

**UNPUBLISHED**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ABINGDON DIVISION**

**UNITED STATES OF AMERICA**

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Case No. 1:00CR00044

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v.

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**OPINION AND ORDER**

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**WILLIAM HENRY BAILEY,**

)

By: James P. Jones

)

United States District Judge

Defendant.

)

*Eric M. Hurt, Assistant United States Attorney, Abingdon, Virginia, for United States;  
David L. Scyphers, Abingdon, Virginia, for defendant.*

Decided: May 2, 2001

In this sentencing of a defendant who pled guilty to possession of firearms by a person who had previously been convicted of a misdemeanor crime of domestic violence, I deny the defendant's request for downward departure under the United States Sentencing Guidelines.

I

The defendant, William Henry Bailey, entered a plea of guilty to count two of an indictment charging him with possession of ammunition on or about or between

January 1997 and January 1999, having previously been convicted of a misdemeanor crime of domestic violence, a violation of 18 U.S.C.A. § 922(g)(9) (West 2000).

An initial sentencing hearing was held on April 9, 2001. Based on the facts contained in the presentence investigation report, as well as the defendant's objections to the report, I found the defendant to be in criminal history category I with an offense level of 15 under the sentencing guidelines, resulting in an imprisonment range of eighteen to twenty-four months.<sup>1</sup> The defendant moved for downward departure from this sentencing range on the grounds that (1) because he had not been aware of the illegality of his ammunition possession, he does not fall within the "heartland" of the crime for which he is convicted; and (2) his possession of the ammunition constituted "aberrant behavior." See United States Sentencing Commission, *Guidelines Manual*, §§ 5K2.0, 5K2.20 (Nov. 2000).

In order to fully consider the motion for downward departure, I adjourned the sentencing hearing and took the motion under advisement. I am now prepared to rule on the motion in this opinion and order.

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<sup>1</sup> I sustained the defendant's objection as to the calculation of his criminal history points, finding that the defendant falls in criminal history category I of the guidelines rather than category III.

## II

Departure is permitted from the designated sentencing guidelines only in extraordinary cases. *See Koon v. United States*, 518 U.S. 81, 92 (1996). In order to depart, the court must “find[ ] that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.” *Id.* “Any factor ‘not expressly forbidden’ by the Guidelines ‘potentially may serve as a basis for departure.’” *United States v. Debeir*, 186 F.3d 561, 566 (4th Cir. 1999) (quoting *United States v. Brock*, 108 F.3d 31, 35 (4th Cir. 1997)). In “rare situations,” a combination of factors may take the case out of the heartland, even though no single factor is sufficient. *Id.* at 572.

I reject the defendant’s argument that downward departure is warranted because the defendant was unaware of the illegality of his ammunition possession. The Fourth Circuit considered a similar argument in *United States v. Mitchell*, 209 F.3d 319 (4th Cir.), *cert. denied*, 121 S.Ct. 123 (2000). In that case, the court rejected a defendant’s argument that because he had not been aware that his continued possession of a firearm was illegal, his conviction under § 922(g)(9) violated his rights under the Due Process Clause of the Fifth Amendment. *See id.* at 323. Citing the familiar maxim “ignorance

of the law is no excuse,” the court nevertheless noted that the defendant was on sufficient notice that he was prohibited from firearm possession, stating,

Mitchell’s conduct in assaulting his wife – the act that led to his misdemeanor domestic violence conviction – put Mitchell on sufficient notice . . . [and] removed [him] from the class of ordinary citizens to the point where he could not reasonably expect to be free from regulation when possessing a firearm.

*Id.* at 323 (internal quotations and citations omitted).

Similarly, the Eighth Circuit has held that “an individual’s domestic violence conviction should itself put that person on notice that subsequent possession of a gun might well be subject to regulation.” *United States v. Hutzell*, 217 F.3d 966, 968 (8th Cir. 2000), *cert. denied*, 121 S.Ct. 1408 (2001). In that case, the court rejected the defendant’s argument for downward departure on the ground that he had had no reason to believe that his conduct was criminal. *See id.* at 969. Noting the considerable public concern over domestic violence, the court concluded that “[n]othing about the circumstances of [the defendant’s] offense afforded him less notice than any other offender would have had with respect to the lawfulness of the conduct in question.”

*Id.* Likewise, I am not persuaded by Bailey’s contention that he merits downward departure under U.S.S.G. § 5K2.20.

I also find that downward departure is not appropriate under U.S.S.G. § 5K2.20 for “aberrant behavior.” The guidelines provide that a court may depart from the applicable guideline range in “an extraordinary case” in which the defendant’s conduct constituted “aberrant behavior.” U.S.S.G. § 5K2.20. Downward departure is not permissible, however, if the defendant’s conduct meets any of the following conditions:

- (1) the offense involved serious bodily injury or death;
- (2) the defendant discharged a firearm or otherwise used a firearm or a dangerous weapon;
- (3) the instant offense of conviction is a serious drug trafficking offense;
- (4) the defendant has more than one criminal history point . . . ; or
- (5) the defendant has a prior federal, or state, felony conviction, regardless of whether the conviction is countable under Chapter Four [of the guidelines].

*Id.* None of these conditions disqualify Bailey from the application of § 5K2.20. However, downward departure for aberrant behavior is nevertheless not appropriate in this case.

The commentary for § 5K2.20 defines “aberrant behavior” as conduct that “represents a marked deviation by the defendant from an otherwise law-abiding life.” U.S.S.G. § 5K2.20, comment (n.1). While the calculation of Bailey’s criminal history under the guidelines placed him in criminal history category I, Bailey’s life cannot be characterized as otherwise “law-abiding.” He had three state court convictions in Ohio in the 1980s for assault, persistent disorderly conduct with intoxication, and domestic

violence. Further, since 1998, Bailey has been convicted in Virginia of several related charges of domestic violence. Thus, Bailey has a history of convictions for illegal, albeit not felonious, conduct. As such, downward departure on the basis of aberrant behavior is not warranted.

### III

While this court has the legal power to depart in this case, for the foregoing reasons, I decline to exercise my discretion to depart and it is **ORDERED** that the defendant's motion for downward departure is denied.

ENTER: May 2, 2001

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United States District Judge