

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8237
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GABINO GARDUNO-BUSTOS,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Western District of Texas
USDC No. MO-93-CR-8-1
- - - - -

October 27, 1993

Before POLITZ, Chief Judge, and SMITH and WIENER, Circuit Judges.

PER CURIAM:*

Gabino Garduno-Bustos appeals the district court's upward departure from the Sentencing Guidelines when imposing his sentence. He does not argue that the district court failed to give acceptable reasons for its upward departure or that the departure itself was unreasonable.

A sentencing court may depart upward from the guidelines whenever it finds that an aggravating circumstance exists that was not adequately taken into consideration by the Sentencing

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Commission. 18 U.S.C. § 3553(b). When departing upward, the district court must articulate acceptable and reasonable reasons justifying the departure. United States v. Murillo, 902 F.2d 1169, 1172 (5th Cir. 1990). An upward departure "is warranted when the criminal history category significantly under-represents the seriousness of the defendant's history or the likelihood that the defendant will commit further crimes." U.S.S.G. § 4A1.3, p.s.; United States v. Lambert, 984 F.2d 658, 660 (5th Cir. 1993) (en banc).

Information contained in the Presentence Report (PSR) will generally be deemed to contain sufficient indicia of reliability to support sentencing findings. United States v. Alfaro, 919 F.2d 962, 966 (5th Cir. 1990). A defendant bears the burden of proving that the contents of the PSR are unreliable, inaccurate, or materially untrue. United States v. Kinder, 946 F.2d 362, 366 (5th Cir. 1991), cert. denied, 112 S.Ct. 1677 (1992).

Bustos did not challenge the contents of the PSR in the district court. Therefore, we review his allegation concerning the lack of indicia of reliability only if it involves a purely legal question and failure to consider it would result in "manifest injustice." United States v. Garcia-Pillado, 898 F.2d 36, 39 (5th Cir. 1990)(citation omitted). Bustos offered no explanation why the contents of the PSR are unreliable, nor did he present any evidence rebutting his prior criminal conduct.

Bustos also argues that the factors relied upon by the district court were unrelated to the conduct involved in his charged offense. In support of his position, he cites Murillo,

902 F.2d at 1171, and United States v. Velasquez-Mercado, 872 F.2d 632, 637 (5th Cir.), cert. denied, 493 U.S. 866 (1989). His reliance on those cases is misplaced.

In both Murillo and Velasquez-Mercado, the upward departure was based on § 5K2.0, which provides a basis for departure when there are circumstances attending an offense which are not adequately taken into consideration by the guidelines. In this case, the district court relied on § 4A1.3, because the criminal history calculation did not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood of the commission of further crimes.

The district court found that Bustos' criminal history category under-represented his criminal past based on numerous instances of public intoxication, a conviction for criminal mischief regarding an arson charge, another conviction for criminal mischief, various motor vehicle violations, repeated instances of deportation, and assaultive conduct displayed by a violent nature and physical abuse of his girlfriend. These specific reasons are adequate for departure. See United States v. Laury, 985 F.2d 1293, 1310 (5th Cir. 1993).

In light of his past criminal conduct, Bustos has shown no "manifest injustice." Garcia-Pillado, 898 F.2d at 39.

AFFIRMED.