

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 97-1157

United States of America,

Appellee,

v.

Jamal Suliman Muhtaseb,

Appellant.

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Appeal from the United States
District Court for the
District of Minnesota.

[UNPUBLISHED]

Submitted: May 5, 1997

Filed: May 9, 1997

Before BOWMAN, WOLLMAN and BEAM, Circuit Judges.

PER CURIAM.

Jamal Muhtaseb pleaded guilty to failing to surrender for service of his sentence, in violation of 18 U.S.C. § 3146(a)(2). At sentencing, the district court¹ denied Muhtaseb's motion for a downward departure under U.S. Sentencing Guidelines Manual § 5K2.0 (1995), and sentenced Muhtaseb to 21 months imprisonment and three years supervised release. Muhtaseb appeals, arguing that the district court erred by denying the departure motion. We affirm.

A court may depart from the applicable Guidelines range "if the court finds 'that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into

¹The Honorable Richard H. Kyle, United States District Judge for the District of Minnesota.

consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.'" U.S. Sentencing Guidelines Manual § 5K2.0, p.s. (1995) (citing 18 U.S.C. § 3553(b)). If a district court's refusal to depart was an exercise of discretion, we cannot review the ruling; if, however, the district court concluded it lacked the authority to depart, we may review the ruling. See United States v. Jenkins, 78 F.3d 1283, 1290 (8th Cir. 1996); United States v. Bieri, 21 F.3d 811, 817 (8th Cir.), cert. denied, 513 U.S. 878 (1994). Upon our review of the record, we conclude the district court was clearly aware of its authority to depart. Thus, its refusal to do so was an unreviewable exercise of discretion.

Accordingly, we affirm.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.