

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

No. 96-4808

RANDOLPH AYERSMAN,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
M. J. Garbis, District Judge; Herbert N. Maletz,
Senior Judge, sitting by designation.
(CR-95-90-MJG)

Submitted: April 8, 1997

Decided: April 24, 1997

Before WIDENER, HALL, and MICHAEL, Circuit Judges.

Dismissed by unpublished per curiam opinion.

COUNSEL

Gregg L. Bernstein, MARTIN, JUNGHANS, SNYDER & BERN-
STEIN, P.A., Baltimore, Maryland, for Appellant. Lynne A. Bat-
taglia, United States Attorney, Richard C. Kay, Assistant United
States Attorney, Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit.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

OPINION

PER CURIAM:

Randolph Ayersman appeals the 60-month sentence he received after he pled guilty to possession of marijuana with intent to distribute, 21 U.S.C. § 841 (1994), and money laundering, 18 U.S.C. § 1957 (1994). He contends that the district court abused its discretion in considering the nature of his offense and his culpability in determining the extent of a substantial assistance departure, USSG § 5K1.1, p.s.1 Ayersman also argues that his assistance merited more than the four-level departure that the court determined was appropriate. Ayersman has moved for summary disposition of his case and a remand for resentencing. The government does not oppose the motion. We dismiss the appeal for lack of jurisdiction and deny the motion for summary disposition as moot.

Randolph Ayersman moved to Maryland from California in 1971. In 1985, he began a home construction business with his brother. Also in 1985, Ayersman began obtaining marijuana in California and transporting it to Maryland, where he distributed it to Dana Kleberg. In 1994, Ayersman's brother, Wilbur, delivered two loads of marijuana (664 pounds) to Ayersman. On December 17, 1994, agents of the Drug Enforcement Administration (DEA) executed search warrants at Ayersman's home and at a farm he owned. Fourteen pounds of marijuana were seized from a freezer in the basement of his home. In February 1995, Ayersman began cooperating with the DEA. At the end of March, he entered into an agreement to plead guilty to money laundering and possession of marijuana with intent to distribute on December 17, 1994. Ayersman stipulated that he took delivery of between 1000 and 3000 pounds of marijuana and that he used cash proceeds of his marijuana business to pay part of the purchase price for his farm.

¹ United States Sentencing Commission, Guidelines Manual (Nov. 1995).

During his cooperation with authorities, Ayersman provided information about his own offense. He also met with and recorded his meetings with Philip Manglitz, a developer who sold lots to Ayersman and accepted undisclosed cash from marijuana sales in part payment. He made calls to his suppliers in California and traveled to California to arrange marijuana purchases. As a result, Charles Maier and Oscar Lucio were prosecuted, as well as Robert Jerrell, a driver employed by Maier.

The government attorney recommended a four-level downward departure, the most it was permitted to recommend according to the United States Attorney's policy, but made clear that he believed Ayersman had rendered an unusual degree of assistance. Ayersman's attorney then asked for a departure of 20 levels, which would have resulted in a guideline range in Zone B of the Sentencing Table and authorized a sentence of probation with certain conditions. See USSG §§ 5A (Sentencing Table), 5B1.1(a). However, the district court decided that a four-level downward departure was appropriate, giving Ayersman a guideline range of 57-71 months. The court imposed a 60-month sentence.

Ayersman first asserts that the district court misapplied USSG § 5K1.1 by considering factors other than his assistance to determine the extent of the departure. He suggests that the court could consider only the factors listed in USSG § 5K1.1.2 He argues that the court's consideration of the nature of his offense and his culpability constituted impermissible double-counting.

This court has held that the sentencing court's decision as to the extent of a departure in the defendant's favor is not reviewable, but an incorrect application of USSG § 5K1.1 is reviewable. See United

2 The factors are: (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered; (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant; (3) the nature and extent of the defendant's assistance; (4) any injury suffered, or any danger or risk of injury to the defendant

or his family resulting from his assistance; (5) the timeliness of the defendant's assistance.

States v. Hill, 70 F.3d 321, 324-25 (4th Cir. 1995). Section 5K1.1 states that the court shall determine an appropriate reduction for reasons "that may include, but are not limited to," consideration of the listed factors. See USSG § 5K1.1 (emphasis added). In Hill, we held that the district court could consider a factor unrelated to the defendant's assistance (his unexpired sentence in another federal district) in determining how far to depart. Hill, 70 F.3d at 324-25; see also United States v. Alvarez, 51 F.3d 36, 39-41 & n.5 (5th Cir. 1995) (factors unrelated to the defendant's substantial assistance may properly limit extent of departure); United States v. Mariano, 983 F.2d 1150, 1156-57 (1st Cir. 1993) (same). The cases on which Ayersman relies deal with the proper bases for a decision to depart; they do not hold that the district court is limited in what factors it may consider when determining the extent of a departure.

Ayersman also contends that the extraordinary nature of his assistance to the government warranted more than a four-level departure. Under Hill, he is not entitled to appellate review of the district court's decision to depart by no more than four levels.

We therefore dismiss the appeal. The motion for summary disposition is denied as moot. 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