

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40845
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ONIE D. ROBERTSON,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 6:94CR12
- - - - -
(March 23, 1995)

Before GARWOOD, BARKSDALE, and STEWART, Circuit Judges.

PER CURIAM:*

Onie D. Robertson challenges the district court's calculation of the amount of loss applicable under the guidelines and its refusal to depart downward. The court's calculation is reviewed for clear error. United States v. Wimbish, 980 F.2d 312, 313 (5th Cir. 1992), cert. denied, 113 S. Ct. 2365 (1993). We will not disturb the district court's exercise of discretion not to depart downward from the guidelines unless the district court mistakenly believed it was not permitted to depart. United

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

States v. Soliman, 954 F.2d 1012, 1014 (5th Cir. 1992).

Robertson intended to defraud the government of the entire amount sought in the three fraudulent returns that he filed. Because the intended loss could be determined and because it was greater than the actual loss, the court correctly used the intended loss in determining Robertson's total offense level. § 2F1.1 comment. (n.7). The court sentenced Robertson within the guidelines, and the record does not indicate, nor does Robertson allege, that the district court mistakenly believed that it could not depart downward. Therefore, this court does not have jurisdiction to review the district court's discretionary refusal to grant a downward departure. United States v. DiMarco, ___ F.3d ___ (5th Cir. Feb. 21, 1995, No. 94-30145), 1995 U.S. App. LEXIS 3321 at *2.

Robertson also challenges the district court's finding that he engaged in "more than minimal planning." That finding is reviewed for clear error. United States v. Barndt, 913 F.2d 201, 204 (5th Cir. 1990). The guidelines define minimal planning as "more planning than is typical for commission of the offense in a simple form." § 1B1.1 comment. (n.1(f)). It "is deemed present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune." Id. There is no dispute that Robertson filed three separate fraudulent returns between April 1992 and April 1993. Because Robertson engaged in repeated acts over a period of time, the court did not err in its finding. The district court's judgment is AFFIRMED.