

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-10858  
Summary Calendar

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UNITED STATES OF AMERICA,  
Plaintiff-Appellee,  
versus  
LUTHER OTIS FOSTER,  
Defendant-Appellant.

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Appeal from the United States District Court  
for the Northern District of Texas  
(2:93-CR-49)

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(May 23, 1995)  
Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:\*

Luther Otis Foster appeals the district court's application of the sentencing guidelines. We affirm.

I. FACTS AND PROCEDURAL HISTORY

On April 25, 1994, Luther Foster pleaded guilty to one count of being a felon in possession of firearms, in violation of 18 U.S.C. § 922(g)(1). He was scheduled to be sentenced on June 29, 1994. The presentence report recommended that Foster receive a reduction in his offense level for his acceptance of responsibility. On June 28, Foster escaped from the Potter

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

County Correctional Center in Amarillo, Texas. He was arrested in Virginia on July 2 and returned to Texas. Subsequently, an amended PSR was prepared recommending that the district court increase Foster's offense level by two points for obstruction of justice and that the court not award Foster a reduction for acceptance of responsibility. Foster filed a motion to extend time to respond to the amended PSR beyond August 8, 1994, to the "final disposition" of his "pending case," the escape charge. The district court denied the motion. Foster nevertheless delivered written objections to the amended PSR to the probation officer on August 22, 1994, objecting to the PSR's obstruction and acceptance recommendations. Foster's attorney reiterated the objections at his sentencing hearing. Despite the denial of the motion to extend time for responding to the amended PSR, the district court considered the late-filed objections. The district court overruled Foster's objections and sentenced him to 120 months imprisonment and three years supervised release.

## II. OBSTRUCTION OF JUSTICE

Foster contends that the district court erred by adjusting his offense level upward based on obstruction of justice. The standard of review with respect to upward adjustments for obstruction of justice is "clearly erroneous." United States v. Winn, 948 F.2d 145, 161 (5th Cir. 1991), cert. denied, 503 U.S. 976, 112 S.Ct. 1599 (1992). A district court's finding will not be deemed to be clearly erroneous unless this court is "left with the definite and firm conviction that a mistake has been

committed." United States v. Pofahl, 990 F.2d 1456, 1480 (5th Cir.), cert. denied, 114 S.Ct. 266 (1993) (citations omitted).

Section 3C1.1 of the sentencing guidelines states:

If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by **2** levels.

The commentary provides that "escaping or attempting to escape from custody before trial or sentencing" is an example of the type of conduct which would trigger the application of this enhancement. U.S.S.G. § 3C1.1, comment. (n.3(e)). Foster argues that the court erred in considering his "alleged escape" in making its determination because he had not been convicted on the charge at the time of sentencing. Foster also argues that because there was no evidence that he *willfully* escaped from jail, § 3C1.1 is not applicable.

Foster's arguments are unavailing. "[T]he district court need only determine its factual findings at sentencing by a `preponderance of the relevant and sufficiently reliable evidence.'" United States v. Angulo, 927 F.2d 202, 205 (5th Cir. 1991). The record establishes that Foster escaped from jail one day prior to his scheduled sentencing and was thus unavailable for sentencing on June 29. Consequently, his sentencing in this case was delayed from June until September. In the interim, Foster was arrested and returned to Texas where the Government filed new charges against him based on his escape. Foster's contention that his actions did not obstruct or impede the

administration of justice is without merit. The district court did not err in adjusting his offense level upward for obstruction of justice.

### III. ACCEPTANCE OF RESPONSIBILITY

Foster contends that the district court erred by denying him a reduction in his offense level for acceptance of responsibility. He argues that the district court erred in considering his escape from jail prior to sentencing. Foster asserts that his guilty plea conserved judicial resources and saved the Government from going to trial and that therefore he is entitled to the reduction for acceptance of responsibility. Of course, Foster fails to mention the consumption of judicial and governmental resources and time caused by his escape from jail prior to sentencing.

Because of the district court's unique position to evaluate whether the defendant has demonstrated acceptance of responsibility, we review such a determination under a standard of review more deferential than that of clear error. United States v. Diaz, 39 F.3d 568, 571 (5th Cir. 1994). The defendant bears the burden of proving that he is entitled to the downward adjustment. United States v. Kinder, 946 F.2d 362, 367 (5th Cir. 1991), cert. denied, \_\_\_ U.S. \_\_\_, 112 S.Ct. 1677 & 2290 (1992).

"Conduct resulting in an enhancement under §3C1.1 . . . ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§3C1.1 and

3E1.1 may apply." Section 3E1.1, comment. (n.4). Accordingly, the district court's application of these two provisions is specifically contemplated by the guidelines. Foster has not shown that his case is extraordinary and deserving of the reduction. See United States v. Ayala, 47 F.3d 688, 691 (5th Cir. 1995). The district court did not err in refusing to find that Foster was entitled to a reduction of his offense level for acceptance of responsibility.

#### IV. EXTENSION OF TIME

Foster also contends that the district court erred in denying his motion for an extension of time in which to respond to the amended PSR. We review a district court's denial of a motion for continuance for an abuse of discretion. United States v. Rodriguez, 15 F.3d 408 (5th Cir. 1994).

Foster argues that he should have received an extension to respond until after a final resolution was reached on the escape charge. He argues that he was unable to adequately make objections to the amended presentence report or to put on the necessary evidence because he was afraid that his rights in the pending escape case would be prejudiced. But Foster has wholly failed to explain in his motion before the district court or to this Court on appeal what other objections he would have made or what other evidence he would have introduced. Thus, he has not shown that the district abused its discretion.

#### CONCLUSION

Accordingly, Foster's sentence is AFFIRMED.