CASE LAW UPDATE - HOT TOPICS

Scenario 1:

Defendant pled guilty to Felon in Possession (18 U.S.C. § 922(g)) on 6/1/2019.

Defendant has three prior convictions. He robbed three different victims in New Orleans on 11/24/2010. The first robbery took place on Bourbon St. at 10:00 p.m., the second took place on Royal St. at 10:15 p.m., and the third was at Frenchman St. at 10:45 p.m.

He pled guilty to all three robberies, sentenced on 6/1/2011, and received a six year sentence for each robbery to run concurrently.

The defendant agrees that the robbery offense would qualify as a violent felony under the Armed Career Criminal Act (ACCA), but claims that because these offenses were treated as a single sentence under §4A1.2, he only has one prior violent felony (not the three that are required under the Act).

Assuming the robbery statute is a violent felony, does the ACCA apply?

Answer:

Yes. The ACCA applies "[i]n the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another." In determining whether the defendant's offenses were committed on occasions different from one another, the court does not use the single sentence rule at §4A1.2, but must determine if the offenses arise from "separate and distinct criminal episodes" or "if the defendant had the opportunity to engage in another crime after he concluded the first crime." In making this determination, the court must rely only on *Shepard* documents. *See U.S. v. Hennessee*, 932 F.3d 437 (6th Cir. July 30, 2019) and *U.S. v. Bordeaux*, 886 F.3d 189 (2d Cir. 2018). Here, because the robberies took place on different streets and at different times, the court would likely find that these offenses would qualify as three predicate convictions.

Scenario 2:

The defendant was arrested in March 2019 while in possession of a firearm. The metal serial-number plate had been removed from the frame of the handgun, but it had a legible serial number on its slide. The number on the slide was used to trace the firearm. The defendant pled guilty to Felon in Possession of a Firearm.

The probation officer applied a four-level enhancement pursuant to §2K2.1(b)(4), which provides an increase if any firearm had an altered or obliterated serial number. The defendant objected to the enhancement because the serial number itself was not altered or obliterated;

rather, the firearm was altered by the removal of the serial-number plate and the weapon could still be traced.

Should the enhancement apply?

Answer:

Yes. Removal of the metal serial-number plate from the frame of a firearm is a material change and alters the serial number, so the enhancement will apply. *See U.S. v. Jones*, 927 F.3d 895 (5th Cir. 2019), and *U.S. v. Thigpen*, 848 F.3d 841 (8th Cir. 2017).

Scenario 3:

Defendant pled guilty to one count of possession of child pornography on February 1, 2019. The defendant used a file sharing program called Ares to download images of child pornography.

The government believes that the 2-level increase for distribution of pornography under §2G2.2(b)(3) applies based on the use of the file sharing program. The defendant argues that he did not know how the program worked.

Should the defendant receive an enhancement pursuant to §2G2.2(b)(3)?

Answer:

To apply the 2-level enhancement at §2G2.2(b)(3)(F), the defendant must knowingly engage in distribution of the images. Thus, mere use of a peer-to-peer (file sharing program) is insufficient to apply the enhancement. *See U.S. v. Lawrence*, 920 F.3d 331 (5th Cir. 2019). The government will have to prove that the defendant knew that the images were being shared, or present evidence to support an inference of knowledge based on the defendant's characteristics. In *U.S. v. Montanez-Quinones*, 911 F.3d 59 (1st Cir. 2019), the First Circuit held that the knowledge requirement can be inferred if the government proves the defendant knew how file sharing programs operated. For example, the government could introduce evidence showing the defendant was a sophisticated and long-time computer user or that he moved files around the program. Here, the government did not introduce any evidence to prove that the defendant knew how the file sharing program was sharing images, so on these limited facts, the enhancement would not apply.

Scenario 4:

The defendant is convicted of production of child pornography for producing a video of himself engaging in sexual activity with one of his 13-year old students on July 5, 2019. The defendant admitted that he had sex with this student another time on June 30, 2019. The probation officer has applied §4B1.5(b) (pattern of activity) based on these two instances of sexual conduct. The defendant objected, arguing that he only has one prior prohibited sexual conduct and that the enhancement should not apply because the enhancement requires two prior instances of sexual abuse.

Should the enhancement at §4B1.5(b) apply?

Answer:

Yes. §4B1.5(b)(2) applies when the offense of conviction is a "covered sex crime," as defined in Application Note 2 [which includes the defendant's instant offense of production of child pornography], and the defendant engaged in a "pattern of activity" involving "prohibited sexual conduct."

Pattern of activity is defined at App. Note 4(B) as at least two separate occasions of the defendant engaging in prohibited sexual conduct with a minor. Prohibited sexual conduct is defined at App. Note 4(A), and includes both the production of child pornography, and the commission of a sex act with a minor, which are the acts in which this defendant engaged on two separate occasions. Although one of the acts occurred during the offense of conviction, that can count as one of the two occasions required under §4B1.5. *See U.S. v. Fox*, 926 F.3d 1275 (11th Cir. 2019) and *U.S. v. Ray*, 840 F.3d 512 (8th Cir. 2017).

Scenario 5A:

The defendant was convicted of conspiracy to distribute cocaine in violation of 18 U.S.C. § 841(b)(1)(b) and is facing a 5-year mandatory minimum. The defendant is currently serving a 2-year sentence in state custody for possession of a weapon and has served one year for that offense. The weapon that was the basis for the state sentence was possessed during the federal drug conspiracy and the court applied the weapon enhancement at §2D1.1(b)(1).

The judge believes that the appropriate drug sentence should be 60 months and is planning on adjusting the sentence to 48 months based on §5G1.3(b), which provides that if the undischarged sentence is relevant conduct to the federal offense, the court should adjust the sentence based on the time the defendant has already served. The government argues that because there is a 5-year mandatory minimum, the court cannot adjust the sentence to 48 months and must impose a 60-month sentence.

Can the court adjust the sentence to 48 months?

Answer:

Yes. The court can sentence the defendant to 48 months because the total period of incarceration is 60 months (48 months plus the 12 months he has served on the undischarged state sentence). *See U.S. v. Rivers,* 329 F.3d 119 (2d Cir. 2003), *U.S. v. Dorsey*, 166 F.3d 558 (3d Cir. 1999), and *U.S. v. Ross*, 219 F.3d 592 (7th Cir. 2000), *U.S. v. Drake*, 49 F.3d 1438 (9th Cir. 1995), and *U.S. v. Kiefer*, 20 F.3d 874 (8th Cir. 1994).

Scenario 5B:

Same facts as above, but the defendant has finished serving his firearms sentence, so §5G1.3 does not apply. However, the court wants to depart under §5K2.23 (Discharged Terms of Imprisonment) and sentence the defendant to 36 months to account for the years the defendant served on the weapon charge because it was relevant conduct to the drug offense.

Can the court sentence below the mandatory minimum based on §5K2.23?

Answer:

No. §5K2.23 does not permit a district court to adjust a federal sentence below the mandatory minimum to account for a related state sentence that has been discharged. *See U.S. v. Moore*, 918 F.3d 368 (4th Cir. 2019) and *U.S. v. Lucas*, 745 F.3d 626 (2d Cir. 2014).