

UNITED STATES COURT OF APPEALS  
For the Fifth Circuit

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No. 93-8627  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

GERONIMO ANTONIO PONCE-SANTOYO,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Western District of Texas

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(EP-92-CR-165-H)

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(February 18, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.

PER CURIAM:\*

Geronimo Antonio Ponce-Santoyo ("Ponce") was born in Mexico and lived in the U.S. as a permanent resident alien since 1977. Ponce was convicted on drug charges in Texas state court in 1987 and was deported in 1988. He re-entered the U.S. the following day, however, and remained in the U.S. undetected until 1991, when

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

he was arrested for heroin possession.

Ponce was subsequently charged with unlawfully re-entering the U.S., a violation of 8 U.S.C. § 1326(a). An attachment to the indictment notified Ponce that he was subject to an enhanced sentence under 8 U.S.C. § 1326(b)(2) because his deportation occurred after a state conviction for an aggravated felony offense, delivering heroin.

This Court vacated Ponce's original guilty-plea conviction and remanded so that Ponce could plead again. On remand, Ponce moved to dismiss the sentencing enhancement filed by the Government. The district court denied his motion. Ponce again pleaded guilty to the indictment.

Ponce's base offense level was eight. See U.S.S.G. § 2L1.2(a); Presentence Report (PSR) ¶ 14. Because he previously was deported after a conviction for an "aggravated felony," Ponce's base offense level was increased by 16 levels, for an adjusted offense level of 24. See § 2L1.2(b)(2); PSR ¶ 16, 20. The district court granted Ponce a three-level downward adjustment for acceptance of responsibility, for a total offense level of 21. Ponce raised no objections to the PSR.

Prior to sentencing, Ponce filed a written motion for a downward departure. He argued that the 16-level increase in his base offense level under § 2L1.2(b)(2) over-represented his criminal history by ignoring the relatively minor nature of his

"aggravated felony."<sup>1</sup> The district court denied the motion and sentenced Ponce to 77 months of imprisonment followed by three years of supervised release.

#### OPINION

Ponce argues that the district court erroneously concluded that it was without the legal authority to grant his motion for a downward departure. This Court will not review a district court's refusal to depart from the Guidelines unless the refusal was in violation of the law. United States v. Adams, 996 F.2d 75, 78 (5th Cir. 1993). 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).

In denying Ponce's motion, the district court stated that "[t]he Court has considered the motion of your counsel for a departure from the guidelines, but I'm unable to find any legal basis or grounds for doing that in your case[.]" The district court's language, particularly the use of the phrase "in your case," indicates that the court denied the motion both on legal and factual grounds. In United States v. Soliman, 954 F.2d 1012, 1014 (5th Cir. 1992), this Court suggested in dicta that it would review a district court's refusal to depart if the refusal were based on a mistaken belief that the departure was not legally permitted. In United States v. Williams, 974 F.2d 25, 26 (5th Cir. 1992), cert.

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<sup>1</sup>Ponce described the nature of his offenses as repeated convictions for possession of "user quantities" of heroin.

denied, 113 S.Ct. 1320 (1993), the district judge indicated at sentencing that he did not think that he had the authority to depart; however, the district court also made a factual finding that the circumstances did not warrant the departure if it were available. This Court did not reach the question whether the departure was authorized, examining instead the district judge's factual finding that the departure was not warranted. Id. Similarly, this Court need not decide whether a departure is authorized in the present case because the district court made a finding that the facts presented by Ponce's situation did not warrant a departure even if it were available.<sup>2</sup>

Ponce argues that he expressly requested that the district court resolve whether a legal ground for departure was presented by his circumstance; therefore, if this Court determines that the district court refused to depart for other than a legal reason, the

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<sup>2</sup>Ponce argues that the district court had the legal authority to depart downward because the policy statement of § 4A1.3, which applies to departures of over-represented criminal history categories, provides analogous support for departures when the Guideline, such as § 2L1.2(b)(2), requires a substantial offense-level enhancement for a defendant whose criminal history is significantly less serious than others receiving the same adjustment. Ponce cites United States v. Hinds, 803 F. Supp. 675, 677-78 (W.D.N.Y. 1992), aff'd, 992 F.2d 321 (2d Cir. 1993)(table), in which the district court departed downward after finding that the defendant's "aggravated felony" was not as serious as other "aggravated felonies" lumped into § 2L1.2(b)(2). Although Hinds supports Ponce's argument, in United States v. Maul-Valverde, 10 F.3d 544, 546 (8th Cir. 1993), the court determined that the district court erred in applying § 4A1.3 to depart downward from a base offense level determined by § 2L1.2(b)(2) because § 4A1.3 authorized departures from the defendant's criminal history category, not from the defendant's base offense level. Id. at 546 (indicating, however, that a departure due to the impact of § 2L1.2(b)(2) might be appropriate under § 5K2.0).

court's failure to resolve the issue was a violation of Fed. R. Crim. P. 32(c)(3)(D). Rule 32(c)(3)(D) mandates that a judge explain which, if any, factual disputes about the validity of a presentence investigation have been resolved in the sentencing procedure. United States v. Lopez-Escobar, 884 F.2d 170, 173 (5th Cir. 1989).

Rule 32(c)(3)(D) is inapplicable to the present situation, however, because Ponce raised no factual dispute regarding his sentencing. He raised no objections to the PSR, and at sentencing, Ponce's counsel stated "[w]ith respect to the facts, Your Honor, there's really nothing to add to the presentence report." Further, although the Guidelines require that a sentencing judge identify reasons for a departure, see Lopez-Escobar, 884 F.2d at 173; 18 U.S.C. § 3553, there is no authority requiring that a sentencing judge identify reasons for not departing. The requirement that a sentencing judge identify reasons for a departure is "to identify the exact circumstance or circumstances . . . which were not adequately considered by the Sentencing Commission." United States v. Mourning, 914 F.2d 699, 708 (5th Cir. 1990). By sentencing Ponce under the Guidelines, the district court determined that the Guidelines were adequate; therefore, the rationale for supplying reasons for departure is not present.

Moreover, even assuming that a departure was available, Ponce's situation did not merit one. Although the amount of heroin possessed by Ponce in his conviction triggering his deportation might have been small, Ponce has many such convictions. See PSR ¶¶

24-28. The PSR indicates that Ponce was described by another individual as his "supplier." PSR ¶ 24. Ponce's criminal history was not over-represented. This Court will not disturb the district court's refusal to grant the downward departure.

Ponce moved in the district court to dismiss the sentencing enhancement filed by the Government pursuant to 8 U.S.C. § 1326(b)(2). He argued that § 1326(b)(2) created a separate offense and that his prior conviction for an aggravated felony was an element of that offense; therefore, the Government could not seek a sentence under that statute without alleging the prior conviction in the indictment.

On appeal, Ponce acknowledges that this Court's opinion in United States v. Vasquez-Olvera, 999 F.2d 943 (5th Cir.), cert. denied, 1993 WL 465451 (U.S. Jan. 18, 1994)(No. 93-6560), which was decided after his guilty-plea hearing, forecloses his argument. In Vasquez, this Court ruled that § 1326(b)(2) is a sentencing-enhancement provision rather than a separate offense; therefore, the Government need not allege a defendant's prior aggravated felony in the indictment to prosecute under that statute.

Because this Court's decision in Vasquez, 999 F.2d at 946-47, is the controlling law of this Circuit, Ponce's second ground of error is denied.

AFFIRMED.