

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-40201
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JEFFREY WAYNE GARDNER,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:97-CR-54-ALL
- - - - -

November 16, 1998

Before DAVIS, DUHE', and PARKER, Circuit Judges.

PER CURIAM:*

Jeffrey Wayne Gardner appeals his sentence following a guilty plea conviction of theft concerning programs receiving federal funds in violation of 18 U.S.C. § 666(a)(1)(A). Gardner argues that the district court erred by increasing his base offense level (1) by two levels for his role as an organizer, leader, manager or supervisor of criminal activity pursuant to U.S.S.G. § 3B1.1(c); (2) by six levels because he "otherwise used" a firearm pursuant to § 2B3.1(b)(2); and (3) by one level

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

pursuant to § 2B3.1(b)(6) because the loss to the victim was more than \$10,000.

We have reviewed the record including the presentence report (PSR) and have determined that the district court did not clearly err in its factual findings and did not misapply the Sentencing Guidelines in sentencing Gardner. See United States v. Manthei, 913 F.2d 1130, 1135-37 (5th Cir. 1990)(the "offense" for purposes of § 3B1.1 includes criminal activity greater in scope than the activity comprising the elements of the offense charged); United States v. Fletcher, 121 F.3d 187, 198 (5th Cir. 1997)(the "otherwise-used" enhancement includes a situation where a defendant both points a weapon at a victim and also explicitly threatens the victim); United States v. Cockerham, 919 F.2d 286, 289 (5th Cir. 1990)(loss under § 2B1.1 "includes the value of all property taken, even that recovered or returned").

AFFIRMED.