

United States Court of Appeals  
FOR THE EIGHTH CIRCUIT

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No. 96-3690

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United States of America,

Appellee,

v.

Frank E. Huff,

Appellant.

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Appeal from the United States  
District Court for the  
Western District of Missouri.

[UNPUBLISHED]

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Submitted: September 22, 1997

Filed: September 25, 1997

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Before McMILLIAN, BEAM, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

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PER CURIAM.

Frank E. Huff pleaded guilty to conspiring to possess with intent to distribute, and to distribute, phencyclidine (PCP) within 1000 feet of a public elementary school, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B) and 860. The district court<sup>1</sup> sentenced him to 100 months imprisonment and 8 years supervised release, and Huff appeals.

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<sup>1</sup>The Honorable Dean Whipple, United States District Judge for the Western District of Missouri.

Appointed counsel has filed a brief under Anders v. California, 386 U.S. 738 (1967), and Huff has not filed a supplemental brief. We affirm.

In his Anders brief, counsel argues that the district court erred by not departing downward based on Huff's argument at sentencing that his criminal history category overstated the seriousness of his past conduct. See U.S. Sentencing Guidelines Manual § 4A1.3, p.s. (district court may depart where criminal history does not adequately reflect seriousness of defendant's past conduct or likelihood defendant will commit future crimes) (1995). Nothing said during the sentencing hearing indicates the court believed it lacked authority to depart downward, and we find the district court's refusal to depart to be an unreviewable exercise of discretion. See United States v. Hall, 7 F.3d 1394, 1396 (8th Cir. 1993) (this court will not review sentencing court's decision not to depart downward under § 4A1.3 when it was aware of its authority to do so).

After conducting the record review required under Penson v. Ohio, 488 U.S. 75, 80 (1988), we find no non-frivolous issues.

Accordingly, we affirm.

A true copy.

Attest:

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