

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60357
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

YVONNE WIMBERLEY,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:94-CR-21
- - - - -

June 30, 1995

Before JONES, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Yvonne Wimberley appeals her sentence for possession of a
firearm by a convicted felon. See 18 U.S.C. § 922(g).

Wimberley contends that the district court should have
reduced her offense level for her acceptance of responsibility.
See U.S.S.G. § 3E1.1. "The sentencing judge's factual
determinations on acceptance of responsibility are entitled to
even greater deference than that accorded under a clearly
erroneous standard." United States v. Maseratti, 1 F.3d 330, 341
(5th Cir. 1993), cert. denied, 114 S. Ct. 1096 (1994). Based

* 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that this opinion should not be published.

upon Wimberley's statements to the probation officer, which contradicted her earlier agreement with the Government's factual basis for her guilty plea, the district court did not clearly err in failing to find that Wimberley had accepted responsibility for the offense of conviction. See United States v. Burian, 19 F.3d 188, 192 (5th Cir. 1994).

Wimberley argues that the evidence at sentencing was insufficient to prove that an attempted burglary was taking place; thus, the district court erred in enhancing her sentence under § 2K2.1(b)(5) (adding four levels "[i]f the defendant used or possessed any firearm . . . in connection with another felony offense."). The district court's findings are reviewed for clear error, whether "it is implausible in light of the record as a whole." United States v. Condren, 18 F.3d 1190, 1199 (5th Cir.), cert. denied, 115 S. Ct. 161 (1994).

At sentencing, the district court's findings are determined by a preponderance of the evidence. See United States v. Angulo, 927 F.2d 202, 205 (5th Cir. 1991). Moreover, the court may rely upon the PSR in making factual determinations. See United States v. Young, 981 F.2d 180, 185 (5th Cir. 1992), cert. denied, 113 S. Ct. 2454 (1993). Based upon what the police observed, as described in the PSR, there was sufficient evidence for the district court to find that Wimberley and her companions were attempting to burglarize the residence, and this finding is not clearly erroneous.

Wimberley argues that the district court erred by imposing a term of incarceration and in failing to depart downward based on

her medical condition. Wimberley's term of incarceration was within the applicable sentencing range. We will not review a district court's refusal to depart from the applicable guideline range unless the court's refusal was a violation of law or the court mistakenly assumed that it could not depart. United States v. Adams, 996 F.2d 75, 78-79 (5th Cir. 1993); see United States v. Guajardo, 950 F.2d 203, 208-09 (5th Cir. 1991), cert. denied, 112 S. Ct. 1773 (1992).

The language of § 5H1.4 allows a departure for "an extraordinary physical impairment." The departure is permissive, not required. The district court, in stating its reasons for not departing downward, indicated that it was aware that it could depart. The court chose not to depart based upon the facts of the case. Therefore, the district court's refusal to depart is not reviewable by this court. See Adams, 996 F.2d at 79.

AFFIRMED.