

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8476

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANCES MARIE PLANTE,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(EP-90-CR-477-B)

(April 7, 1994)

Before: ALDISERT*, REYNALDO G. GARZA and DUHE', Circuit Judges.
ALDISERT, Circuit Judge.**

This appeal requires us to decide whether the district court erred in affirming a decision of the magistrate judge denying Frances Marie Plante a downward departure under the Sentencing Guidelines on her sentence for a misdemeanor offense. We conclude that there was no error and will affirm.

* Circuit Judge of the Third Circuit, sitting by designation.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

After being indicted on one count of marijuana possession and two counts of assaulting crew members aboard an aircraft, Plante agreed to plead guilty to a one count information charging her with simple possession of marijuana in violation of 21 U.S.C. § 844. She was sentenced by a magistrate judge to four months imprisonment followed by one year of supervised release. Plante was also ordered to pay a \$500.00 fine and to participate in a substance abuse program as directed by the U.S. Probation Office.

Following an unsuccessful appeal to the district court, Plante now appeals to us. She contends that the district court's affirmance of the magistrate's decision was in error because the magistrate (1) failed to make adequate findings regarding Plante's request for a downward departure based on her diminished capacity, (2) erred in taking into consideration Plante's outrageous behavior on the aircraft and (3) erred in refusing to order a downward departure based on the contributing actions of the flight crew in allowing Plante to board the plane and in serving her additional alcoholic beverages.

I.

After flying from Los Angeles to Las Vegas, Plante boarded an American West airplane bound for Houston, Texas. Shortly after takeoff and while the "fasten seatbelt" indicator was still illuminated, Plante left her seat and entered the aft

lavatory. Upon leaving the lavatory, she was approached by a flight attendant and instructed to return to her seat and fasten her safety belt. At this point, a small plastic bag containing a green leafy substance fell from Plante's sweater. The flight attendant took custody of the bag, believing it to contain marijuana, and escorted Plante to her seat. Thereafter, Plante became abusive. She demanded the return of her bag, warning the flight attendant that she had "important friends." Mem. Op. and Order at 2. When she did not receive her bag as demanded, Plante shoved the flight attendant against the interior wall of the aircraft.

A male flight attendant was then forced to intervene. Plante, however, persisted in her unruly and irresponsible conduct. She told the male flight attendant that if he returned the substance to her she would compensate him financially or sexually. She also cautioned him that if "she did not get her stash back. . . (he) would not know what was going to be happening to him." Id. He attempted to calm her and offered her non-alcoholic beverages. Plante then threw a miniature whiskey bottle at him. She also pushed him from the back and kicked him. The captain was then summoned to calm Plante, but he too was unsuccessful. She persisted in her campaign of physical and verbal abuse and again offered to buy back the substance.

After the captain returned to the flight deck, Plante began to beat on the flight deck door, attempting to force it open. As a result of her behavior, the flight crew determined

that Plante was a danger to herself and other passengers. She was finally restrained and the aircraft was diverted to El Paso, Texas, where Plante was taken into custody.

The flight attendants claim that they did not serve Plante alcoholic beverages during the flight because she appeared to be intoxicated. During the presentence interview, Plante reported that, because she gets nervous when she flies, she drank three straight tequilas before she boarded the airplane in Los Angeles. While en route to Las Vegas, she consumed another five drinks and took additional miniature bottles of alcohol with her aboard the Houston-bound aircraft.

II.

The law in this area is well-settled. Generally, "[a] claim that the district court refused to depart from the guidelines and imposed a lawful sentence provides no ground for relief." United States v. Buenrostro, 868 F.2d 135, 139 (5th Cir. 1989), cert. denied, 495 U.S. 923 (1990); United States v. Keller, 947 F.2d 739, 741 (5th Cir. 1991). Plante does not dispute that the sentencing range for her offense was properly calculated or that her sentence of four months fell within the lawful range. Rather, she objects to the district court's refusal to depart from the lawful sentencing range.

As the Supreme Court recently noted, "[i]t is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular

sentence." Williams v. United States, 112 S. Ct. 1112, 1121 (1992) (quoting Solem v. Helm, 463 U.S. 277, 290 (1983)). On review, "[w]e give great deference to the district court when sentencing within a properly calculated guideline range." United States v. Matovsky, 935 F.2d 719 (5th Cir. 1991). "We will uphold the district court 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). Thus, we will not disturb a sentence unless "it is imposed in violation of the law or is imposed as a result of incorrect application of the sentencing guidelines, or is a departure from the applicable guideline range and is unreasonable." Matovsky, 935 F.2d at 721; see also Buenrostro, 868 F.2d at 139.

Plante asks us to part from the general rule, claiming exceptional circumstances exist permitting us to reverse the refusal of the district court to depart downwardly. She relies on Section § 5H1.3 of the Sentencing Guidelines:

Mental and emotional conditions are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range except as provided in Chapter Five, Part K, Subpart 2 (Other Grounds for Departure).

Mental and emotional conditions may be relevant in determining the conditions of probation or supervised release; e.g., participation in a mental health program. . .

Section 5K2.13 permits sentencing courts to depart downward if "the defendant committed a non-violent offense while

suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants."

III.

We are not persuaded to depart from the general rule. As a threshold matter, we conclude that Plante is not entitled to relief under Section 5K2.13 because the record reflects that her intoxication was voluntary and self-imposed. Of her own volition, Plante consumed three straight tequilas before her travels began and five more alcoholic beverages en route from Los Angeles to Las Vegas. She then drank several miniature bottles of alcohol on the Houston-bound plane that she had taken with her from the previous flight.

Even if we were to find that Plante's inebriation was involuntary, we do not believe the district court erred in declining to make a downward departure under the diminished capacity exception. A sentencing judge "has discretion to lower a sentence if the defendant was suffering from a significantly reduced mental capacity which contributed to the commission of the offense." Keller, 949 F.2d at 741 (emphasis added). Plante argues that her intoxication, coupled with post-traumatic stress disorder associated with a prior rape, significantly reduced her mental capacity such that she was entitled to a downward departure. She relies on the evaluation of Louiz Natalicio, a psychiatrist, to support her contention that she suffered

diminished capacity and claims the magistrate judge failed to consider a downward departure based on the evidence presented.

As was the case in Keller, 947 F.2d at 741, "[t]his issue was discussed at the sentencing hearing. . . The court's comments reflect that it was not inclined to find as a factual matter that [defendant] was suffering from significantly reduced mental capacity." The magistrate judge heard considerable testimony regarding the opinion of Dr. Natalicio. The record discloses that she considered Plante's objections to the Probation Officer's recommendations and ultimately determined that she would not depart downward. Specifically, the magistrate judge noted that she "had thought a good deal about this. I'm going to give the defendant the benefit of a doubt on this upward departure and I will not be departing upward so her Guideline range is 0-6 months."

Although the magistrate did not specifically offer her reasons for refusing a downward departure, we are satisfied that she adequately considered such a departure and found it was not merited under the circumstances.

IV.

We are satisfied also that the district court did not err in affirming the magistrate judge's consideration of the relevant conduct surrounding Plante's offense. The guidelines allow the sentencing judge to consider all "relevant conduct" in

determining what sentence is appropriate. Relevant conduct under Section 1B1.3(a)(1) of the Sentencing Guidelines includes:

all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction . . . [and] all such acts and omissions that were a part of the same course of conduct of a common scheme or plan as the offense of the conviction.

The commentary notes that conduct "for which the defendant is otherwise accountable" includes all conduct that the defendant "counseled, commanded, induced, procured, or willfully caused." Id., Application Note 1.

We have "interpreted this provision very broadly . . . so as to preserve the traditional discretion of a sentencing court." United States v. Thomas, 932 F.2d 1085, 1088 (5th Cir.) cert. denied, 112 S.Ct. 264 (1991). Furthermore, "[r]elevant conduct may extend beyond the conduct and mental state necessary to the offense of conviction." United States v. Mourning, 914 F.2d 699, 706 (5th Cir. 1990).

In addition to her indictment for possession of marijuana, Plante was originally indicted on two separate counts of assaulting a flight crew. These counts were based upon Plante's abusive behavior related to her attempt to retrieve the marijuana. The magistrate judge had the authority to consider all relevant conduct even though both assault counts were later dismissed as a result of a plea agreement.

Plante relies on Hughey v. United States, 495 U.S. 411 (1990), for the proposition that she should have been sentenced

based only on the conduct involved in the convicted offense. We have previously considered the relationship of Hughey, a pre-guidelines case, to Section 1B1.3 and have rejected the argument that the definition of relevant conduct in Section 1B1.3 is overly broad. United States v. Gracia, 983 F.2d 625, 629 (5th Cir. 1993).

In any event, the magistrate considered relevant conduct in determining where in the applicable six month sentencing range Plante's offense should fall, not in determining the guideline range initially applicable. Not only was consideration of related conduct permissible under the circumstances but, because the sentencing range was less than twenty-four months, the magistrate was free to sentence within the six month range without having to articulate her reasons. See Matovsky, 935 F.2d at 721. It was not improper for the magistrate to note on the record that "things could have been a lot worse."

V.

Finally, we reject Plante's contention that the magistrate judge erred because she failed to depart based on the contributing conduct of the flight crew and pilot. Plante contends that a downward departure was warranted because she was allowed on the plane in a visibly intoxicated state and because the flight attendants served her additional drinks on board. We first note that it is unclear from the record whether any flight

attendant on the Houston-bound airplane served alcoholic beverages to Plante. In any case, we are satisfied that the magistrate judge did consider the flight attendants' behavior, finding any downward departure based on the actions of the crew unwarranted. There is substantial evidence to support that decision.

VI.

We have carefully considered the issues presented by the Appellant. To the extent not discussed herein, all other contentions have been considered and rejected. The judgment of the district court is

AFFIRMED.