



ED STATES COURT OF APPEALS
THE EIGHTH CIRCUIT

NO. 01-2774

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

PATRICIO MURILLO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

Honorable Warren K. Urbom
Senior Judge, United States District Court

BRIEF OF APPELLEE

Submitted by:

MICHAEL G. HEAVICAN
United States Attorney
District of Nebraska

and

ALAN L. EVERETT
Assistant U. S. Attorney
487 Federal Building
100 Centennial Mall North
Lincoln, Nebraska 68508
(402) 437-5241
Attorneys for Appellee

SUMMARY AND STATEMENT REGARDING ORAL ARGUMENT

The defendant, Patricio Murillo, pled guilty to illegal reentry by an alien who had previously been deported following conviction for an aggravated felony. He was sentenced at the bottom end of the applicable guideline range. At sentencing the defendant sought downward departure on the basis of extraordinary cultural assimilation. The district court determined that even if it had authority to depart on these grounds, the particular facts and circumstances of this case did not warrant departure.

Murillo appeals the district court's decision not to grant downward departure, contending that such a departure should have been granted.

The decision by the district court not to depart is not reviewable on appeal. The facts are undisputed and the law is well-settled. The government agrees with the position taken by the defendant that oral argument is not necessary in this case.

TABLE OF CONTENTS

SUMMARY AND STATEMENT REGARDING ORAL ARGUMENT i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE ISSUES iv

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 3

I. THE DISTRICT COURT DID NOT DETERMINE THAT IT LACKED
AUTHORITY TO DEPART ON THE BASIS OF CULTURAL
ASSIMILATION, SO ITS DENIAL OF A DOWNWARD
DEPARTURE IS NOT REVIEWABLE 4

II. THE COURT’S DECISION NOT TO DEPART WAS NOT AN
ABUSE OF DISCRETION 6

CONCLUSION 8

CERTIFICATE OF SERVICE 9

CERTIFICATION OF DISKETTE 10

ADDENDUM

TABLE OF AUTHORITIES

CASES

<i>United States v. Bahena</i> , 223 F.3d 797 (8th Cir. 2000)	4, 6
<i>United States v. Bieri</i> , 21 F.3d 811 (8th Cir. 1994)	5
<i>United States v. Edwards</i> , 225 F.3d 991 (8th Cir. 2000)	6
<i>United States v. Lim</i> , 235 F.3d 382 (8th Cir. 2000)	3, 6
<i>United States v. Lipman</i> , 133 F.3d 726 (9th Cir. 1998)	7
<i>United States v. Shepard</i> , 207 F.3d 455 (8th Cir. 2000)	6

STATUTES

8 U.S.C. § 1326(a)(B)(2)	1
18 U.S.C. § 3553(b)	2

MISCELLANEOUS

U.S. Sentencing Guidelines Manual § 5H1.6 (2000)	7
U.S. Sentencing Guidelines Manual § 5K2.0 (2000)	2, 7

STATEMENT OF THE ISSUES

- I. WHETHER THE DENIAL OF A DOWNWARD DEPARTURE IS UNREVIEWABLE SINCE THE DISTRICT COURT ASSUMED, AT LEAST FOR THE SAKE OF ARGUMENT, THAT IT HAD LEGAL AUTHORITY TO DEPART.

United States v. Lim, 235 F.3d 382 (8th Cir. 2000)

United States v. Bieri, 21 F.3d 811 (8th Cir. 1994)

- II. WHETHER THE DISTRICT COURT'S DECISION NOT TO DEPART, IF REVIEWABLE, WAS AN ABUSE OF DISCRETION.

United States v. Bahena, 223 F.3d 797 (8th Cir. 2000)

United States v. Lipman, 133 F.3d 726 (9th Cir. 1998)

STATEMENT OF THE CASE

The defendant is a citizen of Mexico. In 1993, he was convicted of a felony theft offense in Phoenix, Arizona, and, after his initial sentence of three years probation was revoked, was ultimately sentenced to two years in prison. [Presentence Investigation report, hereafter PSR ¶ 33]. In 1995, he was convicted of kidnaping, following an incident during which he pointed a gun at the victim's head and threatened to kill him. Murillo was sentenced to five years in prison for this offense [PSR ¶ 34].

The defendant was thereafter deported from the United States to Mexico in 1999 [PSR ¶ 11].

Although he has never received permission or consent from the United States Attorney General to apply for readmission to the United States [PSR ¶ 13], the defendant was arrested in Scottsbluff, Nebraska, on December 10, 2000 for threatening a woman regarding a drug deal. When his true identity was learned, he was turned over to INS authorities [PSR ¶ 12].

The defendant was indicted in federal court for being an alien illegally present in the District of Nebraska following deportation subsequent to conviction for an aggravated felony, in violation of 8 U.S.C. § 1326(a)(B)(2). He pled guilty and was sentenced on June 15, 2001. The guidelines calculated a total offense level of 21, a

criminal history category of IV, and a guideline range of 57 to 71 months in prison, and the defendant had no objection with these calculations [Judgment in a Criminal Case, PSR ¶ 59 & transcript of sentencing page 6, lines 9-11(hereafter Tr. 6:9-11) (addendum p. 1)].

Prior to sentencing the defendant filed a motion for downward departure [Filing #18] which he pursued at time of sentencing. The defendant sought downward departure pursuant to 18 U.S.C. § 3553(b) and 5K2.0 on the ground of extraordinary cultural assimilation. The downward departure motion was briefed prior to sentencing and argued by the parties at time of sentencing. The district court did not decide whether, under other circumstances, cultural assimilation could not constitute a proper ground for downward departure. The district court did determine that it need not decide that question because such a departure would not be appropriate under the particular facts and circumstances of the case [Tr. 13:21 - 17:14] (addendum p.p. 4-8). Following the court's ruling, the defendant did not ask the court to clarify its ruling or to make any additional findings [Tr. 17] (addendum p. 8).

The defendant now brings this appeal, asking this Court to remand the case for resentencing.

SUMMARY OF THE ARGUMENT

It has not been determined in this Circuit whether ‘cultural assimilation’ is a proper basis for a downward departure, although the Ninth Circuit has so held. In the instant case the district court did not decide whether it did or did not have such authority, but did determine that on the basis of the particular facts and circumstances of the case such a departure was not justified. Accordingly, the decision to deny downward departure is unreviewable on appeal.

If the court’s decision were reviewable, it would be found not to be an abuse of discretion. The defendant has a terrible criminal record, no steady employment, family in both the United States and Mexico (in fact most of his family lives in Mexico). He has no legitimate claim to downward departure on grounds of cultural assimilation.

ARGUMENT

Standard of Review

“It is well-settled in this Circuit that the discretionary denial of a downward departure is not reviewable, unless the district court determined that it lacked authority to consider a particular mitigating factor.” *United States v. Lim*, 235 F.3d 382, 385 (8th Cir. 2000).

Even if a decision not to depart is subject to review, such review is for abuse of discretion. *United States v. Bahena*, 223 F.3d 797, 807 (8th Cir. 2000).

I. THE DISTRICT COURT DID NOT DETERMINE THAT IT LACKED AUTHORITY TO DEPART ON THE BASIS OF CULTURAL ASSIMILATION, SO ITS DENIAL OF A DOWNWARD DEPARTURE IS NOT REVIEWABLE.

In order to obtain relief, the defendant must establish at least two things: (1) that cultural assimilation is a proper basis for downward departure in these cases, and (2) the district court's decision not to depart was grounded at least in part on an erroneous belief that departure on the grounds of cultural assimilation is not legally permissible. The defendant cannot establish the second proposition, so this Court need not decide whether the first proposition is true in the Eighth Circuit in order to resolve this appeal. In fact, the defendant in his brief does not even attempt to establish that cultural assimilation is a proper basis for downward departure in these cases.

The district court determined that it need not decide whether it had authority to grant downward departure on the grounds of cultural assimilation, it simply felt that under the particular facts and circumstances of this case such a departure was not warranted. The court's comments can be found on pages 13 to 17 of the sentencing transcript (addendum p.p. 4-8). The court was specifically asked whether it was ruling

that cultural assimilation can never be grounds for a downward departure in these cases or, assuming it could, whether this particular case simply wasn't an appropriate one for such a departure. The court very clearly stated it was *not* ruling that cultural assimilation could never be grounds for a downward departure, that it was simply ruling that this particular case was not one appropriate for such a departure. The court went on to explain that because of its determination that downward departure on the grounds of cultural assimilation was not appropriate under the facts and circumstances of *this particular case*, that it was not ruling, and indeed need not rule, on the issue of whether cultural assimilation is an appropriate basis for downward departure in illegal reentry cases.

This Circuit was confronted with a comparable situation in *United States v. Bieri*, 21 F.3d 811 (8th Cir. 1994). In that case a downward departure was being sought on grounds of extraordinary family circumstances. In denying the downward departure the sentencing court said

If the sentence were left completely to my discretion in this case, in all probability I would put the defendant on probation. But I don't think under the guidelines that I have any authority. And I'm going to say, under the facts of this case that I don't have any authority to depart downward from the guidelines. Now if the Eighth Circuit feels otherwise, they can advise me.

Bieri at 817-818. This Court found the comments taken as a whole indicated an

acknowledgment that downward departure was legally permissible but not justified based on the facts of the case, and held the decision not to depart was not reviewable. Similar holdings by this Circuit can be found in *Lim, supra*; *United States v. Edwards*, 225 F.3d 991, 992-93 (8th Cir. 2000); *United States v. Shepard*, 207 F.3d 455 (8th Cir. 2000).

II. THE COURT'S DECISION NOT TO DEPART WAS NOT AN ABUSE OF DISCRETION.

Even if a decision not to depart is subject to review, such review is for abuse of discretion. *United States v. Bahena*, 223 F.3d 797, 807 (8th Cir 2000). The decision not to depart on grounds of cultural assimilation under the facts and circumstances of the instant case was clearly not an abuse of discretion.

In support of his request the defendant points only to the fact that he has a common law wife and three children in the United States [PSR ¶¶ 47-48], and has lived in the United States since 1989 [PSR ¶ 46]. With regard to family members, paragraphs 44 and 45 of the Presentence Investigation Report note that the defendant has both parents and six siblings all living in Guasave, Sinaloa, Mexico and his wife and children intend to move to Mexico with the defendant when he is released from prison [TR 9:17-21 and 12:1-4 (addendum p.p. 2-3)]. The Presentence Investigation Report reveals no history of gainful employment in the United States. His primary

documented conduct in this country has been a history of criminal activity, at times violent [PSR ¶¶ 31-42].

The defendant's brief does not address the fact that this Circuit has not yet held cultural assimilation to constitute grounds for downward departure in illegal reentry cases. In *United States v. Lipman*, 133 F.3d 726 (9th Cir. 1998), the Ninth Circuit held that under appropriate circumstances a defendant might be entitled to a downward departure on the grounds of 'cultural assimilation' pursuant to U.S.S.G. § 5K2.0, which it found analogous to a § 5H1.6 departure for 'family and community ties'. It should be noted, however, that U.S.S.G. § 5H1.6 specifically states "Family ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range."

Furthermore, the Ninth Circuit in *Lipman* upheld the denial of a downward departure despite the fact that Lipman had lived in the United States from the age of 12 until he was 35 years old (a 23 year period); he attended United States schools through high school; he married a United States citizen, and had a total of seven children who were United States citizens; his entire family (mother, three siblings, wife and children) all lived in the United States as citizens; he claimed he had only returned to the United States in order to visit his disabled U.S. citizen daughter who had been sexually assaulted; and finally he claimed the United States was really his native land

where he had roots, family, and a familiar culture. The Ninth Circuit held that this was not the kind of a case which justified downward departure on the grounds of ‘cultural assimilation’. Lipman had a much stronger claim of cultural assimilation than does Mr. Murillo. Downward departure is not appropriate in either case.

CONCLUSION

The district court clearly did not deny departure in this case for the reason that it felt it lacked legal authority to depart on grounds of cultural assimilation. At a minimum the court assumed, for the sake of argument, that it had such authority. The district court made it clear, however, that it did not believe the facts and circumstances of the case warranted departure on the grounds of cultural assimilation. Even if remand *could* be ordered, it would clearly serve no purpose. It is equally clear, however, that the matter is unreviewable on appeal, and the sentence should be affirmed.

Respectfully submitted,

UNITED STATES OF AMERICA

By: MICHAEL G. HEAVICAN
United States Attorney
District of Nebraska

And: _____
ALAN L. EVERETT #15387
Assistant U. S. Attorney
487 Federal Building
100 Centennial Mall North
Lincoln, Nebraska 68508
Telephone: (402) 437-5241

CERTIFICATE OF SERVICE

I, Alan L. Everett, hereby certify that two true and correct copies of the foregoing was served on the following by mailing same this ____ day of _____, 2001.

Karen Shanahan
Assistant Federal Public Defender
201 South 16th Street, Suite 300
Omaha, NE 68102-1623

ALAN L. EVERETT
Assistant U. S. Attorney

CERTIFICATION OF DISKETTE

Pursuant to Rule 28A(d) of the Eighth Circuit Rules of Appellate Procedure, I hereby certify that the enclosed computer diskette containing the full text of the Appellee's Brief has been scanned for viruses and is virus-free. The brief was created using Corel WordPerfect Suite 9.

Dated this ____ day of _____, 2001.

ALAN L. EVERETT
Assistant U.S. Attorney

ADDENDUM

Description

Page

Transcript of Sentencing 1