

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Summary Calendar

No. 94-40593

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
MARK K. CANNON,
Defendant-Appellant.

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No. 94-40605

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
NATHANIEL BEENE,
Defendant-Appellant.

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No. 94-40604

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
ARTHUR RAY CAPERS,
Defendant-Appellant.

* * * * *

No. 94-40632

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
SAMMY CRAWFORD,
Defendant-Appellant.

Appeals from the United States District Court
for the Western District of Louisiana
(CR 94 50022 01, 5:94-CR-50020, 5:94-CR-50023, & CR 94-50021-01)

(January 26, 1995)

Before GARWOOD, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:*

All four defendants appeal the statutory maximum sentences they received for car jacking. We affirm the district court's sentences.

I.

On July 12, 1993, at about 11:30 p.m., Todd Palmer and Addrina Holman were driving a 1988 Suzuki Samurai through the drive-through line at Taco Bell in Shreveport, Louisiana. Defendants jumped into the back of the Samurai. One of the defendants, Sammy Crawford, threw a towel over Palmer's face and head. The four defendants forced Holman to drive the Samurai to a nearby park. They shoved the victims toward the back of the park to a steep, concrete drainage ditch. An eyewitness saw all four defendants and the victims walking through the park, saw Holman stumble and fall, and watched her captor yank her up with the towel. The eyewitness left

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

and called 911 immediately after one of the defendants glared at her.

Once they reached the ditch, two of the defendants, Beene and Capers, left to retrieve the car they had been driving before the car jacking. Crawford and Cannon were left with the victims. In the ditch, Holman was taunted and ordered to dance naked. Then she and Palmer were brutally beaten, kicked, and stomped. None of the defendants admits to having administered the brutal beating. In his presentence investigation report, Cannon stated that Crawford told him to get out of the ditch and watch for the others to return. Cannon said he did so, but saw Crawford kicking Palmer and went down to get him to stop. He asked Crawford why he was beating the victims, and Crawford replied that they needed to be "knocked out" so they would not call the police. Cannon left the ditch as Crawford instructed, but not before he saw Crawford force Holman to strip.

When Beene and Capers returned with the Samurai and their own car, all four defendants left the park, went to the back of a vacant house, stripped the rims and the radio from the Samurai, went to eat, and went home. The two victims were still unconscious when they were found in the ditch around 6:30 the next morning.

Palmer, who had been working his way through university as a draftsman with the National Guard, has been placed on inactive status and is no longer receiving wages or tuition benefits. He was hospitalized from mid-July to early August, 1993. Severe swelling of his brain compelled physicians to induce a coma for

about one week. Palmer, who is right-handed, still has trouble controlling the right side of his body. He has a scar on his right eye and a tracheal scar, and he has developed a stutter. From his release from the hospital until October 7, 1993, he was in a rehabilitation clinic, and he has received extensive therapy for his speech, concentration and attention span, and motor skills for his right side, as well as counseling for emotional problems of anger, frustration, and rage from the incident.

The other victim, Holman, was a full-time student at Southern University in Baton Rouge, Louisiana, majoring in nursing at the time of the incident. She sustained head injuries, a collapsed lung, and kidney injuries, and was hospitalized until August 12, 1993, when she was transferred to a rehabilitation hospital until November 5, 1993. She must receive dialysis three days a week for the rest of her life unless she undergoes a kidney transplant. She has had to undergo treatment and therapy for attention deficit disorder. Although she is still enrolled in one class at Southern University, her severe physical and emotional problems have slowed her academic progress. The medical costs for both victims totaled approximately \$660,000.

II.

All four defendants pled guilty to one count of car jacking and aiding and abetting a car jacking in violation of 18 U.S.C. § 2119 and § 2. Sentencing them under the November 1, 1992, version of the U.S. Sentencing Guidelines, the district court

calculated their base offense level to be 20,¹ added five points for brandishing, displaying, or possessing a firearm during the offense,² added six points for causing permanent or life-threatening bodily injury to the victims,³ added four points for abducting the victims to facilitate the commission of the offense and to escape,⁴ and subtracted three points for acceptance of responsibility.⁵ Accordingly, the district court arrived at an offense level of 32 for all four defendants. Because Cannon and Capers had a criminal history category IV and Crawford and Beene had a criminal history category III, Cannon and Capers had a Guideline sentencing range of 168-210 months, and Crawford and Beene had a Guideline sentencing range of 151-188 months.

The district court then departed upwards to impose the maximum statutory sentence of 300 months' imprisonment for each defendant. The court's reason for the upward departure was the savage nature of the offense conduct and the permanent physical and psychological damage it inflicted, injuries far greater than those caused by the typical car jacking contemplated by the Guidelines.

All four defendants appeal their sentences. Each argues that the upward departure was not warranted, and that the magnitude of

¹ Following U.S.S.G. § 2X5.1, the district court employed the sentencing guidelines for the most analogous offense to car jacking, robbery. U.S.S.G. § 2B3.1(a).

² U.S.S.G. § 2B3.1(b)(2)(C).

³ U.S.S.G. § 2B3.1(b)(3)(C).

⁴ U.S.S.G. § 2B3.1(b)(4)(A).

⁵ U.S.S.G. § 3E1.1.

the departure was unreasonable. In addition, Cannon, Capers, and Crawford make individual arguments of their own.

III.

A.

Each defendant challenges the district court's decision to depart upward as unwarranted. Even though the district court did not specify which Guideline sections supported its upward departure, we can easily infer from the district court's statement what sections it had in mind. The permanent disabilities⁶ and extreme psychological injuries⁷ the victims have suffered, the high cost of their medical treatment,⁸ and the "unusually heinous, cruel, brutal, [and] degrading" treatment⁹ of the victims distinguish this case from the usual car jacking crime. The Guidelines anticipate upward departures for such aggravating circumstances.

Each defendant also challenges the magnitude of the district court's upward departure. Each argues that the upward departure is excessive, and Crawford in particular argues that to impose this great upward departure, the district court needed to find its facts

⁶ U.S.S.G. § 5K2.2. The robbery guideline does anticipate injury to one victim, but "because the robbery guideline does not deal with injury to more than one victim, departure [is] warranted if several persons [are] injured." U.S.S.G. § 5K2.0. Here, of course, two victims were seriously injured.

⁷ U.S.S.G. § 5K2.3.

⁸ U.S.S.G. § 5K2.5.

⁹ U.S.S.G. § 5K2.8.

by clear and convincing evidence, rather than simple preponderance of the evidence. See United States v. Kikumura, 918 F.2d 1084 (3rd Cir. 1990). In Kikumura, however, the court had increased a sentence from about 30 months to 30 years, a 12-fold sentencing increase. See id. at 1100-01. Here, by contrast, the upward departure is far more modest. The upward departure increased Beene's and Crawford's sentences by only about 60 percent of their maximum Guideline sentence, and increased Cannon's and Capers' sentence by about 43 percent of their maximum Guideline sentence. The Fifth Circuit has upheld departures as big as or bigger than these, even when the upward departures were based on facts found only by preponderance of the evidence. See e.g., United States v. Billingsley, 978 F.2d 861 (5th Cir. 1992) (increasing sentence to 120 from guideline maximum of 21 months, an increase of 471 percent), cert. denied, 113 S. Ct. 1661 (1993); United States v. Siciliano, 953 F.2d 939 (5th Cir. 1992) (increasing sentence to ten months from Guideline maximum of six months, an increase of 67 percent); United States v. Roberson, 872 F.2d 597 (5th Cir. 1989) (increasing sentence to 120 months from a Guideline maximum of 37 months, a 224 percent increase), cert. denied, 493 U.S. 861 (1989). In light of the brutality of the beatings and the permanent physical and psychological toll this crime took, the magnitude of the court's upward departure was justified.

B.

In addition to these general arguments, Cannon argues that in light of his youth and psychological profile, his upward departure

was not justified. Cannon is the youngest of the defendants, and testimony showed that he has limited insight, a poor family situation, a low I.Q., and tends to be a follower not a leader. Cannon complained that the district court did not take these factors into account in sentencing. Yet the district court did not have to do so. Under the Sentencing Guidelines, youth, mental and emotional condition, family ties, and lack of guidance as a youth are not ordinarily relevant grounds for imposing a sentence outside the Guideline range. U.S.S.G. § § 5H1.1, 5H1.3, 5H1.4, 5H1.6, 5H1.12. Cannon has offered us no reason to deviate from this general rule here.

C.

Crawford argues that because the district court failed to determine each defendant's role in the victims' beatings, this case should be remanded for further findings. Yet Crawford has waived this argument. In his objections to the presentence report, Crawford challenged his co-defendants' statements that he was responsible for most if not all of the beatings. At the sentencing hearing, however, he withdrew that objection, stating in open court that he was satisfied with the probation officer's explanation that all of the defendants were going to be considered equally accountable for the beatings.

The district court did just that, and Crawford now complains of it on appeal. Having waived the argument below, Crawford may not raise it here. See U.S. v. Olano, 113 S. Ct. 1770 (1993); see

also U.S. v. Hurtado, 846 F.2d 995, 998 (5th Cir.), cert. denied 488 U.S. 863 (1988).

D.

Finally, Capers argues that he should not be held accountable for the brutal beating in the park because he could not have reasonably foreseen it when he agreed to commit a car jacking. The district court rejected that argument based on findings of fact that are not clearly erroneous. The court stated that "Mr. Capers did participate in the armed and brutal kidnapping of the victims and anything that flowed thereafter was a natural result of what he took part of -- part in to begin with" (3 R. 3-4, No. 94-40604). The district court also heard testimony that beating the victims in the park was part of the car jacking plan: to keep the victims from calling the police, the defendants conspired to "knock out" the victims. Based on these factual findings, Capers could reasonably have foreseen the serious injury to the victims, and the district court rightly held him accountable for it.

AFFIRMED.