UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-8364

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DAVID KEITH MOCK,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(P-91-CR-87-1)

(February 18, 1994)

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

PER CURIAM:[*]

Pursuant to a plea agreement, defendant David Keith Mock pled guilty to a one count indictment charging him with possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1) (1988). The district court sentenced Mock to life imprisonment.[1]

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[*] Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1] The sentence imposed by the district court was to run concurrently with the sentence Mock already was serving in state prison for attempted capital murder. The district court also

Mock now appeals his sentence, contending that: (a) the district court improperly calculated his base offense level; (b) the district court violated the Fifth Amendment prohibition against double jeopardy when sentencing him; (c) the district court erroneously found that he had obstructed justice; and (d) the district court erred in holding that he had not accepted responsibility for his actions. We affirm.

I

Two state law enforcement agents, who learned that Mock had broken into several automobiles, stopped a vehicle driven by Mock in Fort Stockton, Texas. As one officer attempted to search Mock, Mock began firing on the officers. In the ensuing shootout, both of the officers and Mock were wounded. Mock fled the scene but a third officer apprehended him a short distance from where the shootout occurred. After Mock's capture, officers searched his vehicle and recovered both the revolver used in the shootings and a stolen rifle. Subsequently, the government charged Mock with possession of a firearm by a convicted felon.

The government later filed an Enhancement Information alleging that Mock had eleven prior violent felony convictions and seeking an enhanced sentence pursuant to 18 U.S.C. § 924(e)(1).[2] Mock and

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sentenced Mock to five years of supervised release and a $50 special assessment.

[2] Section 18 U.S.C. § 924(e)(1) states:

> In the case of a person who violates section 922(g) of this title and has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such

the government then entered into a plea agreement whereby Mock pled guilty to the offense alleged in the indictment and admitted the convictions alleged by the information. The district court determined Mock's base offense level to be 28. *See* United States Sentencing Commission, *Guidelines Manual*, § 2A2.1 (Nov. 1990). The district court then adjusted Mock's offense level upward four levels because one of the officers sustained a permanent or life-threatening injury. *See* U.S.S.G. § 2A2.1(b)(1)(A). The district court imposed a second upward adjustment of three levels because Mock knew that the individuals he assaulted were law enforcement officers. *See* U.S.S.G. § 3A1.2(b). Finally, the district court concluded that a two level upward adjustment for obstruction of justice was appropriate because Mock attempted to escape from state prison. *See* U.S.S.G. § 3C1.1. The district court also rejected a three level reduction for acceptance of responsibility. *See* U.S.S.G. § 3E1.1. Consequently, the district court sentenced Mock to life in prison, which was within the guideline imprisonment range of 360 months to life. *See* U.S.S.G. Chapter 5, Part A.

II

A

Mock initially contends that the district court improperly calculated his base offense level. Mock, however, does not dispute the facts the district court used to arrive at his base offense level. Instead, he complains that the district court both

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> person shall be fined not more than $25,000 and imprisoned not less than 15 years . . . .

misinterpreted and misapplied the guidelines to the facts. We review the trial court's application of the guidelines *de novo*. 18 U.S.C. § 3742(e); *United States v. Otero*, 868 F.2d 1412, 1414 (5th Cir. 1989).

The district court computed Mock's base offense level pursuant to U.S.S.G. § 2A2.1.[3] Mock argues, however, that the district court should have followed § 2K2.1.[4] While it is true that § 2K2.1 sets the base offense level for unlawful receipt or possession of a firearm, § 2K2.1(c)(2) directs the district court to look to § 2X1.1 for the base offense level if the defendant used or possessed the weapon in the commission of another offense.[5] Section 2X1.1, in turn, provides that "[w]hen an attempt, solicitation, or conspiracy is expressly covered by another offense guideline section, apply that guideline section." The district court found that Mock used the unlawfully possessed weapon in the attempted murder of state law enforcement officers, an offense

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[3] Section 2A2.1 provides for a base offense level of 28 "if the object of the offense would have constituted first degree murder." The district court determined that Mock's offense was the attempted first degree murder of two peace officers, thus compelling a base offense level of 28.

[4] Section 2K2.1, which applies to defendants who unlawfully receive, possess, or transport firearms, provides for a base offense level of 12 "if the defendant [was] convicted under 18 U.S.C. § 922(g)."

[5] Section 2K2.1(c)(2) states, "If the defendant used or possessed the firearm in connection with commission or attempted commission of another offense, apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above."

within the meaning of § 2K2.1(c)(2). Consequently, because § 2A2.1 specifically applies to the offense of assault with intent to commit murder, the district court correctly used section to determine Mock's base offense level.

Nevertheless, Mock argues that he violated no federal law when he attacked state law enforcement officers. Mock also points out that no federal law enforcement officers were involved and that the state law enforcement agents were not carrying out any federal law enforcement duties when he shot them. Consequently, Mock asserts that § 2K2.1 should apply rather than § 2A2.1. We find Mock's argument unavailing.

Mock construes § 2K2.1(c)(2) far too narrowly. In *United States v. Gonzales*, 996 F.2d 88, 92 (5th Cir. 1993), we established that § 2K2.1(c)(2) should be applied expansively: "[T]he broad language of section 2K2.1(c)(2), particularly its unlimited references to another offense, indicates that it is not restricted to offenses which would be relevant conduct but embraces all illegal conduct performed or intended by defendant concerning a firearm involved in the charged offense." Adhering to this broad approach, Mock's assault on the officers constitutes illegal conduct within the meaning of the section. Application of the cross-reference found in § 2K2.1(c)(2) in not precluded simply because the illegal conduct performed with the unlawfully possessed firearm does not constitute a violation of federal law.

In addition to the broad construction afforded § 2K2.1(c)(2), we note that

> [t]he firearm statutes often are used as a device to enable the federal court to exercise jurisdiction over offenses that otherwise could be prosecuted only under state law. For example, a convicted felon may be prosecuted for possessing a firearm if he used the firearm to rob a gas station. In preguidelines practice, such prosecutions resulted in high sentences because of the true nature of the underlying conduct. The cross-reference at § 2K2.1(c)(2) deals with such cases.

U.S.S.G. § 2K2.1, comment. (backg'd.); *see Stinson v. United States*, ___ U.S. ___, 113 S. Ct. 1913, 1915, 123 L. Ed. 2d 598 (1993) (noting that the Commentary in the Guidelines Manual is "authoritative unless it violates the Constitution, or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline."). Moreover, we specifically have found that the cross-reference in § 2K2.1(c)(2) applies even when the offense committed in conjunction with the possession of the firearm is a violation of state law and not federal law. *See United States v. Perez*, 897 F.2d 751, 753 n.2 (5th Cir.), *cert. denied*, 498 U.S. 865, 111 S. Ct. 17, 112 L. Ed. 2d 141 (1990). Accordingly, we find that the district court properly applied § 2K2.1(c)(2) and correctly determined Mock's base offense level pursuant to § 2A2.1.[6]

B

[6] Mock relies on *United States v. Carroll*, 798 F. Supp. 291 (D.Md. 1992) as support for his contention that the cross-reference does not apply to conduct which is not a federal offense. However, the Fourth Circuit, applying the reasoning we employ today, vacated that decision. *United States v. Carroll*, 3 F.3d 98, 101-03 (4th Cir. 1993). *See also United States v. Willis*, 925 F.2d 359, 360-61 (10th Cir. 1991) (employing the same reasoning); *United States v. Smith*, 910 F.2d 326, 328-30 (6th Cir. 1990) (same).

Mock next asserts that the district court violated the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution by applying the cross-reference found in § 2K2.1(c)(2), upwardly adjusting for the life-threatening injury to one of the officers, and upwardly adjusting because the victims were law enforcement agents. He contends that the conduct comprising his base offense level, as well as the enhancements, was already prosecuted in state court.

Because Mock's conduct violated both the laws of the state of Texas and the United States, we find his argument to be without merit. Under the concept of dual sovereignty, "a defendant may be prosecuted and sentenced by both federal and state governments if the defendant's criminal conduct violates the laws of each sovereign." *United States v. Brown*, 920 F.2d 1212, 1216 (5th Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2034, 114 L. Ed. 2d 119 (1991); *see also United States v. Moore*, 958 F.2d 646, 650 (5th Cir. 1992); *United States v. Carter*, 953 F.2d 1449, 1462 (5th Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 2980, 119 L. Ed. 2d 598 (1992); *United States v. Harrison*, 918 F.2d 469, 474 (5th Cir. 1990). Thus, Mock may be sentenced for any criminal conduct that violated federal law even though that same conduct also violated state law. *E.g.*, *United States v. Mun*, 928 F.2d 323, 324 (9th Cir. 1991) (finding that "a successful prosecution by the state [does not bar] subsequent sentencing by a federal court for the same conduct"). Accordingly, Mock's double jeopardy argument must fail.

C

Mock next challenges the district court's finding that he obstructed justice. *See* U.S.S.G. § 3C1.1 (requiring a two level increase in offense level if defendant obstructs the administration of justice). Mock, however, does not contest that he attempted to escape from the Darrington Unit of the Texas Penitentiary and that, during his escape attempt, a federal indictment was pending. Instead, Mock argues that the government failed to demonstrate a link between the attempted escape and the existence of the federal indictment. The district court found a sufficient link between the attempted escape and the federal indictment to warrant the enhancement. We review the finding that Mock obstructed justice using the clearly erroneous standard. *United States v. Winn*, 948 F.2d 145, 161 (5th Cir. 1991), *cert denied*, ___ U.S. ___, 112 S. Ct 1599, 118 L. Ed. 2d 313 (1992).

The starting point in assessing Mock's contention is the language of § 3C1.1, which provides for a two-level increase "[i]f the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense." U.S.S.G. § 3C1.1. It is beyond dispute that a defendant obstructs justice by attempting to escape from custody, and Mock does not assert that he intended to return after his escape to participate in the federal prosecution. *See* U.S.S.G. § 3C1.1, comment. (n.3(e)) (stating that enhancement applies to "escaping or attempting to escape from custody before trial or sentencing"). Nothing in this section implies that a defendant must attempt to

escape from federal custody before § 3C1.1 becomes applicable. To the contrary, the section directs an upward adjustment if the defendant obstructs *any* investigation into his conduct. *See United States v. Ball*, 999 F.2d 339, 340 (8th Cir. 1993) (finding that the defendant's attempted escape from a county jail constituted obstruction, even though the defendant had not yet been indicted for any federal offenses); *United States v. Emery*, 991 F.2d 907, 911-12 (1st Cir. 1993) (holding that obstruction of justice adjustment was proper where defendant attempted to escape from county jail before a federal investigation commenced); *see also United States v. Roberson*, 872 F.2d 597, 609 (5th Cir.) (rejecting the defendant's argument that he hid a murdered man's credit card only to obstruct a state murder investigation and not a federal fraud investigation), *cert. denied*, 493 U.S. 861, 110 S. Ct 175, 107 L. Ed. 2d 121 (1989). Accordingly, we find that the district court properly enhanced Mock's sentence for obstruction of justice.

D

Mock's final contention is that the district court erred in finding that Mock had not accepted responsibility for his criminal conduct. Mock asserts that he accepted responsibility because he pled guilty to the indictment, the prosecutor recommended such a reduction in the plea agreement, and he showed remorse.

To receive a reduction for acceptance of responsibility, Mock must show that he "clearly demonstrate[d] a recognition and affirmative acceptance of personal responsibility for his criminal conduct." U.S.S.G. § 3E1.1; *see also United States v. Nevarez-*

Arreola, 885 F.2d 243, 245-46 (5th Cir. 1989). Mock must demonstrate that he has accepted responsibility by a preponderance of the evidence. *See United States v. Kinder*, 946 F.2d 362, 367 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 2290, 119 L.Ed. 2d 214 (1992). We review the district court's finding using the clearly erroneous standard. *United States v. Hardeman*, 933 F.2d 278, 283 (5th Cir. 1991).[7]

While Mock urges this court to order a reduction based on his guilty plea, a guilty plea alone does not compel the sentencing court to find that a defendant has accepted responsibility for his criminal conduct. U.S.S.G. § 3E1.1, comment. (n.3); *see also United States v. Shipley*, 963 F.2d 56, 58 (5th Cir.), *cert denied*, ___ U.S. ___, 113 S. Ct. 348, 121 L. Ed.2d 262 (1992). Moreover, Mock's contention that a reduction is warranted simply because the government recommended it in the plea agreement is erroneous because the district court is not bound by the plea agreement. *See* U.S.S.G. § 6B1.4(d).[8] Furthermore, the district court adjusted Mock's sentence upward for obstruction of justice. An enhancement

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[7] We have not explicitly determined the standard that applies when reviewing a district court's refusal to credit a defendant's acceptance of responsibility. *Compare United States v. Hardeman*, 933 F.2d 278, 283 (5th Cir. 1991) (applying the clearly erroneous standard) *with United States v. Thomas*, 870 F.2d 174, 176 (5th Cir. 1989) (applying the "without foundation" standard) *and United States v. Brigman*, 953 F.2d 906, 909 (5th Cir.) (applying the "great deference" standard), *cert. denied*, ___ U.S. ___, 113 S. Ct. 49, 121 L. Ed. 2d 16 (1992). For the purpose of this appeal, however, "there appears to be no practical difference between the two standards." *United States v. Cartwright*, 6 F.3d 294, 304 (5th Cir. 1993).

[8] The plea agreement itself states that it "binds only the United States Attorney."

for obstruction of justice usually precludes an acceptance of responsibility adjustment. U.S.S.G. § 3E1.1, comment. (n.4) (stating that obstruction of justice enhancement typically precludes acceptance of responsibility adjustment except in "extraordinary cases"); *see United States v. Suransky*, 976 F.2d 242, 247 (5th Cir. 1992). Most damaging to Mock's contention, however, are letters composed by Mock while he was in state prison that demonstrate he did not show "sincere contrition" for his acts.[9] *See United States v. Beard*, 913 F.2d 193, 199 (5th Cir. 1990). Consequently, we conclude that the district court's finding that Mock did not accept responsibility was not clearly erroneous.

IV

For the foregoing reasons, we AFFIRM the judgment of the district court.

[9] A few passages from the letters suffice to show Mock's lack of remorse for his conduct: "I have no time for remorse."; "I even get mad because the cops did not die . . . I know no guilt or remorse, because I have no place for that in my heart."; "If you think I sit around here in a state of mourning, you are wrong. I have no feelings of remorse or regret whatsoever."