IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-41330
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHARLES RAY MCCALLUM,

Defendant-Appellant.

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Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 1:94-CR-29
- - - - - - - - - -
August 23, 1995

Before KING, JOLLY, and WIENER, Circuit Judges.

PER CURIAM:*

In this direct criminal appeal, Charles Ray McCallum challenges the district court's failure to award him an offense-level reduction pursuant to U.S.S.G. § 2K2.1(b)(2). McCallum contends that his intended use of the firearms was for the lawful purpose of hunting and collection and that "[a]ny misuse of the firearms during his periodic mental illness does not nullify the

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

fact that the firearms were obtained and mostly used for legitimate sporting and collecting purposes." (emphasis added).

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 level six. § 2K2.1(b)(2). 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. United States v. Shell, 972 F.2d 548, 550 (5th Cir. 1992). Application of § 2K2.1(b)(2) is determined by the surrounding circumstances, including the number and type of firearms, the location and circumstances of possession and actual use, and the nature of the defendant's criminal history. § 2K2.1(b)(2), comment. (n.10). "[I]t is not sufficient that one among several intended uses might be lawful recreation or collection; one of those must be the sole intended use." Shell, 972 F.2d at 553.

McCallum does not directly challenge the district court's determination that the application of § 2K2.1(b)(2) is independent of a finding of competency. Nor does he cite authority supporting his argument that his misuse of the firearms while deranged should not be held against him. However, even discounting McCallum's admitted misuse of the firearms when he allegedly was incompetent, McCallum has not proved by a preponderance of the evidence that hunting or collection were among the sole reasons he possessed the firearms. McCallum's

testimony at sentencing wherein he admitted that he felt hunted and was "going to hunt back" demonstrates that the district court did not clearly err in not awarding the § 2K2.1(b)(2) adjustment.

This appeal is without arguable merit and is thus DISMISSED as frivolous. See Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983). Counsel is warned that "Federal Public Defenders are like all counsel subject to sanctions. They have no duty to bring frivolous appeals; the opposite is true." United States v. Burleson, 22 F.3d 93, 95 (5th Cir.), cert. denied, 115 S. Ct. 283 (1994). An appointed attorney who believes his client's case is frivolous should file a brief pursuant to Anders v. California, 386 U.S. 738 (1967), in conjunction with a motion to withdraw from representation of the defendant. Future frivolous appeals may lead to sanctions.

APPEAL DISMISSED.