

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20496
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HENRY EARL PHILLIP,

Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Texas
(CR H 94-006)

(March 29, 1995)

Before POLITZ, Chief Judge, JONES and BARKSDALE, Circuit Judges.

POLITZ, Chief Judge:*

Convicted on a guilty plea of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), Henry Earl Phillip appeals his sentence. For the reasons assigned, we affirm.

Background

A search of a vehicle Phillip was driving disclosed police

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

uniforms, firearms, a police flashlight, and fraudulent search and arrest warrants. These items were to be used by Phillip and two others in a scheme to impersonate police officers and, in the course of ostensibly serving arrest and search warrants, to rob drug dealers. Phillip had prior state felony convictions for aggravated robbery and delivery of a controlled substance.

The record reflects that the PSR offense level calculation is 28. It is based on the sentencing guidelines provision permitting the use, in the computation, of the offense level of the contemplated crime when a higher offense level results.¹ The contemplated offense was robbery, and that guideline provision² was used in the PSR with adjustments for possession of the firearms,³ Phillip's leadership role,⁴ and the involvement of controlled substances.⁵ Combined with an unchallenged criminal history category of IV, the guideline sentencing range resulting is 110-137 months.

The trial court accepted the criminal history computation but rejected the base offense level, apparently concluding that use of the robbery factor punished Phillip for conduct for which he had

¹U.S.S.G. §§ 2K2.1(c)(1)(A) & 2X1.1(a).

²U.S.S.G. § 2B3.1(a).

³U.S.S.G. § 2B3.1(b)(2)(c).

⁴U.S.S.G. § 3B1.1(c).

⁵U.S.S.G. § 2B3.1(5).

been punished in state court.⁶ The court recomputed the offense level using the illegal firearm possession⁷ and leadership role, yielding an offense level of 22 and resulting in a sentencing range of 63-78 months. The court then departed upwards because of the police impersonation element. The court expressed particular concern about the reprehensible nature of impersonating police officers, in the setting intended, because of the inherent disrespect engendered for the police and the potential dangers visited on real police officers executing, among their other official duties, valid search and arrest warrants, because they might be viewed as fakes. The court found that the guidelines did not adequately consider this particular aggravating circumstance and departed upward, sentencing Phillip to 120 months imprisonment, the statutory maximum for a felon in possession of a firearm charge.

Analysis

Phillip contends that the district court erred in declining to allow a two-part downward adjustment in the offense level for his acceptance of responsibility and in departing upward.

The guidelines provide for a downward adjustment in the offense level "if the defendant clearly demonstrates acceptance of responsibility for his offense."⁸ To be entitled to this

⁶Prior to the instant sentencing, Phillip was convicted in state court for his role in the robbery scheme and sentenced to imprisonment for 45 years.

⁷U.S.S.G. § 2K2.1(a)(4).

⁸U.S.S.G. § 3E1.1(a).

adjustment the defendant must clearly demonstrate his acceptance of responsibility for all relevant criminal conduct.⁹ The court's finding on this adjustment is given great deference and will be accepted unless without foundation.¹⁰

Phillip persistently declined to admit to the presence of the firearms for use in the robbery scheme. He has not met the standard for allowance of the downward adjustment. Neither his contention that the questions posed were ambiguous nor his claim that to admit to the required purpose of the firearms would prejudice his state court appeal is persuasive. The questions posed were not ambiguous; Phillip doggedly declined to admit the reason the firearms were in the vehicle with the uniforms, police equipment, and false search warrants. The dilemma Phillip suggests he faces may not be used as a substitute for complying with the full acceptance requirement; the dilemma, if it exists, is of Phillip's own making.¹¹

Phillip next challenges his sentence, faulting the reasons for and the extent of the departure. We need not long tarry over this assignment of error for the result reached by the district court is fully supported by the record herein and the controlling precedents of this court.

The 120-month sentence imposed by the court, the maximum

⁹**United States v. Mourning**, 914 F.2d 699 (5th Cir. 1990).

¹⁰**United States v. Roberson**, 872 F.2d 597 (5th Cir.), cert. denied, 493 U.S. 861 (1989).

¹¹**Mourning**.

provided for the offense at issue, is below the mid-range of the sentencing guideline spread resulting from the conjunction of offense level 28 and criminal history category VI, as detailed in the PSR. If the trial judge concluded that he was prohibited from accepting the PSR calculation because it depended on the underlying robbery scheme for which Phillip was punished by the state court, he inadvertently erred.¹² There are no double jeopardy constraints involved when dual sovereigns punish conduct.¹³ The PSR computation is correct both factually and legally. The district court could have and should have used it in its sentencing. The 120-month sentence is, as noted, within the sentencing range under the PSR calculation. Therefore, no departure was necessary, but if it were, the reasons assigned for the departure by the district court would be sufficient to support the sentence imposed.

The sentence is AFFIRMED.

¹²**United States v. Rosogie**, 21 F.3d 632 (5th Cir. 1994).

¹³**United States v. Moore**, 958 F.2d 650 (5th Cir. 1992), cert. denied, _____ U.S. _____, 114 S.Ct. 647 (1993).