

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-50231  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN R. AYCOCK,

Defendant-Appellant.

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Appeal from the United States District Court  
For the Western District of Texas  
(P-93-CR-107)

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(February 6, 1995)

Before POLITZ, Chief Judge, JOLLY and BENAVIDES, Circuit Judges.

POLITZ, Chief Judge:\*

John R. Aycock appeals the upward departure sentence imposed following his plea of guilty to conspiracy to burglarize a United States Post Office. Finding neither error nor abuse of discretion, we affirm.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

### Background

The PSR, while indicating the basis for an upward departure, assigned Aycock an offense level of 10 and a criminal history category of VI resulting in a guidelines sentencing range of 24-30 months. After indicating its intent, the district court departed upward, raising the offense level to 17 which increased the sentencing range to 51 to 63 months. The court then imposed 60 months imprisonment, the statutory maximum for the convicted offense.

In departing, the court assigned several reasons: the criminal history computation did not consider thefts and burglaries committed by Aycock while a juvenile; that his arrest history began at age 11 and escalated as he grew older until, by age 19, he was an habitual offender; that members of his family and close associates were either under indictment or in jail serving sentences; and that he had a demonstrated propensity for recidivism.

Aycock timely appeals, challenging the adequacy of the basis for the upward departure.

### Analysis

We will affirm an upward departure provided the district court assigns acceptable reasons for its action.<sup>1</sup> The findings of fact underlying the departure are reviewed under the clearly erroneous

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<sup>1</sup>**United States v. Lambert**, 984 F.2d 658 (5th Cir. 1993) (en banc).

standard.<sup>2</sup> The decision to depart is reviewed under the abuse of discretion standard.<sup>3</sup>

There was no challenge to the departure in the trial court; we review, therefore, under the plain error doctrine. Under that doctrine we may correct an error if it seriously affects the fairness, integrity, or public reputation of the challenged proceedings.<sup>4</sup> An error is plain if it was clear and obvious under current law at time of trial.<sup>5</sup>

The record reflects that Aycock has an extensive juvenile arrest record beginning in 1985 when he was 11 years old. Three 1986 arrests for felony theft and burglary were followed by a 1987 arrest for theft, 1988 arrests for burglary and theft, and multiple arrests in 1989 and 1990 for possession of burglary tools, unlawfully carrying a weapon, burglary, disorderly conduct, truancy, and being a minor in possession of alcohol. Juvenile counseling efforts were not effective and Aycock continued his criminal ways.

The record also reflects that members of Aycock's family and his known associates are either under indictment or incarcerated. This includes his mother, his wife, and his three brothers.

An upward departure may be based on the inadequacy of a

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<sup>2</sup>**United States v. Pennington**, 9 F.3d 1116 (5th Cir. 1993).

<sup>3</sup>**United States v. McKenzie**, 991 F.2d 203 (5th Cir. 1993).

<sup>4</sup>**United States v. Olano**, 113 S.Ct. 1770 (1993).

<sup>5</sup>**United States v. Calverley**, 37 F.3d 160 (5th Cir. 1994) (*en banc*).

defendant's criminal history category,<sup>6</sup> as well as repeated acts of adult criminal activity that did not result in convictions.<sup>7</sup> Certain uncounted juvenile adjudications and stale convictions also may be considered.<sup>8</sup> Juvenile arrests standing alone are not a sufficient basis.<sup>9</sup>

The record adequately supports the district court's decision to depart upward. The factual findings are not clearly erroneous and the decision to depart was not an abuse of the trial judge's discretion. Considering the record, the guideline computation of criminal history category is inadequate and the district court appropriately increased the offense level to 17, yielding a sentencing range of 51-63 months. The sentence imposed, 60 months, which is the statutory maximum, is obviously within that range.

AFFIRMED.

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<sup>6</sup>**United States v. Laury**, 985 F.2d 1293 (5th Cir. 1993).

<sup>7</sup>U.S.S.G. § 4A1.3(e).

<sup>8</sup>U.S.S.G. § 4A1.2(d)(2) & comment. (N-8); **United States v. Ford**, 996 F.2d 83 (5th Cir. 1993) (juvenile adjudication); **United States v. Carpenter**, 963 F.2d 736 (5th Cir.) (stale convictions), cert. denied, 113 S.Ct. 355 (1992).

<sup>9</sup>U.S.S.G. § 4A1.3; **United States v. Cantu-Dominguez**, 898 F.2d 968 (5th Cir. 1990).