In The

United States Court of Appeals

For the Fourth Circuit

RECORD NO. 03-4589

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

ROBERT NELSON MAY,

Defendant-Appellee.

REPLY BRIEF OF APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA
(Hon. Graham C. Mullen presiding)

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SUMMARY OF THE ARGUMENT

Although relying principally on its opening brief, the United States replies specifically herein to clarify the standard of review in this appeal and to address a few of defendant May's misrepresentations of the factual record that affect this Court's review. Contrary to May's repeated assertions, the United States is not seeking a review of the limited underlying facts found by the district court. Instead, the United States contends that the district court misapplied the guidelines to the facts of this case. This review is conducted *de novo* by this Court. 18 U.S.C. § 3742(e). The facts, as presented to the district court and as reflected in the record, do not support downward departures based on victim provocation and aberrant behavior.

First, the district court failed to make written findings of fact as required by the PROTECT Act. Second, May misrepresents the factual record. For example, he ignores the "course of conduct" he engaged in, and to which he admitted. In depicting his treatment of the victims, Anthony Sanders and Jacquelette Paige Williams, as a "one night event," May ignores his month-long pattern of escalating acts of intimidation toward them. The record reveals that May posted a sign that warned "No Trespassing – Especially Niggers" almost immediately after Sanders

moved into the neighborhood and a full month before the cross burning;[1] that May approached Sanders the morning of the cross burning while armed and provocatively said "Hey, nigger, I got something for you";[2] that later that evening, again armed, he constructed and burned a cross[3] within 20 feet of Sanders' residence;[4] and finally, that May informed the police, and later the media, that he burned the cross "to let the nigger know he wasn't welcome here."[5] This racially motivated course of criminal conduct cannot be justified as provoked by the victim or excused as aberrant by May. Under the *de novo* standard of review, this Court should conclude that a downward departure based on victim misconduct and on aberrant behavior is not justified by the facts of this case.

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[1]J.A. at 12, 78, 104, 132.

[2]J.A. at 12.

[3]The burning cross long has stood "as a message of intimidation, designed to inspire in the victim a fear of bodily harm." *Virginia v. Black*, 123 S. Ct. 1536, 1545 (2003). Moreover, "the person who burns a cross directed at a particular person often is making a serious threat, meant to coerce the victim to comply with [his] wishes." *Id.*

[4]J.A. at 12, 78, 99-100, 102, 132.

[5]J.A. at 99, 103, 105, 132.

Finally, the facts reflected in the record (in contrast to the facts represented by May) do not support an adjustment to May's offense level based on acceptance of responsibility. For these reasons, the decision of the district court should be reversed.

ARGUMENT

I. THE DISTRICT COURT ERRED IN ORDERING A DOWNWARD DEPARTURE BASED ON VICTIM MISCONDUCT AND ABERRANT BEHAVIOR

A. This Court Reviews The Application Of Facts To The Guidelines *De Novo*

Defendant May confuses the appropriate standard of review required by the PROTECT Act, 18 U.S. C. § 3742(e), as well as the type of review that the United States is seeking from this Court. Appellee's Brief at 5-7. Under the PROTECT Act, this Court still reviews for clear error the sentencing court's factual findings. *United States v. Flores*, 336 F.3d 760, 763 (8th Cir. 2003) ("A sentencing court's factual findings are still reviewable for clear error . . . ."). The district court's decision to depart from the Guidelines, where the sentence is outside the applicable guideline range and is not justified by the facts of the case, however, is now reviewed *de novo*. 18 U.S.C. § 3742(e); *see also United States v. Cotto*, – F.3d –, No. 02-1344, 2003 WL 22411031, *3 (2d Cir. Oct. 23, 2003) ("Congress now requires that we review *de*

novo whether a downward departure is 'justified by the facts of the case.'").[6] The district court's departures from the guidelines, based on victim provocation and aberrant behavior, were not justified by the limited facts which it found nor by the evidence presented at sentencing.

B. The District Court's Findings As To Victim Provocation And Aberrant Behavior Do Not Support A Downward Departure

1. *The Facts Do Not Support A Downward Departure Based On Victim Provocation*

As an initial matter and as stated in the United States' opening brief (United States' Brief at 36 n.12), the district court failed to provide the required written statement of the factual findings justifying its departure. 18 U.S.C. § 3553(c)(2) (If a district court departs from the guidelines range, its reasons for departing must "be stated with specificity in the written order of judgment and commitment."); *Flores*, 336 F.3d at 763 (courts of appeal review *de novo* whether district court provided written statement of reasons).

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[6] *See also United States v. Mallon*, 345 F.3d 943, 946 (7th Cir. 2003) (stating that contested issues of fact stand unless clearly erroneous but, for departures under § 3742(e)(3)(B), the courts of appeal shall review *de novo* the district court's application of the guidelines to the facts); *United States v. Griffith*, 344 F.3d 714, 717 (7th Cir. 2003) (The PROTECT Act now requires courts of appeal to review *de novo* the bases for sentences outside the applicable guideline range.).

The district court did, however, make limited, oral factual findings on the issue of victim provocation. J.A. at 79. Its findings that the victim exhibited a persistent hostility toward his neighbors and that the victim has "a terrible record," however, do not support the conclusion that the victim provoked the defendant's offense conduct. As explained in the United States' opening brief, the sentencing court must determine that the victim committed wrongful conduct and that such conduct contributed significantly to provoking the defendant's offense behavior. U.S.S.G. §5K2.10; *United States v. LeRose*, 219 F.3d 335, 340 (4th Cir. 2000). The district court's limited, generalized findings do not meet that requirement.[7] The evidence presented at sentencing, moreover, shows that Sanders' actions were not wrongful and did not significantly provoke defendant May. The district court erred in concluding otherwise.

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[7]Additionally, the district court did not make the factual findings that May's brief claims were made. Although the defendant presented evidence at the sentencing hearing, the district court never specifically accepted that evidence nor did it specifically find the conclusions from the evidence that the defendant draws in his brief. For example, May claims in his brief that Sanders stole from his neighbor. Appellee's Brief at 2, 11, 13. The evidence presented showed only that May's neighbor had a piece of property stolen from him and that he had never had anything stolen before Sanders moved into the neighborhood. Despite May's assertions in his brief, the conclusion that Sanders was the thief is merely speculation, and the district court did not make any findings that Sanders was the thief.

2. *The Facts Do Not Support A Downward Departure Based On Aberrant Behavior*

The district court's conclusion that May's conduct constituted aberrant behavior is reviewed by this Court *de novo*. 18 U.S.C. § 3742(e) (courts of appeals review *de novo* the district court's application of the guidelines to the facts). To the extent that the district court made limited, oral findings of fact during the sentencing hearing, it failed to make *any* factual findings on aberrant behavior. J.A. at 79. The court instead merely stated: "The evidence of aberrant behavior I think, however, is clearly met under the language of the guidelines and I'm finding that he has aberrant behavior." J.A. at 79.[8] The district court's finding is thus based on insufficient evidence and should be reversed.

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[8]The district court did not make specific findings showing the elements of aberrant behavior, that is, that the offense was committed without significant planning, was of limited duration, and was a marked deviation from an otherwise law-abiding life. U.S.S.G. §5K2.20, comment. (n.1) (defining aberrant behavior). The lack of these findings constitutes error. *See United States v. Guerrero*, 333 F.3d 1078, 1082 (9th Cir. 2003); *United States v. Bayles*, 310 F.3d 1302, 1314 (10th Cir. 2002).

The district court also failed to make *any* findings that May presented an extraordinary case, which is error. *United States v. Castano-Vasquez*, 266 F.3d 228, 234 (3d Cir. 2001) (court must find both that conduct was aberrant behavior and that this was an extraordinary case); U.S.S.G. App. C, amend. 603.

Moreover, May has misrepresented two key facts in his brief bearing on this Court's analysis of this issue.[9] First, May suggests that he did not post the "No Trespassing – Especially Niggers" sign until the night of the cross burning. Appellee's Brief at 3. Second, he ignores the fact that he threatened Sanders with a weapon earlier on the day of the cross burning. J.A. at 12, 132.

By limiting his offensive conduct to one night only, May asks this court to ignore the extended course of conduct he directed at his victims – a course of conduct intended to intimidate his neighbors based upon the color of Sanders' skin.[10] As soon as Sanders moved into the neighborhood (providing Sanders with absolutely no time to "provoke" his neighbors before the sign was posted, see I.B.1, *infra*), May and his friend welcomed him with the "No Trespassing–Especially Niggers" sign. J.A. at 12,

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[9]May misrepresents other important facts in his brief. For example, he states that the court found that Sanders provoked May and his neighbors in the weeks prior to the cross burning. Appellee's Brief at 11. Although the district court concluded that Sanders was hostile to "the people of the neighborhood," J.A. at 79, it never made any specific finding, nor did the defense present evidence to show, that Sanders was hostile or provocative toward May.

[10]May's brief concludes that "At bottom, Mr. May's offense was nothing more than a desperate attempt at retaliation by a mentally ill veteran with no criminal history, provoked by a man whose words and actions demonstrated no fear whatsoever of Mr. May and his neighbors." Appellee's Brief at 9. The question this conclusion provokes is *why* should Sanders fear May and his neighbors unless they were trying to instill fear in him?

78, 104, 132. This sign was posted almost one month before the cross burning. J.A. at 12. May then intensified his intimidating acts by brandishing a weapon and threatening Sanders with the warning: "Hey, nigger, I got something for you." He concluded his campaign of racial intimidation by burning a cross – the tool of racial hatred and violence, *see Virginia v. Black*, 123 S. Ct. 1536, 1545 (2003) – while armed with multiple weapons, J.A. at 12, 99-100, 102, 132. Indeed, May reinforced his message by telling the police and a newspaper that the cross was burned "to let the nigger know he wasn't welcome here." J.A. at 99, 103, 105, 132. The clear facts of the record indicate that May engaged in a month-long course of racial intimidation against his victims. The district court clearly erred in finding that May's behavior was aberrant and warranted a downward departure.

II. THE FACTS DO NOT SUPPORT AN ADJUSTED OFFENSE LEVEL BASED ON ACCEPTANCE OF RESPONSIBILITY

The facts of this case also do not support the district court's decision to adjust May's offense level based on acceptance of responsibility. As with victim provocation and aberrant behavior, May misstates the facts "justifying" his acceptance of responsibility. He claims that, once he was caught using drugs, he entered drug treatment and then "ceased using drugs and stayed clean through the date of the sentencing." Appellee's Brief at 19. May ignores, however, that he tested

positive for drugs *three* times. J.A. at 61-62. He was ordered into, not volunteered for, an outpatient drug treatment program after his second positive test. J.A. at 62. After mandated treatment, he tested positive for cocaine and was jailed for an inpatient drug treatment program. J.A. at 72. All three times, he falsely denied usage. J.A. at 61-62. His drug history and concomitant mendacity are reason enough to reverse the district court's finding of acceptance of responsibility.

Put simply, May rewrites the facts in his brief in a transparent attempt to mitigate the campaign of racial intimidation in which he engaged. His attempt to rewrite the facts should be rejected and the district court's decision should be reversed.

CONCLUSION

Much of the defendant's brief is inconsistent with the United States' opening brief, and we urge this Court to adopt the arguments already presented in the government's opening brief. For the foregoing reasons, the government respectfully requests the Court to grant the United States' request for relief.

Respectfully submitted, this the 10th day of November, 2003.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-4589: United States v. Robert Nelson May

CERTIFICATION OF COMPLIANCE WITH RULE 32(A)

1. This reply brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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Dated: November 10, 2003

ROBERT J. CONRAD, JR.
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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of November, 2003, the foregoing brief of the United States was duly served upon the defendant by mailing two copies to counsel for appellee at the following address:

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December 5, 2003

Ms. Patricia S. Connor, Clerk
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Re: *USA v. Robert Nelson May*
Docket No.: 03-4589

Dear Ms. Connor:

Enclosed herewith for filing in the above case are eight copies of the Reply Brief of the Appellant. By copy of this letter, Appellee's counsel is being served with two copies of the Brief at the below address.

Sincerely,

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