

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8247
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RUSSELL W. LOPER,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Western District of Texas
USDC No. W-92-CR-89-1
- - - - -
(October 29, 1993)

Before POLITZ, Chief Judge, and SMITH and WIENER, Circuit Judges.

PER CURIAM:*

A felon claiming a reduction in offense level under U.S.S.G. § 2K2.1(b)(2) bears the burden of establishing entitlement by a preponderance of the evidence. United States 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 facts to the Guidelines is reviewed de novo. See id.

* 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

If a defendant possessed "all firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms," 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). Application of § 2K2.1(b)(2) is determined by the surrounding circumstances, including the number and type of firearms and the location and circumstances of possession. § 2K2.1(b)(2), comment. (n.10).

Loper introduced testimony at the sentencing hearing that the some of the weapons found in his possession were part of a family collection. To be eligible for an offense reduction under § 2K2.1(b)(2), "it is not sufficient that one among several intended uses of a firearm might be lawful recreation or collection; one of those must be the sole intended uses." Shell, 972 F.2d at 553. Loper argued that he possessed the additional weapons to protect his livestock and that the protection of livestock was encompassed within the sporting purpose exception of § 2K2.1(b)(2).

There is no authority for Loper's assertion. Further, even assuming that the protection of livestock is encompassed within the exception, the district court did not accept Loper's argument that his possession of a loaded pistol in the bedroom of his home was for the protection of livestock. The district court, relying on Shell, 972 F.2d at 553, concluded that one with a loaded firearm in his bedroom is not entitled to the reduction and also determined that Loper had not proved that a pistol without a scope was the kind of weapon carried for protection against

predators.

Loper argues that, by concluding that a pistol was likely not the kind of firearm carried for protection against predators, the district judge improperly interjected facts based upon his own experience. The application note to § 2K2.1(b)(2) expressly directs the sentencing court to consider the circumstances attending the possession in assessing the intended use of the weapon, including the type of weapon. § 2K2.1(b)(2), comment. (n.10). Further, Loper bore the burden of proof on the issue whether the guns were used for lawful sporting purposes; therefore, the district court's finding that Loper had not sufficiently developed the record to prove that the weapon was of a type commonly used against predators was not clearly erroneous.

Despite his argument that the weapons were for protection, Loper told one of the investigators that he intended to sell the weapons. He told another investigator that he had already sold them to his mother and was just safekeeping them. In addition, the weapon found in Loper's bedroom was located in close proximity to a plastic bag containing a green leafy substance believed to be marijuana. Because the district court's finding that Loper did not possess the loaded weapons to protect against predators was not clearly erroneous, the district court's sentence is AFFIRMED.