

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-4229

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

LEONARD H. MITCHELL,

Defendant - Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. M. J. Garbis, District Judge. (CR-95-315-MJG)

Submitted: November 21, 1996 Decided: December 6, 1996

Before HALL, WILKINS, and HAMILTON, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Phillip M. Sutley, Baltimore, Maryland, for Appellant. Lynne A. Battaglia, United States Attorney, Martin J. Clarke, Special Assistant United States Attorney, Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit.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

PER CURIAM:

Leonard H. Mitchell was convicted of possessing a firearm while being a convicted felon, 18 U.S.C.A. § 922(g)(1) (West Supp. 1996), and was sentenced as an armed career offender. 18 U.S.C.A. § 924(e) (West Supp. 1996). He seeks to appeal his 265-month sentence, contending that the district court abused its discretion by refusing to depart downward because of his age (42) and the difference between the armed career offender sentence and the guideline range which would have applied were he not a career offender.

A sentencing court's discretionary decision not to depart from the guideline range is not subject to appellate review. United States v. Bayerle, 898 F.2d 28, 31 (4th Cir.), cert. denied, 498 U.S. 819 (1990). However, if the court bases its decision not to depart on a perceived lack of legal authority, its decision is a legal one which is reviewed de novo. United States v. Hall, 977 F.2d 861, 863 (4th Cir. 1992). Here, the district court stated its belief that a departure was not appropriate and, in any case, would not be upheld on the grounds urged. The court expressed no desire to depart. We find that the court exercised its discretion in deciding not to depart.

We therefore dismiss the appeal. 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