

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-30029

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARICE ANN JOHNSON,

Defendant-Appellant.

Appeal from the United States District Court
For the Eastern District of Louisiana
(CR 93-250 "D" (3))

(September 8, 1994)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:*

Marice Ann Johnson was convicted, pursuant to her guilty plea, on one count of unlawful possession of stolen mail, in violation of 18 U.S.C. § 1708. Johnson appeals her sentence, contending that the district court erred in departing upward from the guidelines. Finding no abuse of discretion, we affirm.

On April 4, 1993, employees of Anykind Check Cashing telephoned postal inspectors that Johnson was attempting to obtain

* Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

a photo identification card in the name of Maple Taylor. United States Postal Inspector Jesse McCoy went to the business to investigate. Inspector McCoy questioned Johnson about her attempt to obtain the identification card. Johnson admitted to McCoy that she had a stolen check made payable to Maple Taylor in the amount of \$434.00. Johnson was subsequently arrested for possession of stolen mail and thereafter released on bond. She was convicted upon her guilty plea.

The probation officer calculated Johnson's criminal history category to be IV and her base offense level to be 4. These calculations yielded a sentencing range of two to eight months imprisonment.¹ The probation officer also noted in the presentence investigation report ("PSI") that Johnson's "extensive history of theft related offenses" may be an aggravating factor warranting an upward departure. Neither party filed objections to the PSI.

At sentencing, the district court adopted the findings and recommendations in the PSI. The court departed upward from the recommended guideline range by imposing a sentence of twelve months imprisonment.² In explaining its departure, the court specifically cited the similarity of the instant offense to Johnson's prior criminal conduct as a factor which suggested "the increased likelihood that the defendant will commit future crimes." The

¹ See United States Sentencing Commission, *Guidelines Manual*, Sentencing Table (Nov. 1993).

² In doing so, the court effectively skipped over criminal history category V, which entailed a sentencing range of four to ten months imprisonment. See U.S.S.G. Sentencing Table.

court also cited Johnson's recent adult arrests for theft in December 1992 and December 1993 (the latter occurring while Johnson was awaiting sentencing for the instant offense) as a basis for the upward departure.³ Johnson filed a timely notice of appeal.

Johnson contends that the district court erred in upwardly departing from the guidelines. We review the court's decision to depart from the guidelines for abuse of discretion. *United States v. Roberson*, 872 F.2d 597, 601 (5th Cir.), *cert. denied*, 110 S. Ct. 175 (1989). A departure from the guidelines will be upheld if the district court provided acceptable reasons for the departure and the departure was reasonable. *United States v. Lambert*, 984 F.2d 658, 663 (5th Cir. 1993) (en banc). Section 4A1.3 of the guidelines permit courts to depart upward "when the criminal history category significantly under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit further crimes."

Johnson first argues that the December 1992 arrest was an improper basis for the upward departure. Although the guidelines prohibit a sentencing court from upwardly departing on the basis of a "prior arrest record itself," U.S.S.G. § 4A1.3, p.s., the record here clearly shows that the district court relied on the 1992 arrest for theft based on the *similarity* of that conduct to the

³ The court also cited Johnson's four juvenile sentences for similar theft-related offenses, which, because of time limitations (more than five years since instant offense) were not counted when calculating her criminal history category. See U.S.S.G. § 4A1.2(d)(2). Johnson does not dispute that those uncounted juvenile adjudications may be considered when departing from the guidelines. See *id.* § 4A1.2, comment. (n.8); *United States v. Carpenter*, 963 F.2d 736, 744-45 (5th Cir.), 113 S. Ct. 355 (1992).

instant offense (possession of stolen mail). Consequently, the December 1992 arrest constituted "prior similar adult criminal conduct not resulting in a criminal conviction," a factor which sentencing courts may properly consider when considering an upward departure. U.S.S.G. § 4A1.3(e). As we observed in *United States v. De Luna-Trujillo*, 868 F.2d 122, 125 (5th Cir. 1989), "[p]rior similar adult criminal conduct' may indicate the seriousness of the past crimes and the likelihood of future crimes whether or not it has resulted in conviction. The recidivist's relapse into the same criminal behavior demonstrates his lack of recognition of the gravity of his original wrong, entails greater culpability for the offense with which he is currently charged, and suggests an increased likelihood that the offense will be repeated yet again."⁴ We therefore hold that Johnson's December 1992 arrest was a proper basis for considering an upward departure.

Johnson also apparently argues that the district court failed to adequately explain its reasons for effectively skipping one criminal history category when departing upward. Although a district court, when departing under § 4A1.3 of the guidelines, must evaluate each intermediate criminal history category, "[w]e do not . . . require the district court to go through a ritualistic exercise in which it mechanically discusses each criminal history

⁴ For the same reason, we conclude that the district court also properly relied in part on Johnson's arrest for theft while she awaiting sentencing for the instant offense. Although her December 1993 arrest occurred after, rather than prior to, the instant offense, it nevertheless shows the likelihood of recidivism, and thus was a proper basis for considering an upward departure.

category it rejects en route to the category it selects. Ordinarily the district court's reasons for rejecting intermediate categories will clearly be implicit, if not explicit, in the court's explanation for its departure" *Id.* at 663. Here, departing upward one level, to criminal history category V, would have increased Johnson's sentence by only two months. See U.S.S.G. Sentencing Table. Given Johnson's extensive history of theft-related offenses, which strongly suggests the likelihood of recidivism, we hold that the court's explanation for its departure also explains why it disregarded the intermediate category. See *United States v. McKenzie*, 991 F.2d 203, 205 (5th Cir. 1993).

Lastly, Johnson argues that the extent of the departure (four months) was unreasonable. Again, given the strong likelihood that Johnson may commit the same kinds of crimes, and also, that the statutory maximum for the instant offense is sixty months imprisonment, see 18 U.S.C. § 1708, we hold that the extent of the departure was reasonable. See *McKenzie*, 991 F.2d at 206 n.8; *Lambert*, 984 F.2d at 664.

Accordingly, we AFFIRM the judgment of the district court.