

IN THE UNITED STATES COURT OF APPEALS
for the Fifth Circuit

Nos. 94-30407
94-30386
(Summary Calendar)

UNITED STATES OF AMERICA

Plaintiff-Appellee,

versus

JULIO RIEPELE,

Defendant-Appellant.

Consolidated With

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JEROME GAMBINO,

Defendant-Appellant.

Appeal from United States District Court
for the Middle District of Louisiana
CR-94-9 consolidated with CR-94-10-B-M2

March 24, 1995

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

* 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."

Julio Riepele and Jerome Gambino appeal the district court determination that they were not entitled to a four-level reduction in the offense level for escaping from a "community corrections center, community treatment center, halfway house" or similar facility under § 2P1.1(b)(3) of the federal sentencing guidelines. Riepele also contends that the district court demonstrated judicial bias during sentencing and that he should have been given a closed sentencing hearing. For the following reasons, the sentences of Riepele and Gambino are affirmed.

BACKGROUND

Riepele:

Julio Riepele is a native of Guatemala who came to the United States when he was five years old. He has three convictions for drug-related offenses. Riepele was deported in 1992. He reentered this country without permission and was subsequently convicted of conspiracy to import marijuana and was sentenced to forty-four months at Federal Medical Center, Carville, Louisiana (FMC Carville), from which he escaped. After he was recaptured, Julio Riepele pleaded guilty to escape from the FMC Carville and the district court sentenced him to a term of twenty-four months of imprisonment to run consecutive to his undischarged term of imprisonment.

Gambino:

Jerome Gambino was serving a 108-month sentence for a 1993 cocaine conviction at FMC Carville from August 17 until

Pursuant to that Rule, the Court has determined that this opinion should not be published.

November 3, 1993, when he was discovered missing without permission. He voluntarily surrendered to law enforcement authorities on March 7, 1994, in New Orleans, Louisiana. Jerome Gambino pleaded guilty to unlawful escape from custody in FMC Carville and the district court sentenced him to serve eighteen months in prison and two years supervised release. Gambino's sentence was imposed to run consecutively to his undischarged term of federal imprisonment.

DISCUSSION

Issue 1: Status of FMC Carville

Both Riepele and Gambino contend that the district court erred in finding that they were not entitled to a reduction in offense level pursuant to U.S.S.G. § 2P1.1(b)(3). In relevant part, U.S.S.G § 2P1.1(b)(3) provides that a defendant who escapes from "the non-secure custody of a community corrections center, community treatment center, 'halfway house', or similar facility" is entitled to a four-level reduction in offense level.

A facility is similar to those listed in U.S.S.G. § 2P1.1(b)(3) if it is non-secure and if it is a facility similar to a community corrections center, community treatment center, or halfway house, i.e., facilities designed to integrate their residents into the community. United States v. Shaw, 979 F.2d 41, 45 (5th Cir. 1991). This determination is a factual finding which this court reviews for clear error. Shaw, 979 F.2d at 44 n.3; United States v. Fitzhugh, 984 F.2d 143, 146 (5th Cir.), cert. denied, 114 S. Ct. 259 (1993).

The district court found that although FMC Carville was a non-secure facility, it was not similar to a community corrections center, community treatment center, or halfway house. FMC Carville is located one mile from the city of Carville, Louisiana but 20-25 miles from Baton Rouge, Louisiana, the nearest large city. Its guards are unarmed and the facility is not secured at its perimeter. Residents are called inmates and their stay is termed an incarceration. Inmates stay on site, have restricted visiting hours, must request furloughs in advance. They are not free to leave the premises. Inmates are counted five times each weekday and six times on the weekend. FMC Carville includes release planning in its orientation handbook which outlines the procedure for referral to community corrections centers.

Upon due consideration of the record, we find no clear error in the district court's decision finding that FMC Carville is not a facility similar to a community corrections center, community treatment center, or halfway house. Although FMC Carville is clearly a non-secure facility, its location, counting procedure and furlough policy mark it as a prison not a community corrections center or similar facility.

In United States v. Shaw, 979 F.2d 41 (5th Cir. 1992), this court was faced with the question of whether a prison camp that kept its residents on site all day was similar to a community corrections center, community center, or halfway house. We noted that a major difference between a community center and a prison is that at community centers the individual returns to the center each

evening after participating all day as a member of the community work force. Id. at 43. We also noted that prisons separate people from the "outside" world. Id. This court held that under these conditions the prison camp did not fall under U.S.S.G. § 2P1.1(b)(3). Shaw, 979 F.2d at 45.

Similarly, in the instant case, individuals are also confined all day at FMC Carville. The inmates at FMC Carville are also kept separated from the outside world. Thus, like the prison camp in Shaw, FMC Carville is not similar to the facilities listed in U.S.S.G. § 2P1.1(b)(3). It does not bear the hallmarks of a facility integrated into the community. See Shaw, 979 F.2d at 45(citation omitted).

Riepele and Gambino argue that FMC Carville is similar to the facilities cited in § 2P1.1(b)(3) because the prison was integrated with the Carville facility which serves patients with Hansen's disease. We find this argument to be without merit. In Shaw, this court stated that the function of a community center and other similar facilities is to integrate people into society outside the prison. See id. at 55. In this case, the inmates at FMC Carville are not being integrated into outside society; they are only interacting with an associate community located on the same site.

Riepele and Gambino argue that this court should reject Shaw and apply United States v. Hillstrom, 988 F.2d 448, 453 (3rd Cir. 1993). In Hillstrom, the Third Circuit Court of Appeal held that a § 2P1.1(b)(3) similarity determination should include consideration of the facility's security policies compared to both

the pre-release and the corrections components of a community corrections center, as well as the safety ramifications involved in a prison escape. Id. at 452-53.

Riepele's and Gambino's arguments are without merit. First, Shaw, not Hillstrom, is the law in this Circuit. See United States v. Eckford, 910 F.2d 216, 220 (5th Cir. 1990)(a panel from another circuit cannot overrule a panel from this circuit). Second, the district court did consider the potential danger resulting from an escape from FMC Carville as part of its § 2P1.1(b)(3) determination. Third, the district court compared FMC Carville to community centers as defined in Hillstrom and still denied the four-level reduction.

Issue 2: Judicial Bias

Riepele contends that certain comments of the district court show bias and prejudice toward alien defendants. He argues that the district court's alleged prejudice caused it to deny Riepele's motion for a closed sentencing hearing, and that the lack of a closed hearing resulted in the judge's decision not to depart downward from the guidelines.

Judicial remarks that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. Litkey v. United States, ___ U.S. ___, 114 S.Ct. 1147, 1157 (1994). They may do so if they reveal an opinion that derives from an extrajudicial source; and they will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible. Id.

Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. Id. Our examination of the record reveals that Riepele did not make this objection at the district court level, thus we review this contention for plain error. United States v. Rodriguez, 15 F.3d 408, 414 (5th Cir. 1994). Under this standard the error must be plain, clear, or obvious. Id. at 415.

After imposing sentence, the district court commented that:

the best thing that could happen to the people of the United States is that when you get through serving all your sentence, that the INS kick you out of this country. We do not want you here. We do not need your type here in this country.

And if you want to stay in this country, you have got to live by the rules and regulations and you are not living by the rules and regulations and I love to do naturalization, I love to make people citizens from foreign countries but I do not like people who do not belong here to be coming here and violating the laws of this country and hurting people and [the] distribution of drug[s] hurt[s] people.

So, the best thing for the people of the United States is that the INS should really get you out of this country after you serve your sentence.

Maybe you ought to take that as an indication that you ought not to come back here, okay.

Riepele's guideline sentence range was twenty-four to thirty months. Before making this remark, the district court sentenced

him to the lowest guideline sentence, twenty-four months.

We find Riepele contention to be without merit. First, Judge Polozola's comments do not suggest that he is prejudiced against aliens, but that he does not approve of repeat drug offenders. Second, Riepele's sentence to the lowest possible guideline sentence belies his contention of judicial prejudice. Finally, Riepele has failed to demonstrate that Judge Polozola "display[ed a] clear inability to render fair judgment." Liteky v. United States, ___ U.S. ___, 114 S. Ct. 1147, 1155 (1994). We thus find no plain error in these remarks.

Riepele contends that the district court erred by failing to grant a closed sentencing hearing. Riepele requested that the district court close the sentencing hearing because he wished to testify that he had escaped because his life had been threatened by members of the Cali drug cartel because he had cooperated with the U.S. Customs service. Riepele argues that, if the district court had granted his motion for a closed hearing, he could have convinced the court to depart downward.

Riepele has failed to demonstrate that the district court's refusal to depart from the guidelines based on Riepele's alleged reason for escaping was in violation of law. United States v. Adams, 996 F.2d 75, 78-79 (5th Cir. 1993). As there is no indication of a violation of law, this issue provides no basis for appellate review. See Adams, 996 F.2d at 79.

CONCLUSION

For the foregoing reasons, the convictions of Riepele and Gambino are AFFIRMED.