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UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,  
Plaintiff-Appellee,

v.

No. 99-4350

KENNY KOONGE,  
Defendant-Appellant.

Appeal from the United States District Court  
for the Eastern District of Virginia, at Alexandria.  
Albert V. Bryan, Jr., Senior District Judge.  
(CR-99-129)

Argued: April 4, 2000

Decided: May 19, 2000

Before WILKINSON, Chief Judge, TRAXLER, Circuit Judge,  
and Roger J. MINER, Senior Circuit Judge of the  
United States Court of Appeals for the Second Circuit,  
sitting by designation.

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Affirmed by unpublished per curiam opinion.

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COUNSEL

ARGUED: Dale Warren Dover, Alexandria, Virginia, for Appellant.  
Rita Marie Glavin, Special Assistant United States Attorney,  
UNITED STATES ATTORNEY'S OFFICE, Alexandria, Virginia,  
for Appellee. ON BRIEF: Helen F. Fahey, United States Attorney,  
UNITED STATES ATTORNEY'S OFFICE, Alexandria, Virginia,  
for Appellee.

Unpublished opinions are not binding precedent in this circuit.  
See  
Local Rule 36(c).

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OPINION

PER CURIAM:

Kenny Koonge appeals from an order of the district court affirming his conviction after a bench trial before a United States Magistrate Judge. Koonge was convicted of 1) driving under the influence of alcohol ("DUI") in violation of 36 C.F.R.S 4.23(a)(1); 2) reckless driving in violation of 36 C.F.R. S 4.2, incorporating Va. Code S 46.2-852; and 3) crossing the median in violation of 36 C.F.R. S 4.10(a). The judge imposed a sentence of 18 months' probation with special conditions, fines of \$950 and a special assessment of \$30. We affirm.

I.

On November 21, 1998, at approximately 8:00 a.m., the vehicle that Koonge was driving crossed the median of the George Washington Parkway in northern Virginia and struck an oncoming vehicle. Because the Parkway is within the special maritime and territorial jurisdiction of the federal government, the United States Park Police responded to the accident. Koonge was issued citations for the following infractions: 1) DUI in violation of 36 C.F.R.S 4.23(a)(1); 2) reckless driving in violation of 36 C.F.R. S 4.2, incorporating Va. Code S 46.2-852; 3) operating an uninsured vehicle in violation of 36 C.F.R. S 4.2, incorporating Va. Code S 46.2-707; 4) driving over the median in violation of 36 C.F.R. S 4.10(a); and 5) operating a motor vehicle on a suspended license in violation of 36 C.F.R. S 4.2, incorporating Va. Code S 46.2-301.

Koonge appeared before a federal magistrate judge on February 16, 1999 and pled not guilty to all of the charges. The charges for driving an uninsured vehicle and for driving on a suspended license were subsequently dropped. Koonge also moved for dismissal of either the reckless driving charge or the DUI charge, pursuant to a Virginia statute that provides as follows:

Whenever any person is charged with a violation of S 18.2-51.4 or S 18.2-266 [driving under the influence of alcohol or drugs] or any similar ordinances of any county, city, or town and reckless driving growing out of the same act or acts and is convicted of one of these charges, the court shall dismiss the remaining charge.

Va. Code S 19.2-294.1 (LEXIS 1999). Koonge claimed that this provision of the Virginia Code was incorporated into the reckless driving charge, pursuant to 36 C.F.R. S 4.2, which provides in relevant part that

[u]nless specifically addressed by regulations in this chapter, traffic and the use of vehicles within a [national] park area are governed by State law. State law that is now or may later be in effect is adopted and made a part of the regulations in this part.

36 C.F.R. S 4.2(a). The court denied the motion, finding that Va. Code S 19.2-294.1 is procedural in nature and inapplicable to federal courts. The case then proceeded to trial.

The evidence at trial showed that Koonge's vehicle had crossed the median and struck another vehicle. The driver of the other vehicle, Dr. Thareparambil Jacob Joseph, testified that following the accident, he approached Koonge and smelled alcohol on his person. The Park Police at the scene administered field sobriety tests, which Koonge failed. Breathalyzer tests were also administered approximately 2 hours after the accident. Koonge registered .063 and .058, both of which are within the "under the influence" range and below the level of intoxication.\*

At trial, Koonge testified that he had consumed only one alcoholic beverage during the time period from 11:00 p.m. until the time the accident occurred the next morning. He further testified that he entered the median after simply losing control of his vehicle. (In his statement at the scene, Koonge told the Park Police that he had

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\*Intoxication is a reading of .10 or higher. See 36 C.F.R. S 4.23(a)(2).

swerved into the median when he was cut off by another vehicle.)  
The  
Magistrate Judge rejected Koonge's testimony and found him guilty  
of all charges.

The defendant then reasserted his contention that the dual  
convic-  
tions for reckless driving and DUI were improper, in light of Va.  
Code S 19.2-294.1. The court rejected that argument, finding no  
pro-  
hibition against conviction on both counts in federal court.  
Koonge  
was sentenced to 18 months' probation with special conditions,  
including the completion of an alcohol education program and  
restricted driving privileges, and to fines of \$950 and a \$30  
special  
assessment.

On April 23, 1999, the district court affirmed the decision of  
the  
Magistrate Judge, over Koonge's objections. The court found 1)  
that  
the evidence was sufficient to sustain the conviction, and 2)  
that Va.  
Code S 19.2-294.1 was a procedural rule and inapplicable in  
federal  
court. This appeal followed.

II.

A.

We review sufficiency of the evidence to sustain a guilty charge  
by  
asking whether, when viewed in the light most favorable to the  
gov-  
ernment, the evidence at trial provided a sufficient basis for  
having  
found the defendant guilty beyond a reasonable doubt. See *United  
States v. Williams*, 405 F.2d 14, 17 (1968) (bench trial); *United  
States  
v. Burgos*, 94 F.3d 849, 862 (4th Cir. 1996) (en banc) (trial by  
jury).  
See also *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Glasser  
v.  
United States*, 315 U.S. 60, 80 (1942).

Here, Koonge contends that the evidence was insufficient to sustain either the DUI or the reckless driving charge. We disagree. Several individuals testified that Koonge smelled of alcohol at the scene and appeared disoriented. Additionally, Koonge's own testimony was inconsistent, and he admitted he crossed the median. Thus, there was sufficient evidence from which a reasonable trier of fact could have determined that Koonge was driving under the influence of alcohol on

the George Washington Parkway and that his failure to control his vehicle amounted to reckless driving. As there was independent evidence to support these conclusions, we cannot fault the magistrate judge for choosing to discredit the testimony of Koonge. The fact-finder's credibility determinations are not a subject of appellate review. See *United States v. Wilson*, 118 F.3d 228, 234 (4th Cir. 1997).

B.

We review de novo the district court's legal conclusions. See *United States v. Lipford*, 203 F.3d 259, 270 (4th Cir. 2000). Koonge contends that the trial court erred in refusing to dismiss the reckless driving charge, as Va. Code S 19.2-294.1 instructs Virginia courts to do when a defendant is also charged with DUI. Koonge argues that, contrary to the trial court's finding, this provision is substantive in nature and therefore is assimilated into the federal law that governs his conviction. See *United States v. King*, 824 F.2d 313, 315 (4th Cir. 1987) (stating that the Assimilative Crimes Act of 1942, 18 U.S.C. S 13, (the "ACA") assimilates the entire substantive criminal law of the state); *Kay v. United States*, 255 F.2d 476, 478 (4th Cir. 1958) (holding that the ACA assimilates entire substantive law but does not generally adopt state procedural rules). We reject the contention, however, that at issue here is whether the Virginia state law prohibition on dual convictions for DUI and reckless driving is a substantive or a procedural rule.

We find persuasive the government's position that the ACA is irrelevant in this case. We find Koonge's reliance on Virginia law to

be inapposite, since he was convicted under federal regulations. See United States v. Eubanks, 435 F.2d 1261, 1262 (4th Cir. 1971) (per curiam). Because Koonge was charged pursuant to the Secretary of the Interior's regulations governing vehicles and traffic safety in parks, forests, and public property under the purview of the Department of the Interior, the ACA simply was not invoked in charging Koonge with reckless driving. Specifically, Koonge's DUI charge arose under federal law, i.e., 36 C.F.R. S 4.23(a)(1), the federal DUI offense. Koonge's reckless driving offense, charged pursuant to 36 C.F.R. S 4.2, is likewise a federal offense, although it relies on the reckless driving provision of the Va. Code for its elements. Even if

we were to find that this reckless driving provision brought along with it the prohibition on dual convictions for DUI and reckless driving under Virginia law, that finding would not alter the outcome in this case. Here, the DUI conviction is for a purely federal offense, and therefore the prohibition on dual convictions under Virginia state law is not triggered.

AFFIRMED

6UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,  
Plaintiff-Appellee,

v.

No. 99-4684

DAVID ALAN HARVEY,  
Defendant-Appellant.

Appeal from the United States District Court  
for the Middle District of North Carolina, at Durham.  
Frank W. Bullock, Jr., District Judge.  
(CR-99-7)

Submitted: May 10, 2000

Decided: May 19, 2000

Before LUTTIG and WILLIAMS, Circuit Judges,  
and HAMILTON, Senior Circuit Judge.

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Dismissed by unpublished per curiam opinion.

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COUNSEL

M. Gordon Widenhouse, Jr., Chapel Hill, North Carolina, for  
Appel-  
lant. Walter C. Holton, Jr., United States Attorney, L. Patrick  
Auld,  
Assistant United States Attorney, Greensboro, North Carolina, for  
Appellee.

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Unpublished opinions are not binding precedent in this circuit.  
See  
Local Rule 36(c).

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OPINION

PER CURIAM:

David Alan Harvey appeals the sixty-three-month sentence imposed by the district court after he pled guilty to armed bank robbery, 18 U.S.C.A. S 2113(d) (West Supp. 2000), and attempted armed robbery, 18 U.S.C.A. S 2113(c) (West Supp. 2000). Harvey contends that the district court failed to recognize its authority to depart downward for diminished capacity, aberrant behavior, post-offense rehabilitation, and substantial restitution. We dismiss the appeal for lack of jurisdiction.

In 1996, Harvey's doctor prescribed Demerol and Seconal for frequent migraine headaches. By 1998, Harvey was addicted to these medications, and was obtaining large quantities of them from two doctors and emergency room visits. On December 24, 1998, Harvey robbed a pharmacy with a BB gun, taking Demerol and Seconal.\* On December 26, 1998, he robbed a Phar-Mor pharmacy of Demerol and Seconal. On December 31, 1998, Harvey was fired from his job as sales manager at a car dealership because he was under the influence of medication and unable to perform his duties. The same day, he robbed a bank of \$169,700. Harvey was arrested a few days later. All but \$20,150 of the money stolen from the bank was recovered. By the date of sentencing, Harvey had repaid the loss to Phar-Mor and \$15,000 to the bank, but still owed the bank \$5000.

Harvey requested a departure based on aberrant conduct, diminished capacity, post-offense rehabilitation, and substantial restitution, as well as his "extraordinary cooperation with authorities and acceptance of responsibility . . . his education, vocational skills, work his-

tory, and family responsibilities, and the unlikelihood this  
conduct  
would ever recur."

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\*This conduct was not charged or treated as relevant conduct.

At the sentencing hearing, the district court initially observed that it did not believe that it had discretion to depart downward on the grounds urged by Harvey because the facts did not warrant a departure. The court expressed sympathy for Harvey, and stated that if it had discretion to depart, it might do so. However, after hearing argument, the district court stated:

I don't believe, as a legal and factual matter under the facts of this case, that the arguments you have made give the Court a legal basis to depart below the guideline. That is, I recognize that under certain circumstances you can depart for each of these three grounds.

I don't find any support for finding that the acts in this case -- that is, the bank robbery, the robbery of the pharmacy, and possibly the other pharmacy robbery, or attempted robbery, for that matter -- are such that you would be entitled to depart [sic] for an aberrant act, for diminished capacity, or for the extraordinary acceptance of responsibility after these acts had been committed. That is, individually and in combination, I still don't find that these facts would allow the Court to have the discretion to do that as a matter of fact and as a matter of law.

So I am not refusing to exercise my discretion in this matter.

I am simply finding that under the facts and circumstances of the case, the facts and the law do not permit a departure.

The appeals court "lacks authority to review a decision of the district court not to depart from the applicable guideline range when that decision rests upon a determination that a departure is not warranted."

United States v. Brock, 108 F.3d 31, 33 (4th Cir. 1997) (citing United States v. Bayerle, 898 F.2d 28, 30-31 (4th Cir. 1990)). However, if the court decides not to depart because it believes it lacks legal authority to depart, the court of appeals may review that decision. See Brock, 108 F.3d at 33. The Supreme Court has explained that any factor that is not forbidden as a possible ground for departure under the guidelines may permit a departure, if "the factor, as occurring in the particular circumstances, takes the case outside the heartland of the

applicable Guideline." Koon v. United States , 518 U.S. 81, 109 (1996).

In Brock, this Court listed the forbidden factors:

[D]rug or alcohol dependence or abuse (U.S.S.G. S 5h1.4, p.s.); race, sex, national origin, creed, religion, or socioeco-  
nomic status (U.S.S.G. S 5H1.10, p.s.); lack of youthful guidance or similar circumstances indicating a disadvantaged upbringing (U.S.S.G. S 5H1.12, p.s.).

108 F.3d at 33.

In this case, the district court correctly decided that Harvey's drug addiction was not a permissible ground for departure. In light of Koon and Brock, the court could not have been in doubt about its authority to depart on the non-forbidden grounds put forward by Harvey, if the factor was present to an exceptional degree or otherwise made the case an atypical one. See Brock, 108 F.3d at 35. The court determined that the facts did not justify a departure and decided not to depart. When the district court finds factors that might, if the facts were different, support a departure, but do not support a departure in the case under consideration, the appeals court lacks authority to review the decision. See United States v. DeBeir, 186 F.3d 561, 573 (4th Cir. 1999).

We therefore dismiss the appeal for lack of jurisdiction. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

4UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

In Re: THEODORE MATTHEWS, JR. and  
ALEXIS DIANNE MATTHEWS,  
Debtors.

THEODORE MATTHEWS, JR.; ALEXIS  
DIANNE MATTHEWS,  
Plaintiffs-Appellants,  
99-1874

No.

v.

GERMANTOWN INJURY CARE CENTER,  
INCORPORATED; PARAGON  
MANAGEMENT SYSTEMS,  
INCORPORATED,  
Defendants-Appellees.

Appeal from the United States District Court  
for the District of Maryland, at Baltimore.  
Andre M. Davis, District Judge.  
(CA-99-1360-AMD, BK-97-1-5344-DK,  
AP-98-1-A482-DK)

Argued: April 3, 2000

Decided: May 19, 2000

Before MICHAEL and TRAXLER, Circuit Judges, and  
Roger J. MINER, Senior Circuit Judge of the  
United States Court of Appeals for the Second Circuit,  
sitting by designation.

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Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Murray Leonard Deutchman, Rockville, Maryland, for Appellants. Peter Thomas McDowell, Timonium, Maryland, for Appellees. ON BRIEF: Edward L. Blanton, Jr., Towson, Maryland, for Appellees.

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Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

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OPINION

PER CURIAM:

This case presents an appeal from an order of the United States District Court for the District of Maryland (Davis, J.) adopting the recommendation of the United States Bankruptcy Court to dismiss, on res judicata grounds, the plaintiffs-appellants' damages claims under 11 U.S.C. S 362 and Maryland common law claims for abuse of process, false imprisonment, and malicious prosecution. The plaintiffs-appellants also appeal from so much of the district court's order as dismissed their joint claim for loss of consortium. Finding no error, we affirm.

In 1994, plaintiff-appellant Alexis Matthews ("Alexis") sustained serious injuries for which she obtained medical treatment. Among her medical care providers was the defendant-appellee Germantown Injury Care Center, Inc. ("Germantown"). Subsequently, Alexis was unable to timely pay her medical and other bills and the Matthews (Alexis and Theodore, her husband) filed a joint petition for bankruptcy under Chapter 7. On June 1, 1997, the bankruptcy court issued a Notice of Commencement of Case, which contained instructions that creditors should not take any action against the debtors without

first seeking the permission of the bankruptcy court.  
Nevertheless, on  
July 7, 1997, Germantown requested the issuance of a body attachment for Alexis so she would appear in court in aid of  
Germantown's

efforts to collect on the past due debt. The Clerk of the District Court of Maryland caused a bench warrant to issue, the body attachment was executed, and Alexis was taken into custody, handcuffed, and incarcerated. She was also handcuffed and she was later brought to court, where she was released on bond pending resolution of the bankruptcy.

Alexis applied to the bankruptcy court for the entry of an order holding Germantown in contempt for causing the body attachment to issue in violation of the bankruptcy court stay. In her application, Alexis specifically asserted that Germantown's actions were taken "notwithstanding the provisions of the United States Bankruptcy Code Section 362."\* She requested (1) a declaratory judgment that Germantown had violated the bankruptcy laws; (2) damages in the form of attorneys' fees and costs; (3) a permanent injunction against further efforts to collect the debt without court permission; and (4) whatever further relief would be proper. With her application, Alexis submitted a proposed order to show cause to the bankruptcy court. On January 26, 1998, the bankruptcy court signed the proposed order, issuing a "Show Cause Order For Contempt and Damages Pursuant to 11 U.S.C. Section 362(h)." After the signed order had been entered, copies were sent to Alexis' attorney. Section 362(h) provides that "[a]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages."

On February 13, 1998, the Matthews filed a complaint against Germantown in the United States District