

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JOHNNY D. MATHIS,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The government believes the briefs adequately address the facts and legal issues on appeal and that oral argument is not necessary. Should the Court schedule oral argument, the government requests the opportunity to participate in oral argument.

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No. 11-30698

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JOHNNY D. MATHIS,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE UNITED STATES AS APPELLEE

JURISDICTIONAL STATEMENT

This is an appeal from a district court's final judgment in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231. The court entered final judgment against defendant on July 29, 2011 (R. 311-316),¹ and defendant filed a timely notice of appeal on August 1, 2011 (R. 317). This Court has jurisdiction under 28 U.S.C. 1291.

¹ "R. ___" refers to the page number following the Bates stamp "USCA5" in the district court record. "Br. ___" refers to pages in Mathis's opening brief.

STATEMENT OF THE ISSUE

Whether the district court erred in sentencing by using arson as the underlying offense when defendant pled guilty to interference with fair housing rights, in violation of 42 U.S.C. 3631, by setting fire to the house where the victims were living.

STATEMENT OF THE CASE

On December 10, 2008, a federal grand jury returned a three-count indictment against Johnny Mathis. R. 12-13. Count 1 charged that Mathis violated 42 U.S.C. 3631 by interfering with the fair housing rights of C.G., L.H., and F.H., three Hispanic men, because of their national origin and because they were occupying a dwelling. R. 12. Count 1 specified that the offense involved defendant's firing a weapon at, and setting fire to, the house in which the victims were living. R. 12. Count 2 alleged that Mathis used fire in the commission of a felony, in violation of 18 U.S.C. 844(h)(1). R. 12-13. Count 3 charged that Mathis violated 18 U.S.C. 924(c) by using a firearm during and in relation to a felony. R. 13.

On October 8, 2009, Mathis pled guilty to all three counts in the indictment but withdrew his plea during the reading of his rights under Federal Rule of Criminal Procedure 11(b). R. 242. On October 13, 2009, the first day of trial, Mathis again pled guilty to the three counts in the indictment. R. 257-258.

Subsequently, the district court appointed new counsel (Mathis's attorney on appeal) for Mathis and granted a joint motion by the government and Mathis for defendant to undergo a psychiatric examination. R. 276, 282. On December 14, 2010, the court granted Mathis's motion to withdraw his guilty plea. R. 285.

On April 27, 2011, Mathis pled guilty to Counts 1 and 3 pursuant to a plea agreement in which the government agreed to dismiss the remaining charge in Count 2. See R. 334, 351, 399. At the change of plea hearing, conducted pursuant to Rule 11, see Fed. R. Crim. P. 11, the district court made certain that Mathis understood the nature of the conduct to which he was pleading guilty. R. 335-336. With respect to Count 1, the court stated that "it's alleged that the offense involved the use of a dangerous weapon and fire, in that you shot at and set fire to their home." R. 334-335. The court then described Count 3 and asked Mathis if "those are the ones you intend to plead guilty to[,] is that correct?" R. 335. Mathis responded, "Yes, sir." R. 335. The district court permitted the government to call FBI Agent Jeffrey Goins to recount the facts underlying the charges against Mathis. R. 356-363. In particular, Goins testified that Mathis entered the victims' house with his shotgun, rummaged around the kitchen, and a fire started inside the house while Mathis was inside. R. 360. After the court determined that Mathis fully understood the consequences of his plea, the court accepted Mathis's plea. R. 363-364; see also R. 290-294.

On July 28, 2011, the district court conducted Mathis's sentencing hearing. R. 301. Mathis testified about how he disposed of the gun he used to fire toward the victims' home. R. 386-389. Pamela McCarthy, an FBI agent who worked on the case, testified about the events in connection with the shooting and fire resulting in Mathis's indictment. R. 377-384. McCarthy described the victims' account of the events, including their statement that the fire started in the kitchen while Mathis was rummaging through the kitchen of the victims' house, and the conclusions of two separate fire investigations that the fire was intentionally set. R. 377-384. After McCarthy's testimony, the district court overruled Mathis's objection to using arson with an offense level of 24, instead of aggravated assault with an offense level of 14, as the base offense level for sentencing on Count 1. R. 384. The court stated that its decision was based on McCarthy's testimony and on information in the Presentence Report (PSR). R. 384.

At the conclusion of the sentencing hearing, the district court sentenced Mathis, within the applicable guideline range, to 60 months' incarceration on Count 1, and 120 months on Count 3, to be served consecutively. R. 397. In addition, the court sentenced Mathis to five years of supervised release, and ordered him to pay \$47,014.69 in restitution and a \$200 special assessment. R. 397. The court also ordered Mathis to submit to a substance abuse evaluation and treatment. R. 398.

STATEMENT OF FACTS²

On the evening of June 15, 2008, Johnny Mathis fired three rounds from his .410 caliber shotgun, also known as a Snake Charmer, toward the house across the street from his own home where the victims, three Hispanic men, resided. R.359, 378-379. Upon hearing the gunshots, all three victims ran out of their house and hid in the nearby woods. R. 360, 379. One victim was in the shower at the time and ran out of the house without any clothes on. R. 383.

With his weapon in hand, Mathis ran into the victims' home twice. R. 379. The victims, who could see into the kitchen through a window from their location in the woods, saw Mathis rummaging in the kitchen and then saw flames coming from that area of the kitchen. R. 360, 379-383. As Mathis exited the second time from the house, they saw that the house was on fire. R. 360, 379. Mathis made no effort to put out the fire. R. 379; see also Br. 11. Mathis disposed of his shotgun by throwing it in the pond behind his home. R. 361-362, 380, 387.

After Mathis returned to his own home, his nephew and his nephew's friend arrived. R. 380. While the victim's house was still burning, Mathis laughed about the fire and stated that "a bad tortilla fire" must have started the fire in the victims'

² This statement of facts is based upon the evidence concerning the events underlying the charges against Mathis that was presented at Mathis's change of plea hearing on April 27, 2011, and sentencing hearing on July 28, 2011. See R. 356-363 (Goins), 377-384 (McCarthy), 386-389 (Mathis).

house. R. 362, 380. At about this time, a piece of his shotgun was discovered inside Mathis's house and he immediately disposed of it outside. R. 361, 388-389.

Subsequently, both the Sheriff's Department and Travelers' Insurance investigated the fire and independently concluded that the fire was intentionally set. R. 381-383. Travelers' Insurance determined that the fire started near the base cabinets at one end of the kitchen. R. 382.³

SUMMARY OF ARGUMENT

The district court did not err in sentencing Mathis. The court correctly applied the sentencing guidelines and, therefore, the sentence is procedurally reasonable. Mathis's sole argument is that the district court erred in using arson, instead of aggravated assault, as the underlying offense for sentencing on Count 1. Count 1, to which Mathis pled guilty, specifically states that the "offense involved the use of a dangerous weapon and fire, that is, the defendant shot at and set fire to the victims' home." R. 12. Because Mathis pled guilty on Count 1, the district court did not err in using arson as the base offense level. This Court should uphold Mathis's sentence.

³ The house was owned by the victims' employer, East of Eden Nursery. R. 378. Because the owners of the house incurred monetary losses from Mathis's offense, the court took into account their injury in calculating the appropriate restitution.

ARGUMENT

DEFENDANT'S SENTENCE IS PROCEDURALLY REASONABLE

A. *Standard Of Review*

Under *Gall v. United States*, 552 U.S. 38, 51 (2007), this Court reviews a defendant's sentence for both procedural and substantive reasonableness. Where, as here, the defendant only argues that his sentence is procedurally unreasonable, the court reviews "the district court's interpretation or application of the sentencing guidelines *de novo*." *United States v. Scott*, 654 F.3d 552, 555 (5th Cir. 2011).

B. *The District Court Correctly Used Arson As The Underlying Offense For Sentencing On Count 1 Because Mathis Pled Guilty To Using Fire In Committing The Offense*

Mathis argues (Br. 9-12) that the district court erred in using arson with a base offense level of 24, instead of aggravated assault with a base offense level of 14, as the underlying offense for sentencing for a violation of 42 U.S.C. 3631 (Count 1) because he did not intentionally set the victims' house on fire. He asserts, on the one hand, that he does not know how the fire started (Br. 10) and, on the other hand, that he accidentally started the fire when he tripped over a chair and "fell into th[e] stove" (Br. 11). Regardless of Mathis's assertions, he pled guilty to starting the fire in the victims' home. R. 335, 363; see also R. 290. At the change of plea hearing, the district court described Count 1 as alleging that "the offense involved the use of a dangerous weapon and fire, in that you shot at and set fire to

their home.” R. 335. When asked, Mathis agreed that he “intend[ed] to plead guilty to” this charge. R. 335. After conducting a comprehensive plea colloquy with Mathis, the district court found that Mathis understood the nature of the charges to which he pled guilty and the consequences of his plea. Thus, the district court accepted Mathis’s guilty plea. R. 363-364.

According to the sentencing guideline for a violation of 42 U.S.C. 3631, the base offense level is the greater of 10 or the “level from the offense guideline[s] applicable to any underlying offenses.” See U.S.S.G. § 2H1.1. In this case, the PSR identified arson and aggravated assault as the most analogous underlying offenses. The guideline for arson provides that 24 is the base offense level if the offense (1) created a substantial risk of death or serious bodily injury and that risk was created knowingly; or (2) involved the destruction or attempted destruction of a dwelling. See U.S.S.G. § 2K1.4(a)(1)(A) & (B). Because Mathis pled guilty to starting a fire that could have destroyed the victims’ house, the district court properly sentenced him pursuant to the offense level for arson. See *United States v. Rodriguez*, 660 F.3d 231, 233-235 (5th Cir. 2011) (affirming sentence based on charge to which defendant pled guilty); *United States v. Conn*, 657 F.3d 280, 284-287 (5th Cir. 2011) (same).⁴

⁴ Even if Mathis had not pled guilty to setting the fire, reference to the arson guideline was appropriate because setting the fire was relevant conduct within the
(continued...)

CONCLUSION

For the reasons stated, this Court should affirm defendant's sentence.

Respectfully submitted,

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(...continued)

meaning of Section 1B1.3, which defines "relevant conduct" as including "all acts and omissions * * * that occurred during the commission of the offense of conviction." U.S.S.G. § 1B1.3(a)(1)(A); see also *United States v. Vital*, 68 F.3d 114, 118 (5th Cir. 1995) (sentencing court may consider conduct in counts to which the defendant did not plead guilty and conduct charged in dismissed counts of an indictment).

CERTIFICATE OF SERVICE

I certify that on January 3, 2012, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the United States Court of Appeals for the Fifth Circuit using the CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/Teresa Kwong
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**CERTIFICATE REGARDING PRIVACY REDACTIONS
AND VIRUS SCANNING**

I hereby certify (1) that all required privacy redactions have been made in this brief, in compliance with 5th Cir. Rule 25.2.13; (2) that the electronic submission is an exact copy of the paper document, in compliance with 5th Cir. Rule 25.2.1; and (3) that the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

s/Teresa Kwong
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Dated: January 3, 2012

CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF FOR THE UNITED STATES AS APPELLEE does not exceed the type-volume limitation imposed by Federal Rule of Appellate Procedure 32(a)(7)(B). The brief was prepared using Microsoft Office Word 2007 and contains 2,316 words of proportionally spaced text. The typeface is 14-point Times New Roman font.

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Dated: January 3, 2012