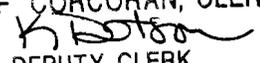


**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION**

JUN 16 2008

JOHN F. CORCORAN, CLERK
BY: 
DEPUTY CLERK

UNITED STATES OF AMERICA,)
Plaintiff)
)
v.)
)
RUSSELL A. EAST,)
Defendant)
)
)

Case No. 5:07CR00060

**REPORT AND
RECOMMENDATION**

By: James G. Welsh
U.S. Magistrate Judge

The Grand Jury previously returned an indictment on November 2, 2007 charging the defendant in Count One, after having been convicted of a crime punishable by imprisonment for a term exceeding one year, with knowingly and intentionally possessing a firearm, specifically described as a Taurus 9 mm handgun, serial number TVE92817, a firearm which had been shipped or transported in interstate or foreign commerce, in violation of Title 18, United States Code, Section 922 (g)(1) and Title 18, United States Code, Section 2.

The defendant was previously arraigned and entered a plea of Not Guilty to Count One. The defendant having now indicated an intent to change his plea, this case was referred to the undersigned for the purpose of conducting a plea hearing in accordance with the provisions of Title 28 U.S.C. § 636(b)(3).

The plea hearing was conducted before the undersigned on May 29, 2008. The defendant was at all times present in person and with his counsel, Andrea S.L. Harris. The United States was

represented by Jeb T. Terrien, Assistant United States Attorney. The proceedings were recorded by a court reporter. *See* Fed. R. Crim. P. 11 (g).

With the defendant's informed and written consent, the undersigned made a Rule 11 inquiry: the government presented a written proffer of evidence for the purpose of establishing an independent basis for the plea, and the defendant entered a conditional plea of guilty to Count One of the indictment subject to a right of the defendant to appeal the District Court's denial of the suppression of evidence motion. *See* Fed. R. Crim. P. 11 (a) (2).

A. DEFENDANT'S RESPONSES TO RULE 11 INQUIRY

The defendant was placed under oath and addressed personally in open court. He expressly acknowledged that he was obligated to testify truthfully in all respects under penalty of perjury and that he understood the government's right, in a prosecution for perjury or false statement, to use against him any statements that he made under oath. *See* Fed. R. Crim. P. 11 (b)(1)(A).

The defendant testified that his full legal name is Russell Anthony East; that he is 35 years of age; that he completed high school; and that he could read and write English. He denied having any medical condition, either physical or mental, which might interfere with his ability to understand and participate fully in the proceedings. Likewise, he denied using any medications or drugs which might impair his ability to understand and participate fully in the proceedings and stated at the time that "his mind was clear." The defendant's counsel represented that she had no reservations about

the defendant's competency to change his plea and to enter a conditional plea of guilty to the offense charged in Count One.

The defendant testified that he had discussed the charge with his attorney and that he had previously received a copy of the Indictment against him. He testified that he understood the charge against him, and he also understood that the charge was a felony. *See* Fed. R. Crim. P. 11 (b)(1)(G). Additionally, the defendant testified that he had discussed with his attorney any defenses he might have and had been given adequate time to prepare any defenses to Count One of the Indictment. He stated that he was fully satisfied with the services of his attorney and that it was his intention and desire to change his prior plea and enter a conditional plea of guilty to Count One.

The defendant confirmed that he fully recognized and understood his right to have the Rule 11 hearing conducted by a United States district judge. He gave his verbal and written consent to proceed with the hearing before the undersigned United States magistrate judge. The defendant's written consent was filed and made a part of the record.

The attorney for the government informed the court that the defendant's proposed conditional plea was to be made pursuant to a written plea agreement. The government's understanding of the plea agreement was then stated in some detail including: an outline of the charge against the defendant set forth in the Indictment, and the range of punishment (§ 1); the defendant's agreement to enter a conditional plea of guilty to Count One (§ 2); the defendant's acknowledgment of the maximum sentence (§ 1); the defendant's obligation to pay the \$100.00 special assessment (§§ 2 and

3); the acceptance of responsibility provision (§ 2); the government's agreement that once the defendant fulfills his obligations under the plea agreement, the government will recommend a sentence at the low end of the sentencing guidelines (§ 4); the agreement's provision concerning any evidence proffered by the defendant (§ 5); the defendant's waiver of his right to appeal his sentence and to attack collaterally the judgment and sentence imposed by the court (§ 6); the defendant's express right to appeal the district court's denial of his suppression of evidence motion (§ 7); agreement's provision concerning the abandonment of any contraband (§ 10); the agreement's substantial assistance provision (§ 12); the defendant's waiver of any statute of limitations defense (§ 11); the agreement's completion of prosecution provision (§ 13); remedies for breaches of the plea agreement (§ 15); and the defendant's acknowledgment of effective representation (§ 16).

Counsel for the defendant and the defendant both separately stated that their understandings of the plea agreement were the same as those set forth by the government's attorney. Defendant's counsel further represented that all of the terms of the plea agreement had been reviewed by the defendant and that she was satisfied that he understood each of its terms.

The defendant was then shown the original plea agreement and affirmed it to be his signature on the document. In addition, he stated that no one had made any other different, or additional promise, or assurance of any kind, in an effort to induce him to enter a plea of guilty in this case. Furthermore, the defendant stated that no one had attempted in any way to force him to plead guilty in this case. The plea agreement was then received, filed, and made a part of the record. The

undersigned noted for the record that the written Plea Agreement constituted the best statement of its terms and as such it “speaks for itself.”

The defendant was thereafter asked if he understood that he was proposing to enter a guilty plea to the charge of possessing a firearm while being a convicted felon as stated in paragraph 1 of the written plea agreement. *See* 18 U.S.C. § 922 (g) (1). The defendant confirmed his understanding and testified that he knew his plea, if accepted, would result in him being adjudged guilty of a felony. The defendant also acknowledged that such adjudication may deprive him of valuable civil rights, such as the right to vote, the right hold public office, the right to serve on a jury, and the right to possess any kind of firearm.

After the government’s attorney stated the maximum possible penalty provide by law for the offense charged in Count One, the defendant expressly acknowledged that he understood the maximum possible penalty provided by law for conviction of the felony set forth in Count One of the Indictment to be confinement in a Federal penitentiary for ten (10) years and a \$250,000.00 fine. *See* Fed. R. Crim. P. 11 (b)(1)(H).

The defendant was informed and expressly acknowledged that the court’s determination of his sentence would include consideration of multiple factors including: the nature and circumstances of the offense; the defendant’s history and characteristics; the seriousness of the offense; the need to promote respect for the law; the need to provide for just punishment and afford adequate deterrence; the need to protect the public; any determined need to provide the defendant with

education, vocational training, medical care or other correctional treatment in the most efficient manner; the kinds of available sentences; the pertinent sentencing guidelines and policy statements; the need to avoid unwanted sentence disparities; and any need to provide for restitution. The defendant recognized and understood that the court may order him to make full restitution to any victim and may require him to forfeit certain property to the government. *See* Fed. R. Crim. P. 11 (b)(1)(J)-(K). He acknowledged that in the event the government was seeking forfeiture of property, it could seek forfeiture of substitute assets and he was waiving his rights to a jury determination of forfeitability and to appeal any issues of proportionality. He also stated that he knew he would be required to pay a mandatory One Hundred Dollar (\$100.00) special assessment. *See Id.* at 11 (b)(1)(L).

The defendant testified that he and his attorney had talked about how the Sentencing Commission Guidelines might apply to his case, including the obligation of the court to consider these Guidelines and the court's discretion to depart from them under certain circumstances and in accordance with applicable court decisions. *See Id.* at 11 (b)(1)(M); United States v. Booker, 543 U.S. 220 (2005). In addition, he acknowledged that he understood that the court would not be able to determine the recommended guideline sentence for his case until after the presentence report had been completed and he and the government each had an opportunity to challenge the facts reported by the probation officer. He acknowledged that he understood, irrespective of any sentence imposed by the court, he would have absolutely no right to withdraw his plea of guilty. He was informed and acknowledged that upon release from prison at the conclusion of any sentence of imprisonment, he could be obligated to serve a significant term of supervised release and if he violated the terms of

the supervised release it could result in his being returned to prison for an additional period of time.

He expressly acknowledged that by pleading guilty he was giving up his rights to have a jury determine beyond a reasonable doubt any of the facts alleged in Count One, including those relating to sentencing. The defendant stated that he fully understood that, pursuant to the terms of the plea agreement, he was waiving any right to appeal his conviction, any right to appeal any sentencing guideline issues, any right to appeal any sentence of the court within the guideline range on the ground that it is unreasonable, and any right to challenge his conviction or his sentence in any post-conviction proceeding. However, the defendant acknowledged and understood that he was expressly reserving his right to appeal the district court's denial of his motion to suppress under the terms of the written plea agreement.

Each of the defendant's procedural rights surrendered on a plea of guilty were also explained including: his right to persist in his previous plea of not guilty to the offense charged; his attendant right to a trial by jury; his right to be represented by counsel at trial and at every other stage of the proceeding; his right at trial to see, hear, confront, and to have cross examined all adverse witnesses; his right to be protected from compelled self incrimination; his right to testify and to present evidence in his defense; his right to the issuance of subpoenas, compulsory process or to compel the attendance of witnesses to testify in his defense; his presumption of innocence; the obligation of the government to prove his guilt beyond a reasonable doubt; the right on his part to decline to testify unless he voluntarily elected to do so in his own defense; and his right to have a unanimous guilty verdict. *See* Fed. R. Crim. P. 11 (b)(1)(F).

In response to further questioning to ensure that his proposed plea was voluntary, the defendant again stated that (other than the promises expressly set forth in the written plea agreement) his plea did not result from any force, threats, or promises of any kind, that his decision to plead guilty was in fact fully voluntary on his part and that it was being made with the advice and assistance of counsel. *See Id* at 11 (b)(2).

To permit the court to determine that an independent factual basis existed for the defendant's guilty plea, counsel for the government made a written proffer summarizing the principal facts which the government was prepared to prove at trial. Adding an amendment that the gun found at the defendant's apartment lacked a necessary gun part in order to be operable, the defendant and his counsel then separately stated that the government's written proffer fairly summarized the government's evidence.

After consultation with his attorney, the defendant waived a reading of the Indictment and entered a plea of GUILTY to Count One alleging the defendant's violation of Title 18, United States Code, Section 922 (g)(1) and Title 18, United States Code, Section 2.

After entering his plea as aforesaid, after an independent basis for the plea was established, and after being informed that the undersigned would recommend acceptance of his aforesaid plea, the defendant reiterated that his plea was fully voluntary and that he was fully satisfied with the advice, assistance and services of his attorney. The undersigned thereafter directed the preparation

of a presentence report and the defendant was remanded to the custody of the United States Marshal pending its completion.

B. GOVERNMENT'S EVIDENCE

Pursuant to its written proffer, the government was prepared at trial to establish beyond a reasonable doubt that Russell A. East, a convicted felon, did knowingly and intentionally possess a firearm, specifically described as a Taurus 9mm handgun, serial number TVE92817, a firearm that had been shipped or transported in interstate or foreign commerce. On February 17, 2005 Virginia law enforcement officers executed an arrest warrant for East alleging that he impersonated a federal agent and possessed a firearm after having been convicted of a felony offense.

Officers initially contacted the defendant by phone. East was interested in becoming a confidential informant and officers were able use this interest to get the defendant out of his home and ensure a safe arrest process. Once outside his residence, East was asked for identification, which he provided, and then consented to a pat-down search. While East was getting into the back seat of an officer's vehicle, other law enforcement officers moved in and arrested East. While in custody, East was asked if there was anyone in his apartment. The defendant responded no one else was present inside.

Officers then asked East if they could search his residence. The defendant asked officers what his options were. The officers responded by indicating a search warrant could be obtained if

East did not consent to the search. As the search commenced, officers informed East of his Miranda rights. The defendant acknowledged that he understood those rights but would nonetheless speak to the officers. Although East initially indicated that he did not have any drugs or weapons in the home, officers found, in plain view, a small package that appeared to contain marijuana. East then advised officers that he had a 9mm pistol located in the hallway closet. The officers found the weapon, a chrome plated, 9mm pistol that was disassembled at that time. The officers also found gun cleaning supplies and 31 rounds of Star 9mm ammunition.

During the ensuing transport of the defendant to Charlottesville, Virginia, East admitted to the officers that he had spent six years of his adult life incarcerated for various crimes. Officers later confirmed that East had been previously convicted of a felony offense.

On April 6, 2005, officers received an ATF laboratory report indicating that the Taurus 9mm pistol, recovered from East's apartment, could have been reassembled in approximately 15 minutes and was manufactured outside the Commonwealth of Virginia, most likely in Brazil. At the hearing conducted before the undersigned, the defendant's counsel amended the facts to include a remark that the Taurus 9mm pistol recovered at the defendant's residence lacked a certain mechanical part that was necessary for firing operation. The government's attorney agreed with the defense counsel's amendment.

C. FINDINGS OF FACT

Based on the evidence, representations of counsel, and defendant's sworn testimony presented as part of the Rule 11 hearing, the undersigned submits the following formal findings of facts, conclusions and recommendations:

1. The defendant is fully competent and capable of entering an informed plea of guilty;
2. The defendant is fully aware of the nature of the charge and the consequences of his guilty plea;
3. The defendant is fully informed and he understands the enumerated items set forth in Rule 11 (b)(1)(A)-(N);
4. Before entering his plea of guilty, the defendant and the government reached a plea agreement which was reduced to writing;
5. The defendant's entry into the written plea agreement and his tender of a plea of guilty to Count One was made with the advice and assistance of counsel;
6. The defendant's entry of a conditional plea of guilty to Count One was made with knowledge and an understanding both of the nature of the offense and the full range of punishment which might be imposed;
7. The defendant's plea of guilty is fully voluntary and did not result from any force, threats, or promises other than those contained in the plea agreement;
8. The plea agreement complies with the requirements of Rule 11 (c)(1); and
9. The evidence presented by the government established an independent basis in fact supporting the offense to which the defendant is pleading guilty, including *inter alia* proof of the offense elements, venue, firearm analysis, and criminal intent.

D. RECOMMENDED DISPOSITION

Based on the above findings of fact, the undersigned RECOMMENDS that the court accept the defendant's plea of guilty to Count One, that the defendant be ADJUDGED GUILTY of this

offense, and that a sentencing hearing be scheduled before the presiding district judge on August 18, 2008 at 9:30 a.m.

E. NOTICE TO PARTIES

Notice is hereby given to the provisions of 28 U.S.C. § 636 (b)(1)(C). Within ten (10) days after being served with a copy of this Report and Recommendation, any party may serve and file written objections to such proposed findings and recommendations as provided by the rules of this court. The presiding district judge shall make a *de novo* determination of those portions of the report or specified findings or recommendations to which an objection is made. The presiding district judge may accept, reject, or modify, in whole or in part, the findings or recommendations made by the undersigned. The presiding district judge may also receive further evidence or recommit the matter to the undersigned with instructions.

Failure to file timely written objections to these proposed findings and recommendations within ten (10) days could waive appellate review. At the conclusion of the ten-day period, the Clerk is directed to transmit the record in this matter to the presiding United States district judge.

The clerk is directed to transmit a copy of this Report and Recommendation to all counsel of record.

DATED: 6th day of June 2008.

s/ James G. Welsh
United States Magistrate Judge