

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 93-1578
Summary Calendar
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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERT LEE ROACH,

Defendant-Appellant.

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Appeal from the United States District Court for the
Northern District of Texas
(4:92-CR-186-Y)
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(February 21, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.*

PER CURIAM:

Defendant-appellant Robert Lee Roach (Roach) was charged in a three-count indictment with three instances of burglarizing three different United States Post Offices in Fort Worth, Texas, on June 14, July 21, and September 30, 1992, contrary to 18 U.S.C. § 2115. Roach pleaded guilty to count one (burglary June 14, 1992, Post

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Office at 4725 Vermont) pursuant to a plea agreement under which the prosecution agreed to dismiss counts two and three. The agreement noted, *inter alia*, that the maximum period of confinement authorized was five years, that there was no agreement as to what the sentence would be, and the defendant would not be allowed to withdraw the plea "if the Court departs from the applicable guideline range."

Roach now appeals his sixty-month sentence, which is the statutory maximum. We affirm.

The PSR, as ultimately amended, found that Roach, then 37, had 24 criminal history points, placing him in criminal history category VI, and an offense level of 10 (after deducting 2 points for acceptance of responsibility), producing a guideline range of confinement of 24 to 30 months. Roach's criminal history points resulted from some 11 offenses since 1975, including 4 burglaries of buildings (1 of which was not assigned criminal history points because it was disposed of by plea in bar) and 2 felony thefts; 6 of the offenses were committed while on parole, and Roach's only probation was revoked because of subsequent criminal conduct. The PSR suggested, and the government requested by motion prior to sentencing, that upward departure under U.S.S.G. § 4A1.3 would be appropriate because criminal history category VI did not adequately reflect the significance of Roach's criminal history.

At sentencing, the district court notified the parties of its tentative findings approving the PSR as amended, finding that Roach had 24 criminal history points as calculated by the PSR, an

adjusted offense level of 10, and a guideline confinement range of 24 to 30 months, and that upward departure was appropriate under section 4A1.3 because Roach's criminal history category VI did "not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes." In this connection, the court noted, among other things, the number of prior offenses, that the 24 criminal history points were almost twice the number sufficient to put Roach in category VI, that the present offense was burglary and several of the prior offenses were, that 6 of the offenses were committed while on parole, that probation for 1 was revoked for subsequent criminal conduct, and that burglaries and felony thefts "are not minor crimes." The court also observed that Roach had served only 10 to 11 years of previous sentences totaling some 52 years. The court stated it would "structure its departure by moving incrementally down the sentencing table to succeeding higher [higher] offense levels in Criminal History Category VI until it finds the guideline range appropriate to this case," which the court determined to be 51 to 63 months (effectively, offense level 17). The court said that it might be inclined to choose a range "a notch or two below" one that approached the statutory maximum [60 months] except for the court's view of the "defendant's recidivism being nearly certain."

The court then called for objections. Defense counsel objected to the upward departure, arguing that no departure was appropriate and if any were that suggested was excessive, but made

no challenge to the criminal history points or facts in respect thereto or to the PSR's amended calculations under the guidelines. After counsel argued these objections, the court stated "there are two factors here. One is the seriousness and also the likelihood of recidivism." Counsel then argued that it was wrong to hold against his client the fact that he had served only a small portion of the time previously assessed and this was objectionable "under equal protection grounds." The court responded "that's a mischaracterization of my findings." After argument, the court overruled the objections, approved its prior tentative findings, and sentenced Roach to 60 months' confinement, 2 years' supervised release, and restitution.

Roach now appeals, claiming that no upward departure was warranted, that if any was its extent was excessive, and that the district court's reasons were improper and inadequate.

Roach's arguments on appeal amount in essence to a quarrel with the theory of the guidelines provision that upward departure under section 4A1.3 is warranted "when the criminal history category significantly underrepresents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit further crimes," or an argument that such departures are inappropriate where the criminal history category is already VI, or are limited to instances involving prior crimes of violence. However, section 4A1.3 expressly contemplates departure above category VI. And, as upward departure is available in such instances, this necessarily also means that it is not restricted to

instances where prior offenses are omitted from the criminal history points. Nor is there any limitation to instances involving prior violence. We have long recognized that an excessive criminal history point total may be a basis for departure where the criminal history category is VI, *United States v. Rogers*, 917 F.2d 165, 169 (5th Cir. 1990), *cert. denied*, 499 U.S. 924 (1981), and that a long criminal history of nonviolent crimes may "demonstrate [] a disrespect for the law not adequately reflected by a category VI criminal history." *United States v. Pennington*, 9 F.3d 116, 118 (5th Cir. 1993).

We also note that the district court did not err in concluding that burglary of a building and felony theft were "not minor crimes." The district court properly recognized that the prior burglaries were not as serious as if they had been of a dwelling or other then occupied structure, but they were burglaries of buildings and that of itself imparts a measure of seriousness to them. See *United States v. Taylor*, 110 S.Ct. 2143, 2152-53 (1990). Moreover, the several prior building burglaries could properly be given increased significance since the offense of conviction was burglary of a building. See, e.g., *United States v. Fisher*, 868 F.2d 128, 130 (5th Cir. 1989) ("the district court was justified in concluding that the only reliable way to keep Fisher from driving stolen trucks is to keep him in prison").

In fixing the extent of departure, the district court followed the methodology called for by section 4A1.3 and *United States v. Lambert*, 984 F.2d 658, 662 (5th Cir. 1993). Its stated reasons for

departure, and its ultimate reference to recidivism were an acceptable statement of why it went past intermediate levels. We do not view this case as being in that "very narrow class of cases" where *Lambert* indicates a more detailed explanation is called for. *Id.*, 984 F.2d at 663. See *United States v. Key*, No. 92-8678 (5th Cir. June 11, 1993) (unpublished); *United States v. Burros*, No. 93-2191 (5th Cir. December 15, 1993) (unpublished). We further conclude that the extent of departure was reasonable.

Roach's remaining complaints concerning the departure rest essentially on mischaracterization of the district court's reasons for doing so or are otherwise plainly without merit.

The district court stated acceptable reasons for upward departure and its findings in that respect are not clearly erroneous. There was no abuse of discretion in the decision to upwardly depart. The extent of the departure is not unreasonable or an abuse of discretion and was adequately calculated and explained as required by section 4A1.3 and *Lambert*.

The conviction and sentence are accordingly

AFFIRMED.