

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 99-1079

United States of America,	*
	*
Appellee,	*
	*
v.	* Appeal from the United States
	* District Court for the
	* District of Nebraska.
Jason Robertson, also known as Duke,	* [UNPUBLISHED]
	*
Appellant.	*

Submitted: April 7, 1999

Filed: April 9, 1999

Before WOLLMAN, LOKEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

PER CURIAM.

Jason Robertson pleaded guilty to conspiring to distribute and possess with intent to distribute cocaine base, in violation of 21 U.S.C. § 846. At sentencing, the district court¹ denied Robertson's motion for a downward departure under U.S. Sentencing Guidelines Manual § 5K2.13, p.s. (1998) for diminished capacity, but granted the government's motion to depart based on Robertson's substantial assistance. The court then sentenced Robertson to 48 months' imprisonment and five

¹The Honorable Richard G. Kopf, United States District Judge for the District of Nebraska.

years' supervised release. After appellate counsel moved to withdraw pursuant to Anders v. California, 386 U.S. 738 (1967), we granted Robertson permission to file a pro se supplemental brief, but he has not done so. We now affirm.

The Anders brief contends that the court erred in denying Robertson's motion for a departure under section 5K2.13. Considering the district court's comments as a whole, see United States v. Knight, 96 F.3d 307, 311 (8th Cir. 1996), cert. denied, 520 U.S. 1180 (1997), we conclude that the court was aware of its authority to depart for diminished capacity and that the court's exercise of discretion not to depart under the circumstances is unreviewable, see United States v. Field, 110 F.3d 587, 591 (8th Cir. 1997) (absent unconstitutional motive, discretionary decision not to depart from Guidelines is unreviewable on appeal).

Upon review of the record in accordance with Penson v. Ohio, 488 U.S. 75, 80 (1988), we find no nonfrivolous issues.

The judgment is affirmed.

A true copy.

Attest:

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