

UNITED STATES COURT OF APPEALS  
for the Fifth Circuit

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No. 94-40300  
(Summary Calendar)

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ZACHARY PAUL YEAGER,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Eastern District of Texas

(6:93-CR-58-4)

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(September 8, 1994)

Before DUHÉ, WIENER, and STEWART, Circuit Judges.

PER CURIAM:<sup>1</sup>

Zachary Yeager appeals the sentence of the district court, contending that it erred in choosing to depart upward from the Sentencing Guidelines based on the relative culpability of the

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<sup>1</sup> 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

defendants. We agree. For the following reasons, Yeager's sentence is vacated and the case is remanded for sentencing.

#### BACKGROUND

Erik and Cherie Salmons, husband and wife, along with Aaron Stutts and appellant, Zachary Paul Yeager, planned to burglarize a convenience store in Frankston, Texas. As part of the plan, they made two pipe bombs to detonate on the other side of town from the store to divert police attention during the burglary. They selected the property of a gas company where liquified petroleum gas ("LPG") was stored. They placed the bombs, to which they had attached timers, between two LPG tanks and then broke into the convenience store stealing cash and checks. One bomb exploded without igniting any LPG. The other bomb failed to detonate. Later, the defendants met at an apartment in Tyler, Texas where they counted and divided the proceeds of the burglary.

Yeager and Stutts were named in five counts of a six-count indictment. The Salmonses were charged in all six counts. Yeager pled guilty to one count of manufacturing an illegal firearm-destructive device and aiding and abetting. The Salmonses each pled guilty to four counts of the indictment plus a one-count information. Stutts pled guilty to three counts of the indictment plus a one-count information. The probation officer determined that the Salmonses were the most culpable of the four defendants, and Yeager was the least culpable. The court sentenced Erik Salmons to 101 months of imprisonment, Cherie Salmons to 101 months (a downward departure), and Stutts to 90 months.

The court sentenced Yeager to 60 months imprisonment and two years of supervised release. The court established Yeager's total offense level as 19 and his criminal history category as I, yielding a sentencing range of 30 to 37 months. The court stated, "The sentence departs from the guidelines [sic] because of the relative culpability of the defendants."

#### DISCUSSION

Yeager contends that the district court erred in basing an upward departure from the Sentencing Guidelines on the relative culpability of the defendants. The government concedes that the reason is inadequate and recommends a remand for the district court to state sufficient reasons for the departure. A "district court may not under any circumstances depart from a recommended Guidelines' sentence--either upward or downward--for the purpose of achieving parity or equity between co-defendants." U.S. v. Ives, 984 F. 2d 649, 650 (5th Cir.), cert. denied, 114 S.Ct. 111 (1993); accord U.S. v. Davidson, 984 F.2d 651, 656 (5th Cir. 1993). A remand is not necessary when the district court relies on more than one reason and the "appellate court may say with confidence that even without considering the invalid factors the district court would have imposed the same sentence." Davidson, 984 F.2d at 656.

The court opened the sentencing hearing by stating that it was concerned about the relative culpability of the co-defendants. The court stated:

Without having the benefit of hearing from Counsel and based strictly upon the pre-sentence reports and my memory of facts developed at the plea hearings, it appeared to

me the Court should probably depart downward on Cherie Salmons to the level of Erik Salmons and depart upward on Yeager, in the mid-range between where it is now and where the other defendants are. That's my view of it at this point, and with that background, I invite your comments.

Yeager's counsel argued that Yeager was different from the other defendants in age, lack of criminal history, and his relative less participation in the burglary plan. The court rejected the pre-sentencing report's suggestion that an upward departure could be based on disruption of government functions. The government urged the court to sentence Yeager at the upper end of the guidelines range. The court announced, "I think it is appropriate to upward [sic] depart on Mr. Yeager to sixty months. That takes into consideration relative culpability of the defendants." The only ground that the district court articulated for the upward departure was the relative culpability of the defendants.

The district court's application of the guidelines in this instance was incorrect. The relative culpability of defendants, standing alone, cannot be used as an appropriate justification for departure. U.S. v. Madison, 990 F.2d 178, 183 (5th Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 114 S.Ct. 339 (1993) (citing U.S. v. Sellers, 975 F.2d 149, 151 (5th Cir. 1992)). Accordingly, Yeager's sentence is vacated and the case is remanded for resentencing.

VACATED AND REMANDED.