IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-10751

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANTONIO RODRIQUEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(4:93-CR-126-Y-1)

(June 27, 1995)

Before HIGGINBOTHAM and PARKER, Circuit Judges, and McBRYDE[*], District Judge.

PER CURIAM:[**]

On June 6, 1993, Antonio Rodriquez became involved in a dispute with Luis Gallardo in Fort Worth, Texas. Rodriquez drew his gun and told Gallardo he would kill him. Gallardo's friends "rushed" Rodriquez to prevent a shooting, and Rodriquez fled.

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[*] District Judge of the Northern District of Texas, 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Rodriquez returned to the scene while police were interviewing witnesses. The police saw the gun in Rodriquez's car, which Rodriquez admitted was his. At the time, Rodriquez had been convicted in state court of murder and had been released on parole after serving two-and-a-half years of his ten-year sentence.

Rodriquez pled guilty to being a felon in possession of a firearm on January 24, 1994. The district court sentenced him to 115 months imprisonment, three years of supervised release, and ordered him deported. Rodriquez appeals.

I.

Rodriquez challenges the district court's decision to depart upwards in his sentencing, increasing his offense level from 17 to 23 and increasing his criminal history category from III to VI. We reject his challenges to both of these increases.

Contrary to Rodriquez's argument, U.S.S.G. § 2K2.1 permits upward departures greater than the four-level increase prescribed in § 2K2.1(b)(5), if the circumstances warrant it. See § 2K2.1(c)(1)(A). Here, the court's findings at sentencing justify its upward departure in offense level. The court found that Rodriquez

> (1) Pointed the gun at Luis Gallardo, apparently with no more provocation than Gallardo's having told Defendant to stop cursing in front of his children and to leave Gallardo's home;
>
> (2) Threatened to kill Gallardo at least twice, the second time while pointing the gun at him, apparently in front of Gallardo's children;
>
> (3) Placed Gallardo in genuine and extreme fear for his life, given the fact that Gallardo knew Defendant and had known him since childhood and, presumably, knew he

had murdered two men already; and

> (4) Resisted the efforts of others to get him to leave Gallardo's residence and then, after leaving, returned to Gallardo's home with the gun still in his possession, whereupon he was arrested by the policeman who had responded to a call for assistance.

We similarly reject Rodriquez's challenge to the court's increase of his criminal history category from category III to category VI. He faults the court for "cursorily" rejecting intermediate criminal history categories between III and VI. However, "[w]e do not . . . require the district court to go through a ritualistic exercise in which it mechanically discusses each criminal history category it rejects en route to the category that it selects." United States v. Lambert, 984 F.2d 658, 663 (5th Cir. 1993) (en banc). The significant upward departure to category VI is justified by the court's findings that:

> (1) Defendant murdered two men, apparently execution-style (both victims found in a car with bullets through their brains), in 1985;
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> (2) In 1986, Defendant pleaded guilty [in state court] to both murders and was assessed the extremely lenient sentence of two ten-year concurrent sentences;
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> (3) Received at the Texas Department of Corrections to begin service of his sentence on October 6, 1986, Defendant was paroled on April 3, 1989, only two and one-half years later;
>
> (4) Defendant's parole was revoked last year because of the instant offense,
>
> (5) Based on reliable information, Defendant has been involved in prior adult criminal conduct not resulting in a criminal conviction which is similar to his conduct in the instant case as follows:
>
> > (a) He was found in unlawful possession of a firearm and, as a result, charged with being a felon in possession on June 9, 1990.

> He was also intoxicated at the time. These charges were dismissed only because the state prosecutors learned of Defendant's indictment in this case.
>
> (b) On November 7, 1982, Defendant was involved, though it's unclear how deeply, in a shooting at a nightclub in Fort Worth. . . .
>
> (c) While using an alias, Defendant unlawfully carried a pistol on June 4, 1983, either a .25 calibre automatic or a .380 calibre automatic, in a situation once again suggesting a willingness to use a weapon and not merely possess it.

The court based its departure on two factors for which § 4A1.3 permits departure. First, the court noted Rodriquez's "rather extensive prior but similar adult criminal conduct not resulting in conviction." Section 4A1.3(e) permits increasing criminal history categories on that ground. Second, the court stated that at age twenty-six, Rodriquez had received "extremely lenient" 10-year concurrent sentences for double murder. The commentary to § 4A1.3 permits increasing criminal history categories of defendants with long records of "serious, assaultive conduct" who had received very light sentences in the past, especially "in the case of younger defendants (e.g., defendants in their early twenties or younger) who are more likely to have received repeated lenient treatment, yet who may actually pose a greater risk of serious recidivism than older defendants." The court's upward departure was within the Guidelines.

II.

Rodriquez also argues that the district court lacked jurisdiction to order him deported under 18 U.S.C. § 3583(d). He

concedes that he did not object to the deportation order below. However, since his argument challenges the district court's jurisdiction, we may review it here. See, e.g., Kelly v. United States, 29 F.3d 1107, 1112-13 (7th Cir. 1994).

For reasons stated in United States v. Quaye, No. 95-10191, we hold that the district court lacked power to order Rodriquez deported under § 3583(d).

The 1994 amendment to 8 U.S.C. § 1252a(d) authorizing district courts to order aliens deported under certain circumstances applies only to aliens whose guilty plea or adjudication of guilt is entered after October 25, 1994. See note to 8 U.S.C. § 1252a(d). Rodriquez pled guilty on January 24, 1994.

Accordingly, we MODIFY the judgment as follows and AFFIRM as modified:

> As a condition of supervised release, upon completion of his term of imprisonment the defendant is to be surrendered to a duly-authorized immigration official for deportation in accordance with the established procedures provided by the Immigration and Naturalization Act, 8 U.S.C. §§ 1101 et seq. As a further condition of supervised release, if ordered deported, defendant shall remain outside the United States.
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> MODIFIED AND AFFIRMED.