

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-60103
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

RONALD LEE LEWIS,

Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Texas

(CR-M-93-118-01)

(November 3, 1994)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

Ronald Lee Lewis pleaded guilty to knowingly making counterfeit cashier's checks, a violation of 18 U.S.C. § 513. Lewis' scheme resulted in the production of approximately 1600 counterfeit cashier's checks, each payable in the sum of \$250.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Approximately 15 checks were redeemed before the scheme was uncovered.

The Presentence Report (PSR) detailed Lewis' prior criminal history, which included a substantial number of juvenile and adult adjudications, several of which were for fraud-related offenses. The PSR calculated Lewis' criminal history points as 19, resulting in a criminal history category of VI. The PSR further noted that two charges pending against Lewis in state court and other adjudications not considered in computing Lewis' criminal history were grounds for departure. Lewis did not file a written objection to the PSR's determination that there were grounds for departure.

At the sentencing hearing, the district court advised Lewis that it was aware of the grounds supporting a departure. After determining that Lewis' guideline sentencing range was 24 to 30 months, the court stated

What's disconcerting to the Court here is, the pattern of the same type of activity coming up over and over again involving checks Plus, as I indicated, I will have to take into account that there are quite a few checks here that were not cashed because the Court's finding would have to be that this was stopped before those were cashed. So this artificial amount of the \$4,000 los[s] could have really been a lot more than that.

And as I indicated, I do feel that his prior history here, one has to note that his total Offense Level is really 19 counting all the prior record that can be counted. We're at 19; that does not include all the prior record that cannot be counted. The highest that we go here is 13 or more. I really don't think that this Offense Level and Criminal History adequately represent his prior background and the severity of this offense. . . .

And, therefore, I've looked at these calculations and I've decided that an increase . . . to Level 17,

would be the appropriate place within which to put all these factors in together. I've considered each level and I've reached the conclusion that a sentence of five years is the appropriate sentence in this case.

And the reasons for the departure are those that I have stated. There is a pattern here that involves the same type of damage and behavior from the standpoint of either stolen credit cards or forged checks or stolen checks or fraudulent checks. And it has been a pattern that has continued here during a long period of Mr. Lewis' lifetime and I don't think that the guidelines have adequately taken all this into account[.]

Lewis did not object to the district court's upward departure.

OPINION

Lewis argues that the district court's departure to a sentence that was twice the maximum which could have been imposed under a "strict application" of the sentencing table was unjustified and unreasonable. He argues that his prior criminal history was fully accounted-for in the Guidelines. He also argues that the district court's reference to the unused cashier's checks and the amount of potential loss was an inappropriate reason for departure because the court's speculation "of what mischief might have occurred in the future is not a proper basis to deviate from the guidelines."

Parties are required to challenge errors in the district court. Because Lewis has forfeited any error relating to the departure by failing to object, this Court may remedy the error only in the most exceptional case. See United States v. Rodriguez, 15 F.3d 408, 414 (5th Cir. 1994). The Supreme Court has directed the courts of appeals to determine whether a case is exceptional by using a two-part analysis. United States v. Olano, ___ U.S. ___, 113 S. Ct. 1770, 1777-79, 123 L. Ed. 2d 508 (1993).

First, an appellant who raises an issue for the first time on appeal has the burden to show that there is actually an error, that it is plain ("clear" or "obvious"), and that it affects substantial rights. Olano, 113 S. Ct. at 1777-78; Rodriguez, 15 F.3d at 414-15; Fed. R. Crim. P. 52(b). This Court lacks the authority to relieve an appellant of this burden. Olano, 113 S. Ct. at 1781.

Second, the Supreme Court has directed that, even when the appellant carries his burden, "[r]ule 52(b) is permissive, not mandatory. If the forfeited error is 'plain' and 'affect[s] substantial rights,' the Court of Appeals has authority to order correction, but is not required to do so." Olano, 113 S. Ct. at 1778 (quoting Fed. R. Crim. P. 52(b)). As the Court stated in Olano:

the standard that should guide the exercise of [this] remedial discretion under Rule 52(b) was articulated in United States v. Atkinson, [297 U.S. 157] (1936). The Court of Appeals should correct a plain forfeited error affecting substantial rights if the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."

Olano, 113 S. Ct. at 1779 (quoting Atkinson, 297 U.S. at 160). Thus, this Court's discretion to correct an error pursuant to Rule 52(b) is narrow. Rodriguez, 15 F.3d at 416-17.

A departure from the Guidelines will be affirmed if the district court offers acceptable reasons for the departure and the departure is reasonable. United States v. Lambert, 984 F.2d 658, 663 (5th Cir. 1993)(en banc). In making a departure, a sentencing court must find an aggravating circumstance not adequately taken into consideration by the Commission in formulating the Guidelines.

§§ 4A1.3 & 5K2.0; 18 U.S.C. § 3553(b). The district court gave two main reasons for its upward departure: (1) the potential loss due to Lewis' offense was greater than that reflected in the Guidelines; and (2) Lewis' criminal history.

The Government argues that under the Guidelines, "the court could have included a reasonable assessment of the value of the unused checks in its calculation of Lewis' offense level." Therefore, a departure based on the potential loss due to Lewis' conduct was not unreasonable. A district court may depart upward when the amount of actual loss caused by a defendant substantially exceeds the maximum amount of loss contemplated by the Guidelines. See United States v. Bachynsky, 949 F.2d 722, 734 (5th Cir. 1991), cert. denied, 113 S. Ct. 150 (1992). However, research reveals no authority indicating that the court may depart upward based on a potential loss. Although the lack of prior authority endorsing such a departure does not preclude a finding that the district court's basis for the departure was valid. See § 5K2.0, p.s. ("[c]ircumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance"), this Court need not address the issue because, even assuming that the district court relied on an invalid factor in support of the departure, the district court also relied on valid factors relating to Lewis' criminal history. See United States v. Davidson, 984 F.2d 651, 657 (5th Cir. 1993)(erroneously reasoned upward departure harmless when district court also relied on different, valid departure basis and

valid departure basis was primary factor motivating the departure). The sentencing record as a whole reveals that the district court placed more emphasis on Lewis' criminal history than on the amount of loss in determining that a departure was appropriate. Therefore, a determination that the departure was valid because it was supported by the alternative acceptable bases would not result in a clear or obvious error affecting Lewis' substantial rights. See Rodriguez, 15 F.3d at 414-15.

A departure under § 4A1.3 is warranted when the criminal history category significantly under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit further crimes. See § 4A1.3, p.s. Repeated acts of similar criminal activity are an acceptable basis for departure because they may indicate the defendant's lack of recognition of the gravity of the original wrong. See United States v. Schmeltzer, 20 F.3d 610, 613 (5th Cir. 1994), petition for cert. filed, (U.S. May 24, 1994)(No. 93-9244); United States v. Medina-Gutierrez, 980 F.2d 980, 984 (5th Cir. 1992). Similarly, the inadequacy of a defendant's criminal history category is an acceptable basis for departure. See United States v. Laury, 985 F.2d 1293, 1310 (5th Cir. 1993)(defendant's 20 criminal history points well above the 13 required to place him in criminal history category VI).

Lewis' criminal history revealed a pattern of criminal activity involving fraud-related offenses that were similar to the offense conduct. Further, even without the numerous juvenile and adult

adjudications that were not considered in calculating Lewis' criminal history points, Lewis' criminal history score was 19, well above the 13 required to place him in criminal history category VI. Thus, the district court's departure was based on acceptable reasons. See Lambert, 984 F.2d at 663.

Regarding the reasonableness of the court's departure, Lewis argues that the district court's method of departure was inappropriate because "rather than moving vertically down the Sentencing Table by increasing the offense level, the court should have extrapolated the criminal history category horizontally to an equivalent criminal history category of VIII[.]" He also challenges the length of his sentence, arguing that it exceeded that recommended for a "career offender" under the guidelines.

The district court correctly departed above criminal history Category VI by staying within the Guidelines and considering sentencing ranges for higher base offense levels. United States v. Pennington, 9 F.3d 1116, 1118 (5th Cir. 1993). Such is the recommended approach to determining the extent of an upward departure. Id. Regarding the length of the sentence, the five-year sentence was not unreasonable. See Lambert, 984 F.2d at 663-64 (100 percent increase held to be reasonable); PSR ¶ 113 (maximum term of imprisonment for violations of § 513 is 10 years). Because the district court's upward departure was supported by valid reasons and because the departure was not unreasonable, the district court did not plainly err by departing upward.

AFFIRMED.