

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-3735  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHARLES H. PETERSON,

Defendant-Appellant.

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Appeal from the United States District Court for the  
Eastern District of Louisiana  
(CR-93-264-E-1)

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(March 23, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:\*

Charles Henry Peterson pleaded guilty to one count of making false statements in connection with the acquisition of three firearms. A presentence investigation report (PSR) was prepared, which provided the following information. On April 6, 1993, Peterson purchased one Llama .9mm semi-automatic pistol and two

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\*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Lorcin, Model L-25, .25 caliber semi-automatic pistols. Peterson answered "No" to a form question asking whether he had been convicted of a crime punishable by a term of imprisonment exceeding one year. A special agent with the Bureau of Alcohol, Tobacco, and Firearms (ATF) determined that on September 11, 1984, Peterson pleaded guilty to third-degree burglary in Alabama, for which he was imprisoned for six years.

After Peterson pawned one of the .25 pistols, ATF agents executed a search warrant for his residence and vehicle. They seized 17 rounds of .25 caliber ammunition from his vehicle and found Peterson in possession of the .9mm semi-automatic pistol and 39 rounds of .9mm ammunition when they arrested him. Peterson contended that he purchased the Llama and two Lorcin's for his personal protection. He further claimed that he fired the pistols only at a supervised indoor shooting range and never used or intended to use them for any illegal purpose.

The PSR applied U.S.S.G. § 2K2.1(a)(6), which resulted in a base offense level of 14. Because the offense involved three firearms, the base offense level was increased by one, pursuant to § 2K2.1(b)(1)(A). After deducting two levels for acceptance of responsibility, the PSR calculated a total offense level of 13. Peterson had a total of 17 criminal history points resulting in a level VI criminal history category. The PSR stated that the guideline range for imprisonment was 33 to 41 months.

Peterson filed an objection to the PSR, arguing that § 2K2.1(b)(2) should have been applied to reduce his offense level to 6 because he possessed the firearms solely for lawful sporting purposes. Peterson contended that the initial complaint showed that Peterson went repeatedly to an indoor shooting range for target practice. Peterson made the same objection at the sentencing hearing, arguing that the evidence showed that pistol targets were found suggesting that he used the guns for target practice and that he also used them to protect his family. The district court declined to apply § 2K2.2(b)(2) and sentenced Peterson to 37 months of imprisonment with three years of supervised release.

On appeal, Peterson argues that the district court misapplied the Guidelines because clear and convincing evidence showed that Peterson never used the firearms in an unlawful manner, but used them solely for lawful sporting purposes.

The Guidelines provide that if a defendant "possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition," the defendant's offense level as determined under § 2K2.1(b)(1) shall be decreased to six. U.S.S.G. § 2K2.1(b)(2). Commentary to the Guidelines provides that "lawful sporting purposes or collection" is to be determined by the surrounding circumstances. § 2K2.1(b)(2) comment. (n.10). "Relevant surrounding circumstances include the

number and type of firearms, the amount and type of ammunition, the location and circumstances of possession and actual use, the nature of the defendant's criminal history (e.g., prior convictions for offenses involving firearms), and the extent to which possession was restricted by local law." Id.

A felon claiming a reduction in offense level under § 2K2.1(b)(2) bears the burden of establishing entitlement by a preponderance of the evidence. U.S. v. Shell, 972 F.2d 548, 550 (5th Cir. 1992). In reviewing a district court's application of the Sentencing Guidelines, the district court's findings of fact are reviewed under the clearly erroneous standard, and the district court's application of the Guidelines to the facts is reviewed de novo.

Peterson argues that the physical evidence, "in the form of the targets from a local shooting range," supports his contention that the firearms were never discharged unlawfully, but were used for target shooting. This evidence, he contends, is contained in the government's original complaint filed against him.

The criminal complaint filed against Peterson is supported by the affidavit of Charles Hustmyre, a special agent with the ATF. Hustmyre attested that when executing the search warrants, he and other ATF agents found inside Peterson's car two firearms targets, which appeared to have been shot, along with seventeen rounds of .25 caliber ammunition.

The district court resolved Peterson's argument as provided in the Addendum to the PSR. The Addendum noted the following. Peterson possessed three firearms, two of which were identical, and that only one would be necessary for use at an indoor shooting range for "sporting purposes." Addendum to PSR, 22. Further, the 17 rounds of .25 caliber ammunition seized from Peterson's car was not congruent with "sporting purposes." Additionally, the firearms were possessed in violation of state, as well as federal law. Last, although Peterson alleged that the firearms were possessed for the "protection of his family," protection of family is not a provision of § 2K2.1(6)(2), which applies only to lawful sporting purposes or collection. Id.

Not considered by the PSR, but argued by the government, is the commentary's directive to consider the nature of the defendant's criminal history such as prior convictions for offenses involving firearms. See § 2K.2(6)(2) comment. (n.10). As the government points out, Peterson has at least ten prior felony convictions although he is only twenty-nine years old. While most of Peterson's offenses were fraud and theft related, he also had two burglary convictions and an escape conviction suggesting violent tendencies.

Peterson simply has not met his burden of establishing entitlement to § 2K2.1(b)(2). Given Peterson's criminal history, the fact that three firearms and the accompanying ammunition were unnecessary for target shooting, and that Peterson violated both

state and federal law, the district court's findings were not clearly erroneous.

The judgment of the district court is therefore

A F F I R M E D.