

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20349
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LUZ STELLA ARBELAEZ,

Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Texas
(CR-H-93-234-02)

(March 2, 1995)

Before POLITZ, Chief Judge, SMITH and WIENER, Circuit Judges.

POLITZ, Chief Judge:*

Convicted on a guilty plea of bribing a public official, Luz Stella Arbelaez appeals her sentence, contesting an upward departure from the Sentencing Guidelines. Finding no reversible error, we affirm.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Background

After Carlos Rendon-Rodriguez fled to Colombia to escape a cocaine smuggling investigation, law enforcement authorities maintained contact with Arbelaez, his wife, through a confidential informant. In 1991 Arbelaez sold undercover agents 210 grams of cocaine and, at Rendon-Rodriguez' behest, asked the informant for false immigration documents. These documents were forthcoming and one set was used to gain entry into the United States by a courier carrying 609 grams of heroin. Six months later Arbelaez inspected a vessel to determine its suitability for importation of 200 kilograms of cocaine. Meanwhile, the requests for additional entry documents continued and, on a trip to the United States in May 1992, Rendon-Rodriguez was introduced to Franklin Bell, an undercover agent posing as a corrupt immigration official. Rendon-Rodriguez ordered several documents from Bell, promising to pay \$13,000 and informing that Arbelaez would serve as intermediary. In that capacity Arbelaez kept Bell posted about when payment would be forthcoming. Arbelaez was present when Rendon-Rodriguez discussed with Bell a plan to smuggle cocaine using body carriers. She also took delivery of falsified documents and on at least one occasion paid Bell for his services.

Arbelaez was indicted for multiple counts of bribery of a public official in violation of 18 U.S.C. § 201(b)(1)(C) and use of unlawfully obtained immigration documents in contravention of 18 U.S.C. § 1546(a). She pled guilty to one count of bribery in exchange for the government's promise to dismiss the remaining

counts and to refrain from recommending an upward departure from the Sentencing Guidelines. The district court departed from a guideline range of four to ten months and sentenced Arbelaez to 24 months imprisonment. This appeal timely followed.

Analysis

The court may depart upwardly from the Sentencing Guidelines if it finds an aggravating circumstance not adequately considered by the Sentencing Commission. We review a departure for abuse of discretion, affirming "if the district court offers acceptable reasons for the departure and the departure is reasonable."¹

The district court explained its decision to depart as follows:

What really bothers me . . . is the part when she is talking to the agent and the agent says, talking about 200 kilos of cocaine, . . . and she said, that's nothing, these folks will take 2,000 kilos.

Which indicates to me that this woman knows a whole lot about cocaine trafficking. Not just the situation where she sells a few ounces of cocaine. It's a situation where she knows all about it.

And . . . the travel documents are not being bought so people can . . . set up dry cleaning establishments in the United States, obviously they were being bought so people could transport and deal cocaine and come back and forth between Colombia and the United States without a hassle. That's why people get these documents.

So that's what really bothers me about this woman. I mean I think she is a whole lot more closely involved in cocaine trafficking than these little pieces, the little tips of the iceberg would indicate to us.

The court proceeded to fashion a sentence incorporating the offense

¹**United States v. Ashburn**, 38 F.3d 803, 807 (5th Cir. 1994) (*en banc*) (internal quotations and citations omitted).

level for trafficking in 210 grams of cocaine, the quantity that Arbelaez had sold to undercover agents in 1991.

Emphasizing the distinction between departures based on the nature of the offense and those premised on criminal history, Arbelaez contends that the district court erred by increasing her offense level on the basis of prior criminal conduct instead of adding points to her criminal history score pursuant to U.S.S.G. § 4A1.3. She also maintains that section 2C1.1, the guideline for bribery, preempts departures for drug-related activity. Subsection 2C1.1(c)(1) provides:

If the offense was committed for the purpose of facilitating the commission of another criminal offense, apply the offense guideline applicable to a conspiracy to commit that other offense if the resulting offense level is greater than that determined above.²

Neither contention is persuasive. The court found that the procurement of false entry documents was part of a larger plan to smuggle narcotics and that Arbelaez' participation extended to the drug trafficking scheme. The court departed on the basis of conduct connected to the offense of conviction, not criminal history.³ To the extent that the court arguably might have made an adjustment pursuant to U.S.S.G. § 2C1.1(c)(1) instead of departing,

²The Commentary explains: "For example, if a bribe was given to a law enforcement officer to allow the smuggling of a quantity of cocaine, the guideline for conspiracy to import cocaine would be applied if it resulted in a greater offense level."

³Conduct that is not technically "related conduct" within the meaning of U.S.S.G. § 1B1.3 but has some nexus to the offense of conviction may serve as the basis of a departure. See **United States v. Ihegboro**, 959 F.2d 26 (5th Cir. 1992); **United States v. Thai**, 29 F.3d 785 (2d Cir.), cert. denied, 115 S.Ct. 456 and 115 S.Ct. 496 (1994).

any error would be harmless; the sentence would have been the same.⁴ Section 2C1.1(c)(1), however, does not appear broad enough to embrace the district court's concerns. The enhancement was based not only on the fact that the bribery was undertaken to facilitate drug smuggling, but also because of other related narcotics activities, most notably, the sale of cocaine to undercover agents and the inspection of a vessel to be used for substantial cocaine importation. A departure was the only mechanism available.⁵

Arbelaez also challenges the district court's factual finding of involvement in narcotics trafficking, emphasizing the government's admission of lack of evidence at sentencing. She did not dispute, however, the factual assertions in the Presentence Investigation Report on which the district court rested its departure. The record adequately supports the court's findings.

AFFIRMED.

⁴See **Williams v. United States**, 503 U.S. 193 (1992). Unlike **United States v. Madison**, 990 F.2d 178, 183 (5th Cir.), cert. dismissed, 114 S.Ct. 339 (1993), on which Arbelaez relies, the district court did not "disregard the guideline sentences" in departing but rather increased offense levels as it would have done pursuant to a guideline adjustment.

⁵Arbelaez also maintains that the departure was inconsistent with her plea bargain. That argument is foreclosed by our *en banc* decision in **Ashburn**.