

UNPUBLISHED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. 1:99CR00074

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v.

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OPINION

)

ANTHONY GOINES,

)

By: James P. Jones

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United States District Judge

Defendant.

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Eric M. Hurt, Assistant United States Attorney, Abingdon, Virginia, for United States; Anthony Goines, pro se.

In this criminal case, the defendant seeks a reduction in his term of imprisonment pursuant to 18 U.S.C.A. § 3582(c)(2) (West 2000). For the reasons that follow, that motion will be denied.

I

The defendant was charged in a three-count indictment with possessing, with the intent to distribute, marijuana and methamphetamine within 1000 feet of a truck stop, in violation of 21 U.S.C.A. §§ 841(a), 849 (West 1999 & Supp. 2001) (count one), possession of a .45-caliber handgun during and in relation to a drug trafficking crime, to wit: possession with intent to distribute methamphetamine, in violation of 18

U.S.C.A. § 924(c) (West 2000) (count two), and being an unlawful user of a controlled substance in possession of a firearm, in violation of 18 U.S.C.A. § 922(g)(3) (West 2000) (count three). On January 13, 2000, the defendant entered guilty pleas to counts two and three in exchange for the government's dismissal of count one.

In calculating his total offense level for sentencing purposes, the defendant received a two-level enhancement under count three for possessing a firearm in relation to his drug distribution scheme. *See U.S. Sentencing Guidelines Manual* §§ 2K2.1, 2X1.1, 2D1.1(b)(1) (1998).¹ The defendant was consequently sentenced to twenty-four months of imprisonment on count three and a mandatory consecutive sentence of sixty months on count two. *See id.* § 2K2.4(a).

Because of amendment 599 to the guidelines, the defendant filed this pro se motion pursuant to 18 U.S.C.A. § 3582(c)(2), arguing that the two-point weapon enhancement that he received under count three had been subsequently abolished by that amendment. Accordingly, he asks that this court reduce his sentence by six months in recognition of these changes to the guidelines.²

¹ The defendant was sentenced on March 28, 2000, when the 1998 version of the guidelines was applicable.

² Assuming the defendant's argument is correct, his total offense level would drop from seventeen to fifteen, yielding a custody range of eighteen to twenty-four months. *See U.S. Sentencing Guidelines Manual* Sentencing Table (2000). Presumably, the six months reduction sought is the difference between the twenty-four months imposed and the eighteen months minimum under the level fifteen offense level. At sentencing, the court did indicate that it wished to sentence the

II

Section 3582(c)(2) provides that the court:

may not modify a term of imprisonment once it has been imposed except that . . . in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant . . . the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C.A. § 3582(c)(2).

Thus, in order to reduce the defendant's sentence under § 3582(c)(2), I must conduct a two-prong inquiry: (1) whether the sentencing range under which the defendant was sentenced has been lowered; and (2) whether, after consideration of the relevant statutory factors, reduction of his sentence is consistent with the policies of the sentencing commission. It is the defendant who must clearly establish that both of these components have been satisfied. *See United States v. Sprague*, 135 F.3d 1301, 1306 (9th Cir. 1998).

Section 2K2.4 of the sentencing guidelines governs the appropriate sentence for violations of 18 U.S.C.A. § 924(c). *U.S. Sentencing Guidelines Manual* § 2K2.4(a)(2) (2000). Amendment 599 to the guidelines, which became effective November 1, 2000,

defendant at the low end of the guideline range. (Tr. 4.)

revised application note 2 to § 2K2.4. That note now reads, in part, “[i]f a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of [a] . . . firearm when determining the sentence for the underlying offense.” *Id.*, application note 2 (2000).

Because he was sentenced pursuant to § 2K2.4 on count three, the defendant directs the court’s attention to the two-level enhancement that he received under count two for his possession of a firearm. According to the defendant, that enhancement would no longer be made under the current version of application note 2. Thus, because his sentence has been “lowered” for purposes of § 3582(c)(2) analysis, the defendant argues that he is entitled to have the two-level enhancement at issue subtracted and his sentence reduced. In response, the government concedes the applicability of amendment 599 to this case.

I disagree. The issue here is whether count three, charging the defendant with being an unlawful user of a controlled substance in possession of a firearm, is considered an “underlying offense” within the meaning of the revised application note.

In answering that question, I am guided by those courts of appeals that have held that the “crimes of violence” and “drug trafficking crimes” referred to in 18 U.S.C.A. § 924(c), and not other charged offenses such as the possession of a firearm by a drug

user, are “underlying offenses” for purposes of scrutiny under § 2K2.4’s application note 2. *See United States v. Paredes*, 139 F.3d 840, 846 (11th Cir. 1998); *United States v. Sanders*, 982 F.2d 4, 7 (1st Cir. 1992). “[T]he underlying offense *must* be the crime during which, by using the gun, the defendant violated § 924(c).” *United States v. Mrazek*, 998 F.2d 453, 455 (7th Cir. 1993) (emphasis added) (internal quotations omitted). *But see United States v. Vincent*, 20 F.3d 229, 241 (6th Cir. 1994) (holding that § 2K2.4 prohibited enhancement for a violation of § 922(g)(3)).³

In the present case, the indictment expressly alleged that it was the drug trafficking offense charged in count one that constituted the underlying offense for § 924(c) purposes. Of course, count one was dismissed in exchange for the defendant’s plea of guilty to counts two and three.

Amendment 599 was meant “to clarify” the applicability of § 2K2.4, *see U.S. Sentencing Guidelines Manual*, app. C. 71 (2000), not to expand the meaning of “underlying offense” as that term is used in § 2K2.4. Thus, because the defendant was not sentenced for the drug trafficking crime underlying the possession of the firearm at issue, no occasion arises to apply application note 2 to § 2K2.4. Accordingly, the

³ The Fourth Circuit has yet to resolve this question. *See United States v. Corley*, No. 94-5271, 1995 WL 222204, at *2 n.6 (4th Cir. Apr. 14, 1995) (unpublished opinion).

defendant has not satisfied the first prong under 18 U.S.C.A. § 3582(c)(2) and his motion will be denied.⁴

III

For the foregoing reasons, the defendant's motion will be denied. An appropriate order will be entered.

DATED: August 9, 2001

United States District Judge

⁴ Because the defendant has not met his burden under the first prong of § 3582(c)(2), it is unnecessary for me to consider the second prong.