstrated that the district court acted on the basis of impermissible motives or incorrect information. Accordingly, McDaniel has not stated a valid Eighth Amendment claim.

V

For the foregoing reasons, we AFFIRM the judgment of the district court.