

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10328
Summary Calendar

UNITED STATES OF AMERICA

Plaintiff-Appellee,

v.

GLEN ELVIN CHAMBERS,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(4:93-CV-52-A)

(December 14, 1994)

Before KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:*

Appellant Glen Elvin Chambers appeals from the district court's upward departure from the sentencing guidelines on his conviction for misprision of a felony. Finding the upward departure to be acceptable and reasonable, we affirm the judgment of the district court.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I. FACTUAL AND PROCEDURAL BACKGROUND

Chambers was President of Hartford Exploration, Inc., a company that telemarketed undivided interests in oil and gas leases to persons throughout the United States. During the course of his employment, Chambers discovered that false and fraudulent representations were being made to potential investors. Chambers failed to disclose this activity to a judge or other civil authority. Moreover, existing investors questioned Chambers about the status of the wells and the viability of the company. Chambers responded positively even though he knew that inflated and misleading information had been disseminated to investors.

Chambers pleaded guilty to misprision of a felony. A Presentence Investigation Report ("PSR") computed Chambers' total offense level under the Sentencing Guidelines at 12, yielding a guideline range of imprisonment of 10-16 months. At the conclusion of the sentencing hearing, however, the trial court departed upward from the total offense level and assessed punishment at 28 months imprisonment. The court believed that a heightened sentence was necessary to reflect Chambers' guilt in the underlying fraudulent activity. As the court stated:

The sentence departs from the guideline range for the following reasons The guid[e]line for misprision of a felony does not take into consideration the underlying mail and wire fraud the defendant conspired to commit. The defendant made admissions in the factual resume justifying this conclusion. The court is also considering the exhibits submitted into evidence at the sentencing hearing in making this departure.

The court also ordered one year of supervised release, a \$10,000 fine, and a mandatory special assessment fee of \$50.

II. STANDARD OF REVIEW

We affirm the sentence of the district court "so long as 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); see United States v. Velasquez-Mercado, 872 F.2d 632, 635 (5th Cir. 1989). When the sentencing court departs from the guidelines, however, it "must articulate reasons justifying the upward departure." Pigno, 922 F.2d at 1165 (internal quotations omitted). If those reasons are "acceptable and the extent of the departure reasonable," the departure will be affirmed. Id. at 1166 (internal quotations omitted).

III. ANALYSIS AND DISCUSSION

A. Notice of Upward Departure

Chambers initially contends that he received inadequate notice of the upward departure because he was not apprised of the specific factors that the district court was considering. According to Chambers, he was therefore unable to effectively challenge the upward departure.

The Supreme Court has made the following observation:

[B]efore a district court can depart upward on a ground not identified as a ground for upward departure either in the presentence report or in a prehearing submission by the Government, Rule 32 requires that the district court give the parties reasonable notice that it is contemplating such a ruling.

Burns v. United States, 111 S. Ct. 2182, 2187 (1991). The Court also noted that "[t]his notice must specifically identify the

ground on which the district court is contemplating an upward departure." Id. Chambers admits that he received notice that the trial court was considering an upward departure, but he claims that he was not informed of the specific grounds for the contemplated departure. After reviewing the record, we disagree with Chambers' contentions.

During the May 20, 1993 arraignment hearing, the district court first expressed concern about whether Chambers' plea of guilty to misprision of a felony adequately reflected his culpability for the underlying fraud. The court noted that there had been "problems with pleas to misprision of felony informations when we found out the defendant ha[d] been guilty of much more serious criminal conduct," and the court explicitly stated that "I have a concern that this is where this case is going." In a March 2, 1994 order, the court advised the parties that "there might be [a] basis for considering an upward departure," and in a March 9, 1994 order, the court stated its assumption that "both parties will plan to develop for the record at the sentencing hearing full information concerning the participation of Glen Elvin Chambers in the activities out of which the offense to which Mr. Chambers has pleaded guilty arose."

In a March 22, 1994 order, the district court stated that an apparent subject for evidentiary presentation at the sentencing hearing was "whether there should be an upward departure," and the court explicitly noted that "[o]n the subject of possible upward departure the court invites the attention of the parties to United

States v. Warters, 885 F.2d 1266 (5th Cir. 1989)." Warters specifically addressed whether a court could consider a defendant's guilt of the underlying offense in contemplating a possible guidelines departure for a misprision conviction. See Warters, 885 F.2d at 1274-76. In that case, we observed that "[a] misprision defendant's personal guilt of the underlying offense is, we determine, a circumstance not taken into account in formulating the misprision guidelines," and we concluded that "[a] district court may depart from the misprision guideline range if it makes a specific finding that [the defendant] was guilty of the underlying offense." Id. at 1275.

Finally, during the March 28, 1994 sentencing hearing, the district court stated that "[w]hen you combine all of those things with the fact that Mr. Chambers was president of the company, you tend to conclude that there was more than just a misprision of felony, that is, concealment of wrongful conduct of others, and that instead there were more of an active participation." The court also raised the issue of whether "the defendant was more of a participant than a mere misprision defendant," and the court continued with the comment that "I will take that into account along with the possibility of an upward departure." In addition, before pronouncing the sentence, the trial court gave each party an opportunity to comment on the possibility of an upward departure, and Chambers availed himself of such opportunity. In short, the evidence clearly indicates that the district court provided notice of the possibility of an upward departure and of the specific

ground -- culpability for the underlying fraud -- that the court was considering.

B. Reasonableness of the Departure

Chambers also asserts that "the trial court failed to specify a valid unusual circumstance that would warrant the upward departure." We find, however, that the court's articulated grounds for departure were acceptable and reasonable.

As mentioned, the district court made an upward departure from the guidelines because "the guid[e]line for misprision of a felony does not take into consideration the underlying mail and wire fraud the defendant conspired to commit. The defendant made admissions in the factual resume justifying this conclusion." In Warters, we noted that:

[a] district court may depart from the misprision guideline range if it makes a specific finding that [the defendant] was guilty of the underlying offense. It should also, in that event, expressly determine (and make the findings on disputed facts necessary to such determination) the applicable guideline range for the underlying offense, to provide an appropriate bench mark [sic] against which to judge the reasonableness of the sentence.

885 F.2d at 1275 (footnote omitted). In the instant case, the district court considered the factual resume, the plea of guilty, and the PSR in specifically finding that "the defendant [Chambers] was guilty of conspiracy with other defendants in this case . . . to accomplish wire fraud and mail fraud." In addition, the PSR reflects that Chambers admitted his knowledge of and involvement in the fraudulent scheme to postal inspectors and to government

attorneys. We conclude that there is reliable evidence to support the finding that Chambers participated in the underlying offense.

In addition, the PSR calculation¹ of Chambers' total offense level was in accord with the sentencing guidelines. The applicable guideline range of sentence for misprision was calculated at 10-16 months, while the guideline range for an underlying fraud conviction was 46-57 months. Thus, because of Chambers' participation in the underlying fraud, we find that the 28 month sentence imposed by the district court was reasonable and in conformity with the requirements that we expressed in Warters.² See Pigno, 922 F.2d at 1167-69 (affirming a district court's upward departure for misprision of a felony because of the defendant's role in the underlying mail fraud offense and the court's satisfaction of the Warters requirements).

C. Review of the Exhibits

¹ The factual findings in the PSR were adopted by the district court.

² Chambers is correct in his contention that the disparity of sentences among co-defendants is not a proper basis for an upward departure. See, e.g., United States v. Ives, 984 F.2d 649, 651 (5th Cir. 1993) ("[D]isparity of sentences among co-defendants simply cannot be deemed an aggravating or mitigating circumstance. As such, it is not a proper basis for departure, either upward or downward."). Although the district court made an occasional reference to the disparity between Chambers' sentence and the sentence of his co-defendants, we are not convinced that this disparity was the reason for the court's upward departure. Indeed, the court frequently referred to Chambers' guilt in the underlying fraud as the impetus for the departure. The judgment of the district court explicitly stated that "the guid[e]line for misprision of a felony does not take into consideration the underlying mail and wire fraud the defendant conspired to commit." As previously explained, this is a proper reason for departure, and we cannot conclude that any improper factor was relied upon.

Chambers' last contention is that the district court erred in considering government exhibits that were neither offered nor admitted into evidence. At sentencing, however, the district court is "not restricted to information that would be admissible at trial. Any information may be considered, so long as it has sufficient indicia of reliability to support its probable accuracy." United States Sentencing Commission Guidelines Manual § 6A1.3 (commentary) (internal quotation omitted); see United States v. Manthei, 913 F.2d 1130, 1138 (5th Cir. 1990). Moreover, we have made the following observations:

Enactment of the guidelines has not restricted the district court's wide discretion in the type and source of information it may consider when imposing sentence.

If information is presented to the sentencing judge with which the defendant would take issue, ***the defendant bears the burden of demonstrating that the information cannot be relied upon because it is materially untrue, inaccurate, or unreliable.***

United States v. Angulo, 927 F.2d 202, 204-05 (5th Cir. 1991) (emphasis added) (citations omitted). Chambers has offered no evidence to indicate that the exhibits are untrue, inaccurate, or unreliable. Consequently, we find no error on the part of the district court.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the sentencing judgment of the district court.