UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-8236

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN NICHOLAS SKRUCK,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas
(MO 92 CR 96 01)

October 8, 1993

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

PER CURIAM:[*]

John Nicholas Skruck, pursuant to his guilty plea, was convicted of misprision of a felony, in violation of 18 U.S.C. § 4 (1988). He appeals his sentence, contending for the first time that the district court erred in (a) departing upward from the sentencing guidelines and (b) not granting a two-level reduction to his base offense for his acceptance of responsibility. Finding no plain error, we affirm.

Skruck formerly worked as the manager of the Crazy Horse Saloon, a topless nightclub in Odessa, Texas. On March 20, 1990, Fantasys, another topless nightclub, opened in West Odessa. The owner of the Crazy Horse Saloon told Skruck to spend whatever it took to put Fantasys out of

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

business. On March 28, 1990, Fantasys burned down. Fire officials suspected arson to be the cause of the blaze. Two former Skruck employees told investigators that after Fantasys burned down, Skruck had made remarks evincing his participation in the blaze. These statements were corroborated by John Patrick Barragan, who told investigators that Skruck had paid him $1,300.00 to burn down Fantasys.

Skruck was subsequently charged with one count of conspiracy to destroy by means of fire property used in an activity affecting interstate commerce, in violation of 18 U.S.C. § 371, a Class D felony, and one count of aiding and abetting of destroying by means of fire property used in an activity affecting interstate commerce, in violation of 18 U.S.C. § 2, a Class C felony. Pursuant to a plea agreement, Skruck pled guilty to one count of misprision of a felony, in violation of 18 U.S.C. § 4.[1]

Applying the 1989 Sentencing Guidelines,[2] the probation officer calculated Skruck's offense level to be four[3] and his criminal history category to be III. *See* Presentence Report ("PSR") at 9-12; U.S.S.G. § 2X4.1. These calculations yielded a sentencing range of 0-6 months imprisonment. *See* PSR at 19. Skruck made no objections to the PSR. Citing Skruck's actual participation in the

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[1] Section 4 provides:

> Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined not more than $500 or imprisoned not more than three years, or both.

18 U.S.C. § 4.

[2] The probation officer correctly relied upon the 1989 Sentencing Guidelines because of an ex post facto problem))i.e., using the 1992 Sentencing Guidelines manual would have increased Skruck's offense level by two. *See* United States Sentencing Commission, *Guidelines Manual*, § 1B1.11(b)(1) (Nov. 1992) (stating that courts shall use the Guidelines Manual in effect on the date that the offense of conviction is committed if the use of the Guidelines Manual in effect on the date of sentencing would violate the ex post facto clause). For the remainder of the opinion, cites to the sentencing guidelines will refer to the 1989 version.

[3] In calculating Skruck's base offense level, the probation officer recommended against a two-level reduction for acceptance of responsibility, *see* U.S.S.G. § 3E1.1(a), based upon an unrecorded statement Skruck made to the probation officer during the sentencing interview. *See* PSR at 9.

underlying offense))destroying by means of fire property used in an activity affecting interstate commerce))the district court upwardly departed from the guidelines by imposing a prison term of 24 months. On appeal, Skruck contends that the court erred in upwardly departing from the guidelines and not granting a two-level reduction to his base offense level for his acceptance of responsibility.

We will affirm the district court's sentence "so long as it results from a correct application of the guidelines to factual findings which are not clearly erroneous." *United States v. Sarasti*, 869 F.2d 805, 806 (5th Cir. 1989). "A factual finding is not clearly erroneous as long as it is plausible in light of the record as a whole." *United States v. Sanders*, 942 f.2d 894, 897 (5th Cir. 1991).

Skruck first contends that the district court erred in departing upward from the guidelines. Because Skruck failed to raise this contention below, we need not consider it on appeal absent plain error. *See United States v. Pigno*, 922 F.2d 1162, 1166 (5th Cir. 1991) (applying plain error standard where defendant failed to object at sentencing to upward departure). Plain error is "error so obvious and substantial that failure to notice it would affect the fairness, integrity, or public reputation of [the] judicial proceedings" and would "result in manifest injustice." *United States v. Lopez*, 923 F.2d 47, 50 (5th Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2032, 114 L. Ed. 2d 117 (1991) (citations omitted).

We will affirm an upward departure from the guidelines if the sentencing court's articulated reasons are acceptable and the extent of departure is reasonable. *Pigno*, 922 F.2d at 1166. A district court may depart upward from the guidelines when it finds "an aggravating or mitigating circumstance not adequately taken into account by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b) (1988). In *United States v. Warters*, 885 F.2d 1266 (5th Cir. 1989), we stated that "[a] misprision defendant's personal guilt of the underlying offense is . . . a circumstance not taken into account in formulating the misprision guidelines." *Id.* at 1275. We thus concluded that a "district court may depart from

the misprision guideline range if it makes a specific finding that [the defendant is] guilty of the underlying offense." *Id.* In departing upward from the guidelines, the district court expressly stated:

> The upward departure from the sentencing guidelines is justified due to the defendant['s] actual participation in the underlying offense as determined in the presentence report. To destroy by means of fire property used in an activity affecting interstate commerce which is a Class C felony, this aggravating factor is not taken into account in my opinion in formulating the misprision of a felony guideline under [the guidelines].

Record on Appeal vol. 2, at 14-15. Based upon this portion of the sentencing transcript, we conclude that the district court specifically found that Skruck was guilty of the underlying offense.

Skruck maintains that the district court erred in its extent of departure, by not expressly determining the applicable guideline range for the underlying offense. *See Warters,* 885 F.2d at 1275 (stating that courts should also "expressly determine the applicable guideline range for the underlying offense, to provide an appropriate bench mark against which to judge the reasonableness of the sentence"). Although the district court did not make this determination, we conclude that such failure did not amount to plain error for several reasons. First, we stated in *Warters* that a court *should,* rather than *must,* make such a determination. Second, the extent of the departure)) from 6 to 24 months imprisonment was reasonable in light of the statutory maximum of 36 months. *See* 18 U.S.C. § 4; *see United States v. Huddleston,* 929 F.2d 1030, 1031 (5th Cir. 1991) (noting that sentences which fall within statutory limits will not be disturbed absent a "gross abuse of discretion"). Lastly, Skruck concedes that the applicable guideline range for the underlying offense is 18-24 months imprisonment. The imposed term of 24 months imprisonment, since its falls within this range, would therefore be reasonable had the court used as its reference point the applicable guideline range for the underlying offense. Accordingly, we hold that the district court did not plainly err in departing upward from the guidelines.

Skruck also contends that the district court erred in not granting a two-level reduction to his base offense level based upon its finding that he failed to accept responsibility for his criminal conduct. Because Skruck failed to raise this contention below, we need not consider it on appeal absent plain error. *See United States v. Bounds,* 943 F.2d 541, 546 (5th Cir. 1991) (applying plain

error standard where defendant failed to object at sentencing to finding of no acceptance of responsibility). The PSR recommended against a two-level reduction to Skruck's base offense level based upon Skruck's "statement to the probation officer" evincing Skruck's failure to accept personal responsibility for his criminal conduct. PSR at 9. Moreover, a defendant bears the burden of "clearly demonstrat[ing] a recognition and affirmative acceptance of personal responsibility for his criminal conduct." U.S.S.G. § 3E1.1(a); *see also United States v. Fields*, 906 F.2d 139, 142 (5th Cir.), *cert. denied*, 498 U.S. 874, 111 S. Ct. 200, 112 L. Ed. 2d 162 (1990). Aside from Skruck's guilty plea, the only evidence of his acceptance of responsibility was his apology at the sentencing hearing. *See id.* comment. (n.3) (stating that a guilty plea, "does not, by itself, entitle a defendant to a reduced section under this section"). We therefore hold that the district court did not plainly err in failing to grant a two-level reduction to Skruck's base offense level.[4]

Accordingly, the district court's sentence is AFFIRMED.

[4] Skruck further contends that the district court did not grant a two-level reduction because it was "predisposed to impose a harsh sentence." After reviewing the record, we cannot find any evidence of predisposition which affected the sentencing proceedings. Although the district court stated it had "no doubt" when it accepted Skruck's guilty plea that it was going to give Skruck the statutory maximum of three years imprisonment, the court *went on* to compliment defense counsel on his work in cutting Skruck's exposure under the appropriate guidelines. The court then imposed a sentence less than the statutory maximum.