

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,
Plaintiff,

v.

Case No. **15-10150-01, 02 JTM**

SHANE COX, and
JEREMY KETTLER,
Defendants.

SENTENCING MEMORANDUM

The defendant, Shane Cox, by and through his attorneys, Steven K. Gradert and Timothy J. Henry, Assistant Federal Public Defenders for the District of Kansas, respectfully submit this Sentencing Memorandum in support of his objections to the presentence report and to request the Court consider imposing a sentence below the suggested sentencing guideline range.

FACTS

On October 6, 2015, Shane Cox was indicted by a Grand Jury with various violations of the National Firearms Act (NFA).

On November 15, 2016, a jury found Cox guilty of possession of an unregistered firearm, which was a short barreled rifle; five counts of transferring firearms (silencers), in violation of the NFA; a charge of making a

firearm (a silencer), in violation of the NFA; and finally, for engaging in business as a dealer and manufacturer of firearms, also a violation of the NFA.

The Court dismissed counts 1 and 5 during the trial. The jury found Mr. Cox not guilty of counts 2 and 4 that charged him with possession of destructive devices, a violation of the NFA.

A presentence report has been prepared and the defendant is scheduled for sentencing on February 6, 2017.

ARGUMENT AND AUTHORITIES

The defense has filed with the United States Probation Office several objections to the calculations of the applicable guideline range.

1. The first objection that impacts the guideline calculation is defendant's objection number 3. The objection involves the two level enhancement in paragraph 59 of the report, which is based on the belief that U.S.S.G. § 2K2.1(b)(3)(B) applies as relevant conduct because a "grenade" was located during the search of the Cox home.

The defense submits that because the jury found Mr. Cox not guilty of the charges that he possessed destructive devices, these two levels should not be applied.

The government's position on this issue is that the jury simply found him not guilty of these charges, but that somehow they did not find these items were not destructive devices.

Counsel submits that this Court heard the arguments and evidence and no conclusion could exist for his acquittal other than the jury determination that these items were not destructive devices as the experts suggested by their testimony.

The Tenth Circuit has stated that relevant conduct under the guidelines “comprises more, often much more, than the offense of conviction itself, and may include uncharged and even acquitted conduct.” *United States v. Altamirano-Quintero*, 511 F.3d 1087, 1095 (10th Cir. 2007) (quoting *United States v. Allen*, 488 F.3d 1244, 1254-55 (10th Cir. 2007)). Nonetheless, relevant conduct “still must relate to the offense of conviction.” *Id.* (quotation omitted).

Relevant conduct must also be criminal conduct. *See United States v. Griffith*, 584 F.3d 1004, 1013 (10th Cir. 2009).

It is our position that the conduct was not criminal, as the jury concluded they were not destructive devices and that regardless, they had nothing to do with the offense of conviction.

This case was primarily an investigation about Mr. Cox making and selling silencers. Destructive devices had no connection to the silencers and there was

no allegation that Mr. Cox was selling destructive devices in violation of the National Firearms Act. They also had nothing to do with the short barreled rifle violation. The two levels pursuant to U.S.S.G. § 2K2.1(b)(3)(B) should not apply.

2. The defense objects to the denial of a two level reduction for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1.

The probation office has correctly stated that the Tenth Circuit requires the defendant to prove by a preponderance of evidence that he is entitled to a reduction for acceptance of responsibility. They are incorrect in suggesting that the defendant denied the essential factual elements for which he was convicted. Again, this Court heard the evidence and the testimony of Mr. Cox. He admitted that he made these items, silencers and a short barreled rifle. He admitted that the silencers were designed to suppress the sound of a firearm. He admitted that he sold the silencers. He admitted all of these items were not registered under the National Firearms Act, and that he had not paid the required taxes. He admitted he was not a licensed firearms dealer. These admitted facts are the essential elements of the offense of conviction.

The defendant only went to trial to preserve the legal issues that were part of this case, namely the validity and/or application of Kansas Second Amendment Protection Act as a defense to the charges. U.S.S.G. § 3E1.1,

application note 2 indicates that the adjustment is not intended to apply to a defendant who puts the government to its burden of proof by denying the essential factual elements of guilt, is convicted and only then admits guilt and expresses remorse.

The application note goes on to state that conviction at trial does not preclude consideration for such a reduction. It gives an example like this case, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt. We submit the defendant is entitled to consideration of a two level reduction.

3. Finally, counsel for the defendant submits that this Court should consider a variance from the applicable sentencing guideline under 18 U.S.C. § 3553(a).

Counsel submits that the history and characteristics of the defendant, combined with the nature and circumstances of the offense warrant a non-incarceration sentence. Mr. Cox's history would indicate that he never would have involved himself in anything criminal in nature.

As the Court is aware, Mr. Cox relied, perhaps unreasonably, on the fact that the State of Kansas by its lawmakers, including Governor Sam Brownback, passed the Kansas Second Amendment Protection Act that appeared to exempt silencers from the definition of a firearm. It also appeared

to exempt firearms made in Kansas, labeled made in Kansas, and that did not leave the State from federal regulations.

Mr. Cox consulted with a lawyer, law enforcement, and had communications between our State Governor directed to the Attorney General of the United States before he started to make and sell these items. He did not try to conceal what he was doing and sold them openly in his store while displaying the State law.

Unfortunately, federal law enforcement decided to investigate this as if it was being done in a clandestine manner and then proceed to enforce federal law knowing the issue, which in essence, is a battle between the State of Kansas and the Federal government regarding the regulation of firearms. Mr. Cox and his co-defendant got swept up into this legal entanglement and now have felony convictions.

They will both suffer the collateral consequences for this conviction, which can include difficulty in finding employment and a loss of certain civil rights, including a prohibition against possessing a firearm. This is very harsh punishment for Mr. Cox as shooting was one of his primary hobbies and passions.

There are many arguments that suggest that gun silencers are not inherently dangerous and should not even be included in the definitions of a

“firearm” under the National Firearms Act. This is what the Kansas law was attempting to do. There have been and there are currently proposals in Congress to loosen the limits on silencers. In 2015, legislation was introduced in the House of Representatives known as the Hearing Protection Act. It is counsel’s understanding that there is similar legislation pending in the current session of Congress. The new President of the United States’ own son, Donald Trump, Jr., also a shooting enthusiast, has advocated for silencers as hearing protection for those who hunt and shoot.

Shane Cox has a large support system, including his family, his mother, stepfather, and children. He is well liked in his community and his church. He is a devout Christian and loves this country. He wanted to serve in the military, but was prevented due to his poor hearing, but his daughter is currently in the United States Marine Corps serving overseas. Shane is a hard worker who lives a very simple life. He is not a danger to anyone and he is honest to a fault.

CONCLUSION

This case is so far from the heartland of cases involving firearms and presents complex legal concerns that led Mr. Cox to a conclusion that will leave him with a felony conviction and all the negatives that come with that.

This case is not a case that warrants an incarceration sentence, and regardless of the Court’s conclusions on the guideline applications, we

respectfully ask the Court to consider alternative forms of punishment that does not require prison, such as community service as a sufficient, but not greater than necessary form of punishment.

Respectfully submitted,

s/Steven K. Gradert

STEVEN K. GRADERT

Sup. Ct. No. 12781

Assistant Federal Public Defender

Federal Public Defender Office

301 N. Main, Suite 850

Wichita, KS 67202

Telephone: (316) 269-6445

Fax: (316) 269-6175

Email: steve_gradert@fd.org

Counsel for defendant Cox

s/Timothy J. Henry

TIMOTHY J. HENRY

Sup. Ct. No. 12934

Assistant Federal Public Defender

Federal Public Defender Office

301 N. Main, Suite 850

Wichita, KS 67202

Telephone: (316) 269-6445

Fax: (316) 269-6175

Email: tim_henry@fd.org

Counsel for defendant Cox

CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2017, I electronically filed the foregoing SENTENCING MEMORANDUM with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to the following:

Richard L. Hathaway
Assistant U.S. Attorney
rich.hathaway@usdoj.gov

Derek L. Schmidt
Kansas Attorney General
derek.schmidt@ag.ks.gov

Jeffrey A. Chanay
Chief Deputy Attorney General
jeff.chanay@ag.ks.gov

Stephen R. McAllister
Solicitor General of Kansas
steve.mcallister@trqlaw.com

Dwight R. Carswell
Assistant Solicitor General
dwight.carswell@ag.ks.gov

Bryan C. Clark
Assistant Solicitor General
bryan.clark@ag.ks.gov

Ian M. Clark
Ariagno, Kerns, Mank & White, LLC
iclark@warriorlawyers.com

One copy sent via U.S. Mail to:

Shane Cox
Petrolia, KS

s/Steven K. Gradert
STEVEN K. GRADERT
Sup. Ct. No. 12781
Assistant Federal Public Defender
301 N. Main, Suite 850
Wichita, KS 67202
Telephone: (316) 269-6445
Fax: (316) 269-6175
Email: steve_gradert@fd.org