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USA v. Alabed

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 99-1785/1786

UNITED STATES OF AMERICA

v.

MUSTAFA ALABED

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(Crim. Nos. 97-641-01, 99-323-01)
District Judges: The Honorable James McGirr Kelly
The Honorable Eduardo C. Robreno

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
February 26, 2002

Before: ROTH, FUENTES and GIBSON*, Circuit Judges

(Opinion Filed: September 5, 2002)

* The Honorable John R. Gibson, United States Circuit Judge for the Eight Circuit, sitting by designation.

OPINION OF THE COURT

FUENTES, Circuit Judge:

Mustafa Alabed pled guilty and was convicted on charges of distribution of heroin, in violation of 21 U.S.C. 841(a)(1), and bank fraud, in violation of 18 U.S.C. 1344. He now appeals the sentence imposed based upon those convictions. For the reasons stated below, we affirm.

Because we write for the benefit of parties who are already familiar with the facts of this case, we begin with Alabed's legal claims. Alabed first challenges the district court's decision to sentence him based on the combined weight of both packages sold to an undercover informant as heroin, even though the larger of the two contained only trace amounts of heroin combined with common cutting agents, procaine and lidocaine. The District Court calculated Alabed's sentence using the Drug Quantity Table, subsection (c) of U.S.S.G. 2D1.1. Footnote (a)(1)(A) of the "Application Notes to [the] Drug Quantity Table" provides that: "Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance" (emphasis added).

Alabed claims that "it is patently unfair, unjust and an abuse of discretion for the District Court to have... used the one kilogram amount to set [Alabed's] sentencing range under the [U.S. Sentencing] Guidelines." App. Br. at 10. While Alabed admits that he negotiated for the sale of one kilogram of heroin, he argues that he "was only involved in a plan to provide cutting powder to the informant, with little or no heroin to be delivered." Therefore he claims that he should be sentenced based upon either the contents of the

smaller package plus the net weight of the heroin in the larger package or simply upon the weight of the smaller package. App. at 9.

This Court has thoroughly examined this issue in a published opinion analyzing the identical claim of Alabed's co-defendant regarding the heroin distribution charge. See *United States v. Juan Berroa-Medrano* slip op. ___ 2002 at ___. In that case, we decided that the District Court was correct in considering the entire weight of the larger package in calculating the sentence of a defendant who had pled guilty to distribution of heroin and, accordingly, we affirmed the sentence of the District Court Id. at ___. Alabed raises no new relevant factors that might distinguish his claim from Berroa-Medrano's. Therefore, we affirm the District Court's sentencing decision to include both packages in calculating Alabed's Guideline range.

Alabed next argues that the District Court erred in applying a two-level enhancement in his base offense level under the Guidelines for possession of a deadly weapon. Alabed is mistaken. Although the original indictment alleged that Alabed's co-defendant Berroa-Medrano was armed with a handgun during the drug transaction, the Government subsequently withdrew that specific charge when it was determined that their informant had mistaken a large metal tube on Berroa-Medrano's keychain for a handgun. Alabed offers no evidence, and none appears in the record, that the District Court ever considered or applied such an enhancement at Alabed's sentence. Therefore, we reject Alabed's claim on this issue.

Alabed similarly claims that the District Court failed to reduce his sentence based upon the "safety valve" provision of the Guideline, U.S.S.G. 5C1.2. Alabed indicates that "[u]nder such provision, the applicable [sentencing] range [w]ould properly have been 70-87 months." Nevertheless, we have thoroughly considered Alabed's contention and, in light of the District Court's ultimate sentence of 60 months, we conclude that Alabed has failed to offer any proof that the District Court did not consider the safety valve provision in setting his Guideline range. Therefore, Alabed's claim is unsupported.

Finally, to the degree that Alabed objects to the extent of the downward departure provided by the district court, this Court lacks jurisdiction to consider such a claim. See App. Br. at 9 (arguing that "[t]he District Court failed to genuinely take into account the significant fact that defendant cooperated fully with authorities and never impeded nor obstructed justice once the investigations were underway"). The statute which permits a defendant to appeal from a sentence allows the defendant to challenge the extent of a trial court's departure from the applicable guideline range only where the sentence imposed is greater than the applicable guideline range. See 18 U.S.C. 3742(a)(3). Therefore, this Court has determined that, as long as the district court has indicated that it is aware of its power to depart from a guideline range, the extent of a downward departure is committed entirely to a district court's discretion. See *U.S. v. Denardi*, 892 F.2d 269, 272 (3d Cir. 1989); *U.S. v. Khalil*, 132 F.3d 897, 898 (3d Cir. 1997) ("[t]his court has no jurisdiction to review the extent or degree of a district court judge's discretionary downward departure from the applicable sentencing guideline range"). In the instant matter, the District Court stated that it was departing from the guidelines and then did so. See App. at 34 ("[l]et me just say for the record [that]... I will grant the motion to depart from the guidelines."). Therefore, we refuse to take up Alabed's claim that his particular case required a greater departure from the Guidelines than the district court allowed.

The remainder of Alabed's claims are entirely meritless. Therefore, we affirm the sentence imposed by the District Court for the reasons stated above.

TO THE CLERK OF THE COURT:

Kindly file the foregoing Opinion.

Circuit Judge

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/s/ Ju