

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-8108

Summary Calendar

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Jesus Quintero,

Defendant-Appellant,

versus

United States of America,

Plaintiff-Appellee.

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Appeal from the United States District Court  
for the Western District of Texas  
(SA 89 CR 315)

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September 30, 1993

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:\*

Jesus Quintero appeals his sentence for transporting aliens in violation of 8 U.S.C. § 1324(a)(1)(B). He contends that the district court erred in (1) increasing his offense level for obstruction of justice; (2) departing upward from the sentencing guidelines based on aggravating circumstances; and (3) failing to

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

afford him the right of allocution at resentencing. We VACATE the sentence and REMAND.

I.

Quintero appeals from his resentencing which the district court undertook on remand from an earlier appeal to this court.<sup>1</sup> In regard to his original sentencing, Quintero argued: "(1) that the district court upwardly departed from the sentencing guidelines based on a factor adequately considered by the Sentencing Commission; and (2) that, in imposing a two-point increase for obstruction of justice, it double counted the danger to others caused by his flight."<sup>2</sup> In the present action, Quintero questions the same two sentence enhancements and, additionally, asserts that the district court judge committed reversible error in failing to ask him whether he wished to make a statement prior to the imposition of sentence.

The facts relevant to this appeal require only brief summary.<sup>3</sup> An agent of the Immigration and Naturalization Service observed a group of people, later determined to be illegal aliens, leaving a "piggy-back" trailer on a freight train. Travel in piggy-back trailers has been recognized as dangerous. Guides escorted the group from the train to a mobile home. The same day, the INS agent

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<sup>1</sup> In U.S. v. Quintero, No. 90-5684 at 1 (5th Cir. filed May 7, 1992), this court affirmed Quintero's conviction but vacated and remanded for resentencing.

<sup>2</sup> Id. at 6.

<sup>3</sup> This court summarized the facts of this case more fully in U.S. v. Quintero, No. 90-5684 (1992).

observed Quintero, disguised in a wig, make several trips to the mobile home carrying food and drink. That evening, Quintero returned to the trailer in a pick-up truck. The illegal aliens left the mobile home and boarded the truck, which Quintero then drove away. When INS agents stopped the truck, Quintero escaped by lurching across the other lane of traffic and off the road into a brushy field. When the truck became mired in undergrowth, Quintero fled on foot, abandoning the truck and its cargo. Several days later, agents arrested Quintero. Again, Quintero wore a disguise and attempted to flee, this time unsuccessfully.

On the day of the arrest, the INS agents requested and received a warrant to search Quintero's mobile home. The agents found a .22 caliber automatic rifle, torn and partially burned photographs of Quintero holding a firearm and currency in large denominations, lists of aliens' names, and fresh hair clippings.

A jury found Quintero guilty on two counts of transporting aliens illegally. The judge sentenced him to, inter alia, 60 months imprisonment on each count. On remand from this court, the judge imposed the same sentence.<sup>4</sup>

## II.

Quintero questions two sentence enhancements imposed by the district court judge. These enhancements were at issue in his previous appeal.

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<sup>4</sup> Both at the original sentencing and on remand, the judge imposed two sentences of 60 months to run concurrently followed by concurrent three-year terms of supervised release. The only change between the two sentences involved fines which the judge imposed at the first sentencing and later waived at resentencing.

A.

Quintero contends that the district court committed reversible error in raising the assessment of Quintero's offense by two levels for obstruction of justice. Under U.S.S.G. § 3C1.1, the guidelines allow such an increase where "the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the... offense... ." The district court relied on several aspects of Quintero's behavior in its application of § 3C1.1. The court noted: (1) Quintero fled to avoid arrest; (2) he wore a wig during the commission of the crime; and (3) he attempted to destroy evidence of the crime he had committed. This court must determine whether these actions may serve properly as the basis for the increase in Quintero's sentence. If they are all appropriate, this court must affirm the district court's sentence. Alternatively, if this court can say "with confidence" that the sentence would have been the same had the district court not considered whichever of these grounds proves illegitimate, resentencing is unnecessary. U.S. v. Davidson, 984 F.2d 651, 657 (5th Cir. 1993). Cf. United States v. Pierce, 893 F.2d 669, 677 (5th Cir. 1990), cert. denied, \_\_\_ U.S. \_\_\_, 113 S.Ct. 621 (1992) (holding that where sufficient evidence exists for one of the rationales offered by a district court for an upward departure from the sentencing guidelines, an appellate court should affirm the sentence).<sup>5</sup>

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<sup>5</sup> The court in Pierce offered a compelling argument as to why the upward departure was appropriate. Thus, although the court did not employ the Davidson standard--which would have

This court ruled in response to Quintero's previous appeal that Quintero's flight from arrest was not an appropriate basis for an increase in his sentence level for obstruction of justice pursuant to § 3C1.1. This is so because, as this court noted, factors already taken into account by the guidelines both in kind and degree cannot support an upward departure. See, e.g., United States v. Siciliano, 953 F.2d 939, 942 (5th Cir. 1992). § 3C1.2 captures fully the appropriate augmentation of a sentence for a defendant's flight from law enforcement officials. Moreover, the notes to § 3C1.1 indicate that such flight does not qualify as an obstruction of justice. U.S.S.G. § 3C1.1, note 4(d). Therefore, this court must consider whether the other grounds offered by the district court serve as an adequate basis for an upward departure under § 3C1.1.

The district court noted that Quintero wore a disguise during the commission of the offense. In particular, the record indicates that the court considered at resentencing Quintero's attempt to hide his identity when he brought food and drink to the aliens in the mobile home. Where a defendant disguises himself so as to avoid the detection of a crime, rather than to impede or obstruct an investigation or a prosecution, § 3C1.1 does not apply. See U.S. v. Luna, 909 F.2d 119, 120 (5th Cir. 1990) (Per Curiam) (The defendant's "intent clearly was not to impede the investigation or

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required a determination that the sentence would not have changed had the district court considered only legitimate grounds for its decision to augment the sentence--it reasoned in the same manner to the same effect as it would have under that standard. The two cases are not, therefore, in conflict.

the prosecution of his offense. His intent was to disguise himself in such a way so that his crime would go unpunished.") (quoting United States v. Wilson, 904 F.2d 234, 235 (5th Cir. 1990)) (internal quotation marks omitted). If the court considered instead or in addition Quintero's actions after he escaped from the first attempt at arrest, it failed to make clear that potentially legitimate basis for its decision.<sup>6</sup> This court cannot assume that the district court considered the disguise Quintero used to conceal his identity while fleeing from arrest but not the one he employed while perpetrating the crime. Thus, this court cannot conclude with confidence that the district court would have imposed the same sentence had it contemplated only the appropriate basis for sentencing.

The district court also relied on Quintero's attempt to destroy evidence for its sentence enhancement under § 3C1.1. The authorities found partially torn and burned photographs in Quintero's residence. These photographs tended to incriminate Quintero. The district court did not find, however, that Quintero was personally responsible for destroying the photographs. Moreover, if a defendant destroys evidence contemporaneously with an arrest, that act shall not by itself form the basis of a

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<sup>6</sup> The Wilson court distinguished between acts taken before and after an investigation has begun. Although Quintero was under investigation at both times he employed the disguise, his actions during perpetration of the crime constitute "a routine precaution any law violator might take", United States v. Wilson, 904 F.2d 234, 236 (5th Cir. 1990) (internal quotation marks omitted), and not a willful attempt to thwart an investigation of which he neither was nor should have been aware. Thus, the holding in Wilson applies.

sentence enhancement unless it imposed a material hinderance to an investigation or prosecution. § 3C1.1, note 3(d). The district court did not find that Quintero attempted to destroy the photographs at a time subsequent to his arrest, nor did it find that the damage to the photographs posed a material hinderance to the investigation or prosecution. As a result, this court cannot conclude with confidence that the district court relied appropriately on this basis for augmenting Quintero's offense level. The district court should make the findings on remand necessary to clarify its reason or reasons for enhancing Quintero's sentence for obstructing justice.

B.

Quintero contends that the district court judge erred in departing upwards from the sentencing guidelines by seven levels. The judge based this departure on the large number of aliens Quintero smuggled into the United States and on Quintero's inhumane treatment of those aliens. To decide whether this enhancement was appropriate, we must first determine which version of the Sentencing Guidelines applies to Quintero's resentencing.

The Sentencing Guidelines were amended on November 1, 1992. This revision occurred subsequent to Quintero's original sentencing, but prior to his resentencing on December 22, 1992. In general, the sentencing guidelines in effect at the time of sentencing apply. See United States v. Woolford, 896 F.2d 99, 102 (5th Cir. 1990). However, revisions implemented after a defendant commits a crime but before that defendant's sentencing do not apply

if they would increase the defendant's sentence. U.S. v. Davidson, 984 F.2d 651, 655-56 (5th Cir. 1993). This rule extends to revisions made in the interim between sentencing and resentencing. See U.S. v. Gross, 979 F.2d 1048, 1052-53 (5th Cir. 1992). Nevertheless, a court may look to such revisions for guidance. Davidson, 984 F.2d at 656 (interpreting United States v. Bachynsky, 949 F.2d 722, 735 (5th Cir. 1991), cert. denied, \_\_ U.S. \_\_, 113 S.Ct. 150 (1992)).

The revised version of the Guidelines establishes the appropriate enhancement for smuggling, transporting, or harboring various numbers of illegal aliens. The Guidelines provide for a sentence enhancement of two levels for crimes involving six to twenty-four aliens. U.S.S.G. § 2L1.1(b)(2)(A). At most, according to the presentencing investigation report, the defendant transported fourteen aliens into the country. Thus, a two level enhancement would be appropriate. The enhancement which the district court imposed exceeds this amount by five levels.

Section 2L1.1, note 5, of the Sentencing Guidelines provides for sentence enhancement for an offense involving the inhumane treatment of illegal aliens. The unrevised version of the Guidelines also allowed a district court judge to enhance a sentence based on inhumane treatment. See U.S.S.G., Appendix C, amendment 450. The question, then, is whether the district court's decision to impose a five level increase for inhumane treatment is appropriate. A sentencing court may take into account an aggravating factor for which the Sentencing Commission has not



calibrated the appropriate sentence enhancement. See U.S. v. Velasquez-Mercado, 872 F.2d 632, 637 (5th Cir.), cert. denied, 493 U.S. 806 (1989). An appellate court will uphold a reasonable departure from the guidelines based on acceptable reasons. Id. In making this determination, even if a departure exceeds the maximum recommended amount by several times, that fact is of no independent consequence in determining whether the sentence is reasonable. U.S. v. Lopez-Escobar, 884 F.2d 170, 173 (5th Cir. 1989).

The defendant put the lives of the illegal aliens he transported at risk. The district court held that a five level increase would result in a sentence commensurate with that reprehensible action. Had the court determined that the defendant was responsible for smuggling over 100 aliens into the country, the Guidelines would have required a six-level sentence enhancement. This court is not prepared to hold that a defendant who transports large numbers of aliens is more culpable than one who risks the lives of the aliens he smuggles. The district court's decision was reasonable.

### III.

Quintero also attacks his sentence because the district court judge failed to ask Quintero whether he wished to make any statement on his own behalf. This court has established that a defendant must be afforded the opportunity to speak before the imposition of sentence. U.S. v. Anderson, 987 F.2d 251, 261 (5th Cir. 1993), petition for cert. filed, (U.S. June 18, 1993) (No. 92-9147). In the past, the Fifth Circuit has held that failure to

accord the defendant the right of allocution requires remand for resentencing. United States v. Sparrow, 673 F.2d 862, 865 (5th Cir. 1982). However, our recent opinion in United States v. Johnson, No. 92-8057, slip op. 6416 (5th Cir. Aug. 26, 1993) (en banc), has placed this standard in doubt. In Johnson, we held that all errors in Rule 11 proceedings are subject to harmless error analysis. Id. at 6422-24. In the present case, it is unnecessary to decide whether the holding in Johnson extends to the right of allocution under Fed.R.Crim.P. 32(a)(1)(C). Upon remand, the district court will no doubt accord Quintero his right to speak, rendering this issue moot.

#### Conclusion

This court vacates the district court's sentence and remands for resentencing. The district court should afford Quintero the right of allocution. It should also clarify its basis for the two-level enhancement for obstruction of justice. We vacate the district court's sentence and remand for resentencing.