

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50776
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DAN JENNINGS,

Defendant-Appellant.

Appeal from United States District Court
for the Western District of Texas
(A-94-CR-112(1))

(May 12, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

This sentencing case concerns the issue of whether an upward departure was properly granted based upon valid factors argued to and apparently relied upon by the district judge, notwithstanding the fact that evidence concerning three invalid factors was also presented to the court. After carefully considering the evidence and the arguments of the parties, we conclude that, even without consideration of the invalid factors, the district court would have granted the Government's request for upward departure and imposed

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

an identical sentence. The defendant's use of cocaine while on release pending sentencing, the fact that he was in the company of an alleged known drug dealer when arrested, and the fact that he gave a false name when arrested all constituted conduct which unmistakably persuaded the district court to grant the departure. Because these are valid factors upon which to base an upward departure, we affirm.

Background

Pursuant to a plea agreement, Dan Jennings pleaded guilty to possession of methamphetamine with intent to distribute. He was released on bond pending sentencing with the requirement that he meet with DEA Agent Hildreth three times a week. Also as part of the plea agreement, Jennings was to cooperate with authorities in a drug investigation.

At sentencing, the Government requested a four level upward departure, stating that Jennings's conduct between the entry of his guilty plea and the date of the sentencing hearing constituted an aggravating circumstance of a kind and to a degree not adequately taken into account by the Sentencing Commission and that Jennings had interfered with ongoing criminal investigations.

The court had before it evidence of the following conduct, which the Government orally argued as the basis for upward departure: (1) Jennings's urinalysis tested positive for cocaine while he was out on release; (2) Jennings failed to appear at a scheduled hearing; (3) he was considered a fugitive after he failed to appear; (4) he did not meet with Agent Hildreth as agreed; (5)

he was arrested in the company of a suspected amphetamine dealer;
(6) he initially gave a false name (his brother's) when arrested.

The PSR states that, while out on release, Jennings had submitted to a urinalysis which tested positive for cocaine. Citing the cocaine test results, Pretrial Services moved that an arrest warrant be issued for Jennings and a hearing held as to whether his bond should be revoked.

On September 30, Jennings's sentencing hearing, which was originally set for October 13, 1994, was rescheduled for October 6. Jennings apparently did not appear. He claimed that he had not been aware of the new date. On October 6, a warrant was issued for his arrest, although it is not clear whether this was for the alleged cocaine use or for failure to appear. The record does not indicate any other court appearances Jennings might have missed, although certain references at the sentencing hearing imply that he missed more than one date.¹

There was testimony that Jennings had failed to meet with Agent Hildreth as required by the terms of his release pending sentencing. Also, he was considered a fugitive for the nineteen days from issuance of the arrest warrant until his arrest on October 25. When arrested this time, Jennings at first gave police a false name. When he was arrested, he was in the company of an individual alleged by the Government to be a known amphetamine dealer.

¹The second "missed" date referred to by the Government seems to be the original October 13 hearing, which had been rescheduled.

Agent Hildreth testified that Jennings's companion at the time of his arrest was the target of an ongoing drug investigation, an investigation with which Jennings was supposed to be cooperating. Hildreth testified that Jennings knew he was not supposed to be meeting people involved in narcotics transactions without permission or surveillance by Hildreth or Sergeant Bredl, and that Jennings had not been in contact with either of them for weeks prior to his arrest.² Hildreth stated, without elaboration, that Jennings's behavior at the time he was a fugitive hindered in the investigation of that dealer.

The PSR indicates an offense level of 18 and a criminal history category of IV, with a sentencing range of 41-51 months' imprisonment, and states no factors warranting a departure from the applicable Guidelines range. Based on a review of the record, the PSR with attachments, and the evidence at the sentencing hearing, the district court assessed the requested four-level upward departure, stating:

The court has reviewed the record in this case, Mr. Jennings, as well as the presentence report and attached materials. And based upon that review, together with the information brought to the attention of the court during this hearing, it's the judgment of this court that an upward departure should be granted in this case based upon the government's motion and arguments, some of the arguments in that motion.

The court specifically finds that none of the guidelines that are applicable to this case contemplate the conduct of this defendant between the time he entered a guilty plea and the date of the sentencing hearing.

²This refutes Jennings's testimony that his meeting with the dealer was in furtherance of his agreement to cooperate in investigations.

And so there exists an aggravating circumstance of a kind and to a degree that wasn't adequately taken into account by the Sentencing Commission.

In addition, the court finds that the conduct of this defendant did interfere, to some extent, with an ongoing criminal investigation.

(emphasis added). The district court's assessment increased the offense level to 22, with a range of 63-78 months. The court chose a sentence in the middle of the range, and imposed a sentence of 72 months' imprisonment, a \$5,000 fine, and three years' supervised release, and stipulated that Jennings should participate in a substance abuse program.

Discussion

Jennings argues that the district court considered invalid factors in assessing the upward departure. He states that most of the Government's evidence in support of its request for upward departure, although aggravating, was behavior already taken into account by the obstruction of justice and substantial assistance Guidelines, §§ 3C1.1(d) and 5K1.1. According to Jennings, the remaining evidence is insufficient to indicate that the district court would have imposed the same sentence absent consideration of the invalid factors, and the matter should be remanded for resentencing.

The Government's position is that the departure was based solely on Jennings's post-arrest interference with an ongoing criminal investigation, a matter not covered by the Guidelines, and therefore a proper factor to consider in an upward departure.

Further, the Government states that the departure was reasonable due to the seriousness of the obstructive conduct.

It is an incorrect application of the Guidelines for a district court to depart from the applicable sentencing range based on a factor that the Commission has already fully considered in establishing the guideline range or on a factor that the Commission has expressly rejected as an appropriate ground for departure. Williams v. United States, 112 S. Ct. 1112, 1119 (1992).

In Williams, the Court held that when a district court relies upon an improper ground in departing from the guideline range, a reviewing court is obliged, under 18 U.S.C. § 3742(f), to inquire whether the sentence was imposed either in violation of law or as a result of an incorrect application of the Guidelines. The Court specified that remand is not automatic whenever a district court has considered an erroneous factor in sentencing. Id. Remand is only required if the sentence was imposed "as a result of" an incorrect application of the Guidelines. A sentence is imposed "as a result of" a misapplication of the Guidelines if the sentence would have been different but for the district court's error. In determining whether a remand is required, the question is whether the district court would have imposed the same sentence had it not relied upon the invalid factors. "[O]nce the court of appeals has decided that the district court misapplied the Guidelines, a remand is appropriate unless the reviewing court concludes, on the record as a whole, that the error was harmless, *i.e.*, that the error did

not affect the district court's selection of the sentence imposed." Id. at 1120-21.

Jennings argues that three of the grounds presented by the Government as justifying upward departure are invalid. We have carefully considered the arguments presented by both Jennings and the Government. We conclude that the district court was presented with evidence at the sentencing hearing concerning both permissible and impermissible grounds to justify an upward departure. Because the district court in large part merely adopted the Government's arguments by reference in stating his reasons for granting the upward departure,³ it is difficult to determine whether he relied upon only permissible factors. Nonetheless, we have analyzed each of the grounds for upward departure presented to the district court as justifying the upward departure, and we conclude that an identical sentence would have been imposed if the invalid factors had not been argued or considered.

Jennings' positive test for cocaine use

Jennings does not argue that Jennings' positive test for cocaine use while he was released pending sentencing was an impermissible factor for the judge to consider in granting the upward departure. This obvious recidivism on the part of Jennings

³If a sentencing judge departs upward from the Guidelines, he must state "the specific reason for the imposition of the sentence different from that described." 18 U.S.C. § 3553(c). In this case, we find that the district judge only minimally complied with § 3553(c) in stating his reasons for granting the upward departure, referring somewhat obliquely to "this conduct" of the defendant described by the Government and adopting merely by reference the arguments forwarded by the Government in support of the motion for upward departure.

is not otherwise covered by the Guidelines and was thus a valid factor for the court to consider. The judge's reference to "this conduct" in his reasons for granting the upward departure unmistakably points in part to Jennings' cocaine use.

Failure to meet with DEA agent Hildreth

The Government also argued that an upward departure should be granted because Jennings did not meet with DEA agents as agreed in order to cooperate in the investigation of other individuals. Jennings properly argues that this was an improper factor upon which to base an upward departure pursuant to U.S.S.G. § 5K1.2, a policy statement, which provides that "A defendant's refusal to assist authorities in the investigation of other persons may not be considered as an aggravating sentencing factor." If a policy statement "prohibits a district court from taking a specified action, the statement is an authoritative guide to the meaning of the applicable guideline." Williams, 112 S. Ct. at 1119.

Giving a false name when arrested

The Government also argued that Jennings' giving of a false name when arrested warranted upward departure, and the court did question Jennings about it. Jennings asserts that the court could not properly base a departure on the fact that Jennings gave a false name upon his (second) arrest. Jennings argues that giving a false name upon arrest is an invalid factor upon which to base an upward departure because that conduct was already considered in the obstruction of justice guideline, U.S.S.G. § 3C1.1: "If the defendant willfully obstructed or impeded, or attempted to obstruct

or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels." This conduct took place at the sentencing phase, and could be construed as an attempt to obstruct the sentencing.

However, the commentary to § 3C1.1 states that providing a false name or identification document at arrest does not warrant application of the obstruction enhancement unless it "actually result[s] in a significant hindrance to the investigation or prosecution of the instant offense." U.S.S.G. § 3C1.1, comment. (n.4(a)). The false name does not seem to have hindered the prosecution, because the arresting officer knew Jennings's real name. Thus, Jennings' conduct falls outside the scope of the obstruction enhancement. Because Jennings' conduct does not seem to fit within the obstruction enhancement or any other guideline provision, it is eligible to be considered as an aggravating factor. The Government's argument and the court's questions indicate that the conduct may have formed part of the court's reasons for the upward departure. The fact that the defendant tried to use a false name illustrates his defiance and uncooperative nature in the face of authority, which seems to have driven the district court's decision in part to grant the upward departure.

Failure to appear in court/time spent as a fugitive

Jennings argues in his brief that time spent as a fugitive and failure to appear in court were also behaviors considered by the

obstruction of justice guideline, and therefore could not form the basis for a departure. See U.S.S.G. § 3C1.1, comment. (n.3(e)). Although the district court could have applied the 2-level obstruction enhancement and additionally departed two levels if the obstructive conduct was sufficiently egregious, see United States v. Wade, 931 F.2d 300, 306 (5th Cir.), cert. denied, 502 U.S. 888 (1991), the court did not apply the enhancement. As noted above, departure from the Guidelines is only warranted for factors not considered in establishing the Guidelines. Williams, 112 S. Ct. at 1119. Jennings's contention that these were invalid factors has merit. However, there was sufficient evidence based upon permissible factors that we conclude that the same sentence would have been imposed absent any consideration of these invalid factors.

Arrested in company of drug dealer

As noted above, at the time of his arrest, Jennings was in the company of an alleged known drug dealer who was the "target" of the investigation in which Jennings had initially agreed to cooperate. The government argued and presented evidence that Jennings impeded in the investigation of that individual, presumably in part because the dealer was then possibly "tipped off" to the fact that he was under investigation.⁴

⁴Agent Hildreth testified in this regard. In response to the district court's question as to whether Jennings's behavior had an effect on Hildreth's ability to pursue ongoing investigations of other people, Agent Hildreth first stated, "No, sir, I can't say that." After counsel for the Government asked whether Jennings's failure to report his meeting with an individual interfered with the investigation of that target,

Jennings argues that this conduct is covered by the obstruction of justice enhancement cited above, found in § 3C1.1. Thus, he argues that it cannot form the basis for an upward departure. We disagree. The obstruction enhancement is applicable when the defendant's conduct impedes the investigation or prosecution of "the instant offense." "The instant offense" was Jennings' conviction offense. There has been no suggestion that the fact that Jennings was with the alleged drug dealer when he was arrested somehow impeded the case against Jennings. Jennings' conduct is not the same as that contemplated by the obstruction enhancement; thus, the conduct was properly considered by the district judge as aggravating.⁵

Conclusion

We conclude that there was ample evidence based upon valid factors to justify the upward departure. We are convinced that the district judge would have imposed the identical sentence had the invalid factors and evidence pertaining thereto not been presented. See United States v. Davidson, 984 F.2d 651, 657 (5th Cir. 1993), and United States v. Stout, 32 F.3d 901, 903-04 (5th Cir. 1994).

Hildreth gave a rather nonresponsive explanation, finally concluding, "And yes, that did hinder the investigation of that individual, yes."

⁵Moreover, Jennings had been told not to meet with the dealer unless under surveillance. At the time he was arrested, Jennings had not checked in with DEA for at least two weeks. Jennings' contact with the drug dealer outside the confines of the DEA investigation constituted additional evidence of his defiance and obvious recidivism, which clearly formed part of the district court's decision to grant the upward departure, even apart from the court's reference to the fact that Jennings had impeded in the investigation of the dealer.

We also conclude that the upward departure and resultant increase in Jennings' sentence was reasonable. We AFFIRM.