

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8654
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALFORD RAY RICHARDS,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Western District of Texas
USDC No. MO-93-CR-017-(2)

- - - - -
(May 18, 1994)

Before HIGGINBOTHAM, BARKSDALE, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Alford Ray Richards argues that the district court erred by departing upward in sentencing him for his conviction for misprision of a felony.

This Court will affirm a district court's sentence if "it results from a correct application of the guidelines to factual findings which are not clearly erroneous." United States v. Pigno, 922 F.2d 1162, 1165 (5th Cir. 1991). Prior to departing from the guidelines, the district court "must find that there exists an aggravating or mitigating circumstance of a kind, or to

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." Id. at 1166-67 (internal quotations and citations omitted).

"[T]he guideline range for misprision does not contemplate the defendant's personal guilt of the underlying offense." Id. at 1167 (internal quotations and citation omitted); see also United States v. Warters, 885 F.2d 1266, 1275 (5th Cir. 1989).

"[T]he district court may depart from the misprision guideline range if it makes a specific finding that the defendant was guilty of the underlying offense." Pigno, 922 F.2d at 1167.

The district court stated that it was departing upward based on Richards's participation in the underlying offense of transporting goods by fraud as reflected in the presentence investigation report. Richards admitted during the presentence investigation that he sold and transported a vehicle to California for which he did not possess the title. Therefore, there is reliable evidence to support the district court's finding that Richards participated in the underlying offense.

The district court must also determine the applicable guideline range for the underlying offense to provide an appropriate bench mark against which to judge the reasonableness of the sentence. Pigno, 922 F.2d at 1167. The district court properly calculated the offense level for the underlying offense of transporting goods by fraud, considered the offense level for the misprision offense, and imposed a reasonable sentence within the lower guideline range for the underlying offense. See

U.S.S.G. § 2B1.1; § 2X4.1(a). The district court's upward departure was based on a proper application of the guidelines and factual findings that are not clearly erroneous.

This appeal borders on being frivolous. We caution counsel. Counsel is subject to sanctions. Counsel has no duty to bring frivolous appeals; the opposite is true. See United States v. Burleson, ___ F.3d ___, (5th Cir. May 18, 1994, No. 93-2619).

AFFIRMED.