

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-10150
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

KENNETH GARNER,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:94-CR-034-E c/w 66
- - - - -

August 23, 1995

Before KING, JOLLY, and WIENER, Circuit Judges.

PER CURIAM:*

Kenneth Wade Garner contends that the district court erred by increasing his base offense level three levels for assaulting a law enforcement officer. This court reviews district court findings of fact regarding sentencing guideline issues for clear error. United States v. Mir, 919 F.2d 940, 943 (5th Cir. 1990).

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

A defendant's base offense level is increased by three levels when a defendant assaults a law-enforcement officer in a manner creating a substantial risk of serious bodily injury, knowing or having reasonable cause to believe that the person was a law enforcement officer. U.S.S.G. § 3A1.2(b). Adjustments under this guideline are determined on the basis of all relevant conduct as defined by § 1B1.3. United States v. Gonzales, 996 F.2d 88, 93 (5th Cir. 1993).

The PSR and testimony at sentencing established that the FBI had reason to believe that Garner was holding his kidnapping victim in a specific motel room and was armed. Immediately after using a battering ram to effect entry into Garner's motel room, Garner was informed "FBI, keep your hands in the air," in an audible manner. He sat up on the bed, put his hands in the air initially, and then put his hands in front of his eyes as if to shield the light from the flashlights. He was again commanded "FBI, keep your hands in the air."

Garner took evasive action, retrieved a .38 revolver from under his pillow, struggled with an FBI agent for the gun, pushed the gun below the agent's belt line, and pulled the trigger. The gun misfired. Garner offered no rebuttal evidence to support his assertion that he did not know that the individuals were law enforcement officers. See Mir, 919 F.2d at 943. The district court did not clearly err regarding the three-level upward adjustment. See United States v. Rodriguez, 897 F.2d 1324, 1328 (5th Cir.), cert. denied, 498 U.S. 857 (1990).

AFFIRMED.