

UNPUBLISHED

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION**

UNITED STATES OF AMERICA

v.

WARREN LAWSON,

Defendant.

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Case No. 2:01CR10037

OPINION

By: James P. Jones
United States District Judge

Rick A. Mountcastle, Assistant United States Attorney, Abingdon, Virginia, for United States of America; Henry S. Keuling-Stout, Big Stone Gap, Virginia, for Defendant.

In sentencing the defendant on May 6, 2002, I sustained his objection to an enhancement of his sentence, holding that the Supreme Court's decision in *Apprendi* made such an enhancement unconstitutional. This opinion elaborates on my reasons for the decision.

On March 30, 2001, the defendant, Warren Lawson, was arrested in the Eastern District of Tennessee on federal drug charges. He appeared before a United States magistrate judge in that district and was released under certain conditions pursuant to the provisions of the Bail Reform Act, 18 U.S.C.A. §§ 3141-3150 (West 2000). One of the conditions was that he reside at a halfway house in Chattanooga, Tennessee. On

April 9, 2001, Lawson stopped residing at the halfway house and absconded pretrial supervision.

On May 9, 2001, Lawson was arrested by state authorities in Scott County, Virginia, in this judicial district. Following his arrest, police seized several firearms and Lawson admitted that he possessed the firearms and that he was a regular user of illegal drugs. On June 13, 2001, a grand jury of this court indicted Lawson for being in possession of firearms while a unlawful user of a controlled substance and a fugitive from justice, and after having been convicted of a felony, in violation of 18 U.S.C.A. § 922(g)(1), (2), (3) (West 2000).

On February 14, 2002, Lawson pleaded guilty to the charges contained in the indictment. A presentence investigation report was prepared by a probation officer, to which the defendant filed timely objections. One of his objections was to the application by the probation officer of 18 U.S.C.A. § 3147 to his sentence. That section provides that a person convicted of an offense while on release under the Bail Reform Act, “in addition to the sentence prescribed for the offense,” shall be sentenced to a consecutive term of imprisonment of not more than ten years. 18 U.S.C.A. § 3147 (West 2000).

The Sentencing Commission has adopted a provision of the sentencing guidelines in order to deal with § 3147. Section 2J1.7 of the guidelines provides as follows:

If an enhancement under 18 U.S.C. § 3147 applies, add 3 levels to the offense level for the offense committed while on release as if this section were a specific offense characteristic contained in the offense guideline for the offense committed while on release.

U.S. Sentencing Guidelines Manual § 2J1.7 (2001). The commentary to the guideline provides that in order to comply with the statute, the court “should divide the sentence on the judgment form between the sentence attributable to the underlying offense and the sentence attributable to the enhancement.” *Id.*, cmt. n.2. Applying the § 3147 enhancement to Lawson as prescribed by § 2J1.7 results in a total offense level of 14 and a custody range of 27 to 33 months. Without the enhancement, his total offense level is 12 and the range is 21 to 27 months.¹

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court held that where a provision of state law increased a criminal sentence beyond the maximum otherwise authorized by statute for the offense, the enhancement was “the functional equivalent of an element” and thus could only be constitutionally imposed where the element had been found by a jury beyond a reasonable doubt. *See id.* at 490, 494 n.19. The full meaning of *Apprendi* has yet to be revealed to us, but lower courts have begun to elaborate on its scope. The Fourth Circuit has held, for example, that *Apprendi* does

¹ Lawson has a criminal history category of IV. Without the enhancement, his base offense level is 14 and he is entitled to a reduction for acceptance of responsibility of two levels. With the enhancement, his base offense level would be 17 and he would be entitled to a reduction of three levels for acceptance of responsibility. *See id.* § 3E1.1.

not void the federal sentencing guidelines, since those guidelines “merely serve to regulate discretion long entrusted to the sentencing judge.” *United States v. Kinter*, 235 F.3d 192, 201 (4th Cir. 2000).

Importantly for this case, however, the Fourth Circuit has broadened *Apprendi* in one respect beyond its strict holding. While the Court in *Apprendi* declined to address whether its announced constitutional principle also required the enhancement to be included in the charging indictment, *see Apprendi*, 530 U.S. at 477 n.3, the Fourth Circuit has held that an enhancement treated as an element of the offense under *Apprendi* must be considered as such in regard to the right to indictment by a grand jury. *See United States v. Cotton*, 261 F.3d 397, 404 n.4 (4th Cir. 2001), *cert. granted*, 122 S. Ct. 803 (2002); *United States v. Promise*, 255 F.3d 150, 157 n.6 (4th Cir. 2001) (en banc).

Since the sentencing enhancement provided for in § 3147 increases the maximum penalty to which the defendant is otherwise subject, I find that it is the functional equivalent of an element of the crime, and thus was required to have been charged in the indictment. As the Fourth Circuit has held, the fact that Lawson pleaded guilty to the indictment is of no legal significance, since it would be “jurisdictional error” for the court to sentence Lawson based on an element not charged in the indictment. *See United States v. Dinnall*, 269 F.3d 418, 423 n.3 (4th Cir. 2001).

In *Apprendi* the Court excluded from its new rule, at least for the time being, sentencing enhancements based upon prior convictions. *See Apprendi*, 530 U.S. at 489-90. However, the enhancement contained in § 3147 does not involve a prior conviction, but the determination of whether the principal offense was committed while the accused was “released” under the Bail Reform Act. While that may not involve a difficult factual determination in most cases, it nevertheless is a fact to be charged and proved to the same extent as, for example, the interstate travel of the firearms Lawson possessed.

It is true that the enhancement here did not produce a greater sentence for Lawson than the ten-year maximum prescribed for his underlying offense. *See* 18 U.S.C.A. § 924(a)(2) (West 2000) (fixing maximum penalty for violation of § 922).² While it has been held that *Apprendi* does not apply to the application of § 3147 unless the actual enhanced sentence received by the defendant exceeds the maximum statutory sentence for the underlying offense, *see United States v. Ellis*, 241 F.3d 1096, 1104 (9th Cir. 2001), *United States v. Parolin*, 239 F.3d 922, 930 (7th Cir. 2001), I find to

² Although Lawson was charged in the indictment with violations of several provisions of § 922(g), he is subject to only one punishment. *See United States v. Dunford*, 148 F.3d 385, 389 (4th Cir.1998) (holding that regardless of defendant’s membership in more than one disqualifying class, he only violates § 922(g) once for each act of possession).

the contrary, since § 3147 requires an additional, consecutive sentence to that imposed for the original crime.

It has also been held that the assimilation of § 3147 into a sentencing guideline precludes any *Apprendi* challenge. *See United States v. Randall*, Nos. 01-1452, 01-1453, 2002 WL 562830, at *3 (1st Cir. Apr. 19, 2002). However, § 2J1.7 of the guidelines is expressly conditioned upon the application of § 3147. While the Sentencing Commission might have adopted a specific offense characteristic providing for a three-level increase for offenses committed while on release, it instead provided for the enhancement only in the circumstances where § 3147 applies. Since I find that § 3147 cannot be applied here in the absence of an indictment setting forth its violation, I hold that § 2J1.7 is in turn inapplicable.

For these reasons, I sustained the defendant's objection to the increase in his total offense level.

DATED: May 9, 2002

United States District Judge