

United States Court of Appeals

Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

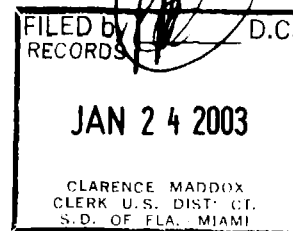


In Replying Give Number
Of Case And Names of Parties

January 16, 2003

Clarence Maddox
Clerk, U.S. District Court
301 N. Miami Avenue
Miami FL 33128

RE: 02-12557-GG USA v. Hakki Cemal Aksoy
DC DKT NO.: 00-00788 CR-FAM



The enclosed certified copy of the judgment and a copy of this court's opinion are hereby issued as the mandate of this court.

Also enclosed are the following:
Original Exhibits, consisting of: one psi (1 PSI (incl of p/cks) (incl of TRANS)).
Original record on appeal or review, consisting of: eight volumes

The district court clerk is requested to acknowledge receipt on the copy of this letter enclosed to the clerk.

A copy of this letter and the judgment form, but not a copy of the court's opinion or Rule 36-1 decision, is also being mailed to counsel and pro se parties. A copy of the court's opinion or Rule 36-1 decision was previously mailed to counsel and pro se parties on the date it was issued.

Sincerely,

THOMAS K. KAHN, Clerk

Reply To: James Delaney (404) 335-6113

Encl.



United States Court of Appeals

For the Eleventh Circuit

No. 02-12557

District Court Docket No.
00-00788-CR-FAM

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

Dec 18, 2002

THOMAS K. KAHN
CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HAKKI CEMAL AKSOY,
a.k.a. Hasan Yilmaz,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

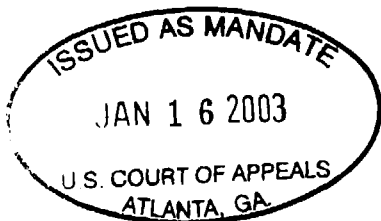
A True Copy - Attested
Clerk, U.S. Court of Appeals
Eleventh Circuit

By *Meoli*
Clerk
Atlanta, Georgia

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: December 18, 2002
For the Court: Thomas K. Kahn, Clerk
By: Meoli, Anthony





[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

No. 02-12557
Non-Argument Calendar

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
DEC 18 2002
THOMAS K. KAHN
CLERK

D.C. Docket No. 00-00788-CR-FAM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HAKKI CEMAL AKSOY,
a.k.a. Hasan Yilmaz,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Florida

(December 18, 2002)

Before ANDERSON, BLACK and FAY, Circuit Judges.

PER CURIAM:



A jury convicted Hakki Cemal Aksoy of making a false statement in an application for an alien registration card, in violation of 18 U.S.C. § 1546(a) (Count 1), making a false statement in an application to register permanent residence, in violation of 18 U.S.C. § 1001(a)(2) (Count 2), unlawful possession of a firearm by an illegal alien, in violation of 18 U.S.C. § 922(g)(5) (Count 3), and possession of an alien registration card, in violation of 18 U.S.C. § 1546(a) (Count 4). The district court sentenced Aksoy to concurrent 60-month terms of imprisonment on counts one, two, and four, and a concurrent 120-month term of imprisonment on count three. In determining Aksoy's sentence, the district court upwardly departed from the applicable guideline range of 18 to 24 months, pursuant to U.S.S.G. § 4A1.3, based on its findings that (1) Aksoy's criminal history category did not adequately reflect the seriousness of his past criminal conduct, (2) Aksoy committed the offenses while a fugitive on manslaughter charges in Turkey, and (3) it was likely that Aksoy would commit other crimes.

On appeal, Aksoy raises four challenges to his sentence. First, he alleges that the district court abused its discretion by failing to provide him notice of its intent to depart from the Sentencing Guidelines. Aksoy also maintains that the district court abused its discretion by departing from criminal history category I to category VI without explaining why each intervening category was insufficient.



Next, Aksoy asserts that the district court abused its discretion by considering protected First Amendment speech as a basis for the departure. Finally, Aksoy contends that the departure was unreasonable. For the reasons set forth more fully below, we affirm Aksoy's sentences.

Aksoy is a Turkish national who fled Turkey after being indicted for the murder of another Turkish national. Aksoy entered the United States in or about June 1994 and unsuccessfully applied for political asylum. In his application, Aksoy acknowledged that he had been charged with the murder of a Turkish national. Thereafter, the INS learned that Aksoy had applied for permanent resident alien status under the name of "Hasan Yilmaz." In addition to using a false name, Aksoy indicated in his application that he had never been arrested, cited, charged, fined, or imprisoned for breaking any law outside of the United States.

After arresting Aksoy, authorities searched his residence and located (1) a loaded Taurus .9 mm pistol under his mattress; (2) a high-capacity magazine that fit the Taurus; (3) two boxes of extra ammunition and a bag of spent shell casings; (4) a counterfeit "green card" in the name of Hasan Yilmaz; (5) books and pamphlets on "the guerilla's arsenal," guerilla tactics, how to make a silencer, how to make and detect car bombs, how to make homemade explosives, how to



disappear and never be found; and (6) a handwritten recipe for making a nitrogen phosphate bomb.

The presentence investigation report (“PSI”) indicated that Aksoy had no criminal history points and a criminal history category of I. However, the probation officer noted that Aksoy had four prior Turkish convictions, namely (1) a March 13, 1988, conviction for violation of a firearm law; (2) a December 15, 1990, conviction for battery; and (3) March 6, 1991, convictions for battery and (4) a violation of a firearm law.¹ The probation officer also pointed out that Aksoy was indicted in Turkey for the murder of a Turkish national, and those charges currently were pending in Turkey. The probation officer in the PSI advised the court that a departure may be warranted under § 4A1.3 because Aksoy’s criminal history category did not adequately reflect the seriousness of his past criminal conduct. The probation officer pointed out that Aksoy’s prior sentences were not used to compute his criminal history category because they were sentences for foreign offenses.

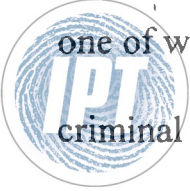
Prior to sentencing, the government moved for an upward departure, pursuant to § 4A1.3, arguing that “category I does not remotely reflect the

¹ Aksoy’s Turkish convictions were not assessed points because foreign convictions do not count for purposes of determining a defendant’s criminal history category. See U.S.S.G. § 4A1.2(h).



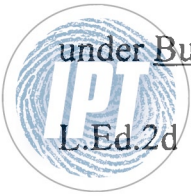
seriousness of Aksoy's criminal history or the likelihood that he will commit other crimes," and setting forth the following three reasons in support. First, the government maintained that Aksoy's Turkish convictions, which were excluded as foreign convictions, were not reflected in his recommended guideline sentencing range. The government explained that, had Aksoy's Turkish convictions been included for purposes of calculating his guideline sentencing range, he would have had six criminal history points, resulting in a category III. Next, the government maintained that an upward departure was appropriate because Aksoy committed the offenses while he was a fugitive on manslaughter charges in Turkey. Finally, the government asserted that Aksoy's history of violent crimes, combined with the fact that authorities located a bomb recipe and other suggestive materials in his residence, indicate that Aksoy is a dangerous individual who in all likelihood would commit other crimes.

During sentencing, the government pointed out that the PSI addendum included a report from Aksoy's prison psychologist, who had visited Aksoy and had quoted Aksoy as stating "[the] U.S. will pay, I will bomb Americans, you will see." The district court found that, based on an adjusted offense level of 15 and criminal history category of I, Aksoy's applicable guideline range was 18 to 24 months. The court then departed upward for three "independent[]" reasons, each



one of which would allow for the departure. First, the court found that Aksoy's criminal history category did not adequately reflect "the seriousness of [his] past criminal conduct or the likelihood that [he] will commit other crimes." The court explained that Aksoy's Turkish convictions, alone, "would be a sufficient basis to increase his criminal history category from 1 to 3." Next, the court found that an upward departure was warranted solely based on the fact that Aksoy had committed the offenses while a fugitive on manslaughter charges in Turkey. Finally, the court found that, in light of the materials that were located in Aksoy's residence, including a firearm and books on how to manufacture weapons, it was likely that Aksoy would commit other crimes. The court clarified that it would not ban the literature, but it properly could consider it solely as evidence of Aksoy's dangerousness. Thereafter, the district court sentenced Aksoy to concurrent 60-month terms of imprisonment on counts one, two, and four, and a concurrent 120-month term of imprisonment on count three.

Aksoy argues on appeal that the district court erroneously failed to notify him of its intent to upwardly depart from the applicable guideline sentencing range. Aksoy concedes that the PSI and the government's motion for an upward departure alerted him to the possibility of "a small upward departure." Aksoy contends, however, that he was entitled to notice of the full extent of the departure



under Burns v. United States, 501 U.S. 129, 138-39, 111 S.Ct. 2182, 2187, 115 L.Ed.2d 123 (1991), which held that a district court that is considering a sua sponte upward departure must “specifically identify” the grounds for the departure, because “the extent of the departure [that Aksoy received was] not argued, let alone contemplated, by either party.”


We review for abuse of discretion a district court’s decision to depart upward from the applicable sentencing guidelines range. United States v. Taylor, 88 F.3d 938, 942 (11th Cir. 1996). “Before imposing an upward departure on a ground not identified as a ground for upward departure either in the presentence report or in a prehearing submission by the Government, a district court must give reasonable notice that it is contemplating such a ruling.” United States v. Dixon, 71 F.3d 380, 383 (11th Cir. 1995) (internal citations omitted). Generally, the PSI or the government’s own recommendation will satisfy the notice requirement. See Burns, 501 U.S. at 135. In the “extraordinary case” where a district court sua sponte departs upward, however, the district must specifically identify the ground on which it is contemplating an upward departure. Id. 501 U.S. at 135-39 (explaining that Congress did not intend district courts to sua sponte depart from the guidelines without notice because a defendant’s right under Fed.R.Crim.P. 32



to comment on matters relating to the appropriate sentence is meaningless if he is not informed that a decision is contemplated).

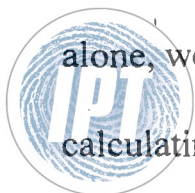
Here, the grounds upon which the district court relied in finding that a departure was appropriate were specifically identified in the PSI and the government's motion for a departure. Aksoy's claim, therefore, lacks merit because he was provided adequate notice of the departure and a full and fair opportunity to comment on every ground upon which the district court based its decision to depart. See Dixon, 71 F.3d at 383; Burns, 501 U.S. at 135-39. Additionally, the government correctly asserts that Aksoy's reliance on Burns is misplaced. The Supreme Court explained that Burns applies only to "the extraordinary case in which the district court, on its own initiative and contrary to the expectations of [both parties]," upwardly departs. Burns, 501 U.S. at 135. This case is distinguishable from Burns because, unlike Burns, the district court did not sua sponte upwardly depart, and Aksoy was provided advance notice of the grounds upon which the district court based its decision to depart. Thus, Aksoy was not entitled to notice of the extent of the departure.

Next, Aksoy argues that the district court erroneously departed from criminal history category I to category VI without explaining why each intervening category was insufficient. When departing upward under § 4A1.3, a



district court generally must compare a defendant to other defendants in the next highest criminal history category until an appropriate category is reached. United States v. Maurice, 69 F.3d 1553, 1559 (11th Cir. 1995). However, where a district court selects a higher criminal history category by adding points for uncounted convictions, “an explanation of this calculation serves as an adequate explanation for the inappropriateness of the intervening criminal history categories.” Id. Furthermore, we have held that a district court’s failure to specifically mention intervening criminal history categories was not error where it was clear from the record that the court considered and rejected the sufficiency of those categories. See United States v. Brown, 51 F.3d 233, 234 (11th Cir. 1995) (finding no error where the district court neglected to specifically discuss level V, but gave specific reasons to advance from category IV to category VI); U.S.S.G. § 4A1.2(h) (uncounted foreign convictions may be considered as a basis for an upward departure under § 4A1.3).

In departing from criminal history category I to category VI, the district court did not specifically mention each intervening category. However, a review of the sentencing hearing transcripts reveals that the court considered and rejected the sufficiency of intervening categories I through V. The court explained that it departed from category I to category III because Aksoy’s Turkish convictions,




alone, would have resulted in a category III had they been included for purposes of calculating his guideline sentencing range. Moreover, in departing to category VI, the court expressly stated that, based on “dangerousness,” Aksoy’s criminal history category “would have to go all the way up to six, and even further, because it is just not enough.” Accordingly, because the district court gave specific reasons for advancing from category I to category VI, the court’s failure to specifically mention each intervening category was not an abuse of discretion.

See Brown, 51 F.3d at 234.

Next, Aksoy argues that the district court erroneously based the upward departure on protected First Amendment speech. Aksoy contends that the district court upwardly departed because it “did not like” the books found in his apartment. Aksoy also maintains that the government failed to prove that he owned or intended to act on the literature that was found in his apartment.

If reliable information indicates that a defendant’s criminal history category does not adequately reflect the seriousness of his past criminal conduct or the likelihood that he will commit other crimes, the court may depart from the otherwise applicable guideline range. U.S.S.G. § 4A1.3; United States v. Riggs, 967 F.2d 561, 563 (11th Cir. 1992). The defendant in Riggs was convicted of a conspiracy whereby he “hacked” into computers for the purpose of stealing and



disseminating protected information. Id. at 562. The district court departed upward, finding that the defendant's criminal history category did not adequately reflect his likelihood of recidivism. Id. at 563. On appeal, the defendant argued that the district court's consideration of his self-authored tutorial on how to break into telephone computer systems was erroneous because the tutorial was not "reliable information" within the meaning of § 4A1.3. Id. We affirmed the sentence, concluding that the tutorial was indicative of an increased likelihood that the defendant would commit other crimes. Id. Further concluding that a district court properly may consider lawful conduct as a basis for a departure, we stated that "[n]othing in § 4A1.3 limits the reliable information a court may consider to unlawful conduct. Even lawful conduct can be pertinent to recidivism." Id.

This case is similar to Riggs because, like Riggs, the district court considered Aksoy's lawful conduct, i.e., possession of a bomb recipe and other literature, as a ground to depart from the applicable sentencing guideline. Similar to Riggs, the district court here did not abuse its discretion because it considered Aksoy's lawful conduct solely as evidence that he likely would commit other crimes. See Riggs, 967 F.2d at 563. Aksoy's argument that Riggs does not apply due to the "timing and pattern" of his crimes, and the fact that he did not author the literature at issue, is unpersuasive. Regardless of the factual differences



between Riggs and this case, our holding in Riggs, that a district court properly may consider lawful conduct as a basis for a departure, is applicable here.


Aksoy correctly points out that other Circuits have held that imposition of a sentence based on a defendant's beliefs would violate the First Amendment. See United States v. Rosenberg, 806 F.2d 1169, 1179 (3d Cir. 1986); United States v. Brown, 479 F.2d 1170, 1174 (2d. Cir. 1973). Here, however, the district court did not sentence Aksoy based on his beliefs, as evidenced by its statements that it would not ban the literature at issue and that the departure had "nothing to do with [Aksoy's] religious beliefs." Accordingly, Aksoy's contention that his First Amendment rights have been violated is without merit.

Additionally, Aksoy is not entitled to relief on his assertion that the government failed to prove that he owned or intended to act on the literature at issue. The district court's finding, that the literature at issue was indicative of an increased likelihood that Aksoy will commit other offenses, was adequately supported by (1) the fact that the literature was found in Aksoy's residence and contained handwritten notes in Turkish; (2) Aksoy's possession of a loaded firearm, a high-capacity magazine, and two boxes of ammunition; and (3) Aksoy's statement that he was planning to bomb Americans.



Finally, Aksoy argues that the departure to 10 years from a range of 18 to 24 months was unreasonable for several reasons. First, he points out that the government never alleged that he was a terrorist, that he was involved in a terrorist organization, or that he read or intended to act on the literature that was found in his apartment. Next, Aksoy contends that the district court erroneously considered the underlying facts of his prior Turkish convictions, rather than the “timing or pattern” of those convictions. Finally, Aksoy alleges that (1) there was a legitimate explanation for his current offenses, (2) he does not pose a danger to the United States because it is likely that he will be deported, and (3) he behaved well during court proceedings.

We have held that a district court’s departure from the guidelines must be reasonable. See United States v. Melvin, 187 F.3d 1316, 1322 (11th Cir. 1999), cert. denied, 530 U.S. 1231 (2000). “It is not the role of the appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.” Id. at 1323 (internal citations omitted). In determining whether an upward departure is reasonable, we will consider whether the defendant’s sentence falls within the cumulative statutory maximum sentence for the offenses. See id. (upward departure from a guideline range of 21 to 27 months to a 120-month sentence was not unreasonable where the cumulative statutory



maximum for the offenses was 300 months' imprisonment); United States v. Hersh, 297 F.3d 1233, 1254 (11th Cir. 2002) (ten-level upward departure in base offense level was reasonable where the defendant's sentence fell within the combined statutory maximum for all of the counts); United States v. Taylor, 88 F.3d 938, 948 (11th Cir. 1996) (eight-level upward departure was reasonable where the defendant was sentenced below the statutory maximum).

Aksoy has failed to demonstrate that the district court's departure was unreasonable. First, Aksoy's 10-year sentence falls well below the cumulative statutory maximum sentence of 35 years. See 18 U.S.C. § 1546(a) (providing for a ten-year maximum sentence for first or second-time offenders if the offense did not facilitate a drug-trafficking offense or an act of international terrorism); 18 U.S.C. § 1001(a)(2) (providing for a five-year maximum term of imprisonment); 18 U.S.C. § 924(a)(2) (providing for a ten-year maximum term of imprisonment for violations of § 922(g)). Aksoy's contention that the district court was required to run his sentences concurrently under U.S.S.G. § 5G1.2 is without merit. See United States v. Perez, 956 F.2d 1098, 1103 (11th Cir. 1992) (holding that a district court has the authority to impose consecutive or concurrent sentences if it departs from the guidelines).



Next, Aksoy is correct that the government never alleged that Aksoy was a terrorist; nevertheless, the literature and illegal firearm found in his residence, coupled with the statement that he planned to bomb Americans, support the district court's finding that he likely will commit other crimes. Additionally, Aksoy's contention that the district court erroneously considered the underlying facts of his prior Turkish convictions is belied by the record. The district court considered Aksoy's prior Turkish convictions solely in determining that their point values would have resulted in a criminal history category of III. The record does not support Aksoy's statement that the court considered the underlying facts of those convictions.

Finally, Aksoy is not entitled to relief on his claims that (1) there was a legitimate explanation for his current offenses, (2) he does not pose a danger to the United States because it is likely that he will be deported, and (3) he behaved well during court proceedings. Aside from Aksoy's statement that, "as explained at trial, there was a legitimate explanation for the immigration crimes he committed," he has failed to offer argument on this issue. Accordingly, this issue is deemed abandoned. See United States v. Cunningham, 161 F.3d 1343, 1344 (11th Cir. 1998). Additionally, Aksoy's contention that he faces deportation is of no consequence because this does not prove, as Aksoy maintains, that he "can hardly



be said to be a future danger to society.” Finally, Aksoy’s assertion that he was well-behaved during trial does not establish that the district court abused its discretion in the extent of the departure.

Accordingly, we conclude that the district court did not abuse its discretion by (1) failing to provide Aksoy notice of its intent to depart, (2) departing from criminal history category I to category VI without explaining why each intervening category was insufficient, and (3) considering protected First Amendment speech as a basis for the upward departure. We further conclude that the extent of the departure was not unreasonable. Accordingly, we affirm Aksoy’s sentences.

AFFIRMED.

A True Copy - Attached:
Clerk U.S. Court of Appeals
Eleventh Circuit
By: [Signature]
Deputy Clerk
Atlantic Region