UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-50138

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

DAVID LEE HENLEY,

Defendant-Appellee.

Appeal from the United States District Court
For the Western District of Texas
(A-93-CR-98(01))

(March 7, 1995)

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

POLITZ, Chief Judge:[*]

The prosecution appeals a downward departure in the sentencing of David Lee Henley. For the reasons assigned, we affirm.

Background

Pursuant to a plea agreement Henley pled guilty to bank

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

robbery[1] and use of a firearm during the commission of a crime of violence.[2] In the presentence report the probation officer calculated an offense level of 28 and a criminal history category of I, resulting in a Sentencing Guidelines penalty range of 78 to 97 months imprisonment. The firearm count carried a mandatory consecutive 60-month sentence.

The district court adopted the factual findings in the PSR, departed downward 10 months, and imposed 68 months imprisonment on the bank robbery count and 60 consecutive months on the firearm count, for a total period of imprisonment of 128 months. The court assigned two reasons for the downward departure: (1) the disparity between Henley's sentence and that of his codefendant, and (2) Henley's distinguished military record. Prior to the sentencing hearing the court gave the government no notice of its intent to depart downward. The government appeals.[3]

Analysis

In reviewing departures from the Guidelines we inquire whether the sentence violates the law or was imposed as a result of an incorrect application of the Guidelines and whether the departure was unreasonable.[4] We accept the findings of fact made by the

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[1]18 U.S.C. § 2113(a) & (d).

[2]18 U.S.C. § 924(c).

[3]18 U.S.C. § 3742(b)(1).

[4]**United States v. Lambert**, 984 F.2d 658 (5th Cir. 1993) (*en banc*).

district court unless clearly erroneous.[5]

At the outset Henley maintains that the government waives the issue it now raises on appeal because it did not object at the sentencing hearing and did not reserve the right to appeal the sentence in the written plea agreement. Neither contention has merit. The record reflects that the prosecutor adequately made known his objection at sentencing,[6] and the plea agreement, as a contract between the parties, will not be read to contain a waiver not expressly contained therein.[7] The language of the plea agreement enforces this conclusion by limiting its reach to the specifications detailed therein.[8]

The government contends that the court erred by failing to give notice of its intention to depart downward from the Guideline range. We agree. In **Burns v. United States**,[9] involving an upward departure, the Court taught:

> It is equally appropriate to frame the issue as whether the parties are entitled to notice before the district court departs upward or downward from the Guidelines range. Under Rule 32, it is clear that the defendant and

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[5]**United States v. Lara-Velasquez**, 919 F.2d 946 (5th Cir. 1990).

[6]Fed.R.Crim.P. 51.

[7]**United States v. Benchimol**, 471 U.S. 453 (1985). See also **United States v. Melancon**, 972 F.2d 566 (5th Cir. 1992) (holding that waiver of right to appeal must be informed and voluntary).

[8]Our colleagues in the First Circuit reached the same conclusion under almost identical factual circumstances in **United States v. Anderson**, 921 F.2d 335 (1st Cir. 1990).

[9]501 U.S. 129 (1991).

the Government enjoy equal procedural entitlements.[10] The government was entitled to notice of the court's intention to depart downward just as the defendant is entitled to notice of an upward departure. Ordinarily we would vacate and remand for resentencing after the giving of adequate notice. We do not do so here because of the state of the record, considerations of judicial economy, and harmless error.[11] The government had an opportunity to voice its position and the record clearly reflects the reasons for the trial court's action, which persuades us that on remand the court would assess the same sentence.

The government's first challenge to the court's reasons for downward departure, disparity with the sentence of the codefendant, is well taken. Disparity between sentences of codefendants "is not a proper basis for departure, either upward or downward."[12] Departure on this basis alone would be error.

The government also contends that the court erred in basing its downward departure on Henley's military service record. The sentencing court may depart downward if it "finds that [a] . . . mitigating circumstance exists that was not adequately taken into consideration by the Commission,"[13] but the court must adequately

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[10]**Burns**, 111 S.Ct. 2182, 2185 n.4 (1991) (emphasis in original).

[11]**United States v. Tello**, 9 F.3d 1119 (5th Cir. 1993).

[12]**United States v. Ives**, 984 F.2d 649, 651 (5th Cir.), cert. denied, 114 S.Ct. 111 (1993).

[13]**United States v. Roberson**, 872 F.2d 597, 601 (5th Cir.), cert. denied, 493 U.S. 861 (1989).

explain its reasons on the record.[14] While the Guidelines provide that "[m]ilitary . . . service . . . [is] not ordinarily relevant in determining whether a sentence should be outside the applicable range,"[15] they do not preclude consideration of a military record in extraordinary circumstances.

The district court leaves no doubt that it was departing downward from 78 to 68 months because of Henley's distinguished career in the military. The record fully supports this characterization. Henley did more than merely serve in the armed forces; he served on active duty for 20 years,[16] including service in Vietnam. During his career Henley received numerous decorations recognizing the quality of his service to his country.[17] Such an extended, exemplary military record reflects a positive contribution to society. We are not prepared to say that the district court's recognition of this distinguished service in the armed forces, including time in a combat theater, as extraordinary circumstances justifying a downward departure, was an erroneous

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[14]**Lambert**; **United States v. Huddleston**, 929 F.2d 1030 (5th Cir. 1991).

[15]U.S.S.G. § 5H1.11 (as amended Nov. 1, 1991).

[16]Statistics reflect that very few of those joining the enlisted ranks in 1970, just over 1%, completed a full 20-year career in the Army.

[17]The record establishes that Henley received the following decorations over the course of his 20-year career: the Meritorious Service Medal, the Air Medal, the Army Commendation Medal with three Oak Leaf Clusters, the Army Achievement Medal with three Oak Leaf Clusters, the Good Conduct Medal, the National Defense Service Medal, the NCO Professional Development Ribbon, the Army Service Ribbon, the Overseas Service Ribbon, the Vietnam Campaign Medal, and the Vietnam Cross of Gallantry with Palm.

application of the Sentencing Guidelines.[18]

For these reasons, we conclude that the court's error in failing to give notice of its intent to depart was, in this particular case, a harmless error and that the reasons assigned by the district court for the departure pass muster.[19] The judgment appealed is, accordingly, AFFIRMED.

[18]Two other circuits have concluded that military service can be the basis for a downward departure under exceptional circumstances. **United States v. Neil**, 903 F.2d 564 (8th Cir. 1990) (recognizing principle but declining to allow departure when defendant served for 11 years within the continental United States as a recruiter); **United States v. McCaleb**, 908 F.2d 176 (7th Cir. 1990) (accord). See also **United States v. Pipich**, 688 F.Supp. 191 (D.Md. 1988) (departing downward on basis of exemplary military service).

[19]The government does not suggest, nor do we find any evidence in the record that the extent of the departure was unreasonable.