

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Nos. 2:25-cr-20027-SHL
2:25-cr-20042-SHL

STEVEN R. HALE,

Defendant.

DEFENDANT’S POSITION WITH REGARD TO SENTENCING FACTORS

COMES NOW Defendant, Steven R. Hale, by and through his appointed counsel, Needum L. Germany, pursuant to Federal Rule of Criminal Procedure 32, Local Criminal Rule 32.1, and USSG § 6A1.2(b), and submits the following position with respect to sentencing in this case.

I. Defense Counsel Certification

Undersigned counsel and Mr. Hale have reviewed the draft Presentence Investigation Report (“draft PSR”). Counsel has communicated the following position to the probation officer and Assistant United States Attorney in the form of a copy of this document.

II. The Sentencing Hearing

The sentencing hearing will last approximately one hour.

III. Sentencing Factors in Dispute

A. Factual Objections

Mr. Hale objects to the facts stated in paragraphs 18 and 19 to the extent that they suggest that the box containing nine live rounds of 9mm ammunition was found in his room. (See draft

PSR, ECF No. 32, PageID 63.) The ammunition was found in a drawer in a room previously belonging to Mr. Hale's adult sister who now resides elsewhere. The family now uses that room for storage. A photo produced in discovery shows the box of bullets found in a drawer along with Mr. Hale's niece's doll house furniture and various other items. The firearm found in Mr. Hale's Camero belongs to his father and the box of ammunition matches his father's firearm. Id.

B. Legal Objections

A. Mr. Hale's base offense level should be 20 under USSG § 2K2.1(a)(3) (2021).

One of the convictions used to increase Mr. Hale's base offense level to 24 is a 2008 attempted robbery conviction. Id. at PageID 65, 69. This conviction cannot be used to increase the base offense level because it raises Ex Post Facto issues.

Mr. Hale committed his instant offenses between November of 2021 and May of 2022. Id. at PageID 58, 60. Effective November 1, 2023, the Sentencing Commission amended USSG § 4B1.2 by moving attempt crimes out of the commentary and into the text. See USSG § 4B1.2(d) (2024). That amendment does not apply in this case, as the 2021 version of the Guidelines Manual must be used to avoid Ex Post Facto problems.

"Relying on Guidelines amendments that become effective after the defendant committed the crime for which the defendant is sentenced violates the U.S. Constitution's Ex Post Facto Clause if that version yields a higher sentencing range than the one in effect during the relevant conduct." United States v. Ivy, 93 F.4th 937, 944 n.1 (2024) (citing Peugh v. United States, 569 U.S. 530, 544 (2013) ("A retrospective increase in the Guidelines range applicable to a defendant creates a sufficient risk of a higher sentence to constitute an ex post facto violation.")). The 2021 version of the Guidelines does not include attempt crimes in the text of § 4B1.2's definition of crime of violence. Attempt crimes are addressed only in the commentary. See USSG § 4B1.2,

cmt. n.1 (2021). Under United States v. Havis, 927 F.3d 382, 386 (6th Cir. 2019) (en banc), it is improper to rely on the expanded commentary definition to conduct the categorical approach analysis of Mr. Hale’s attempted robbery conviction. (See draft PSR, ECF No. 32, PageID 69.) Therefore, Mr. Hale has only one prior crime of violence in his criminal history, armed robbery. Id. at PageID 67. This is because robbery was included in § 4B1.2’s enumerated offense clause in 2021. See USSG 4B1.2(a)(2) (2021). With only one crime of violence, Mr. Hale’s base offense level would be 20. See USSG § 2K2.1(a)(4) (2021).

B. Mr. Hale objects to application of the four-level enhancement provided under USSG § 2K2.1(b)(6)(B).

Section 2K2.1(b)(6)(B) states that courts should increase the offense level by four where a defendant “used or possessed any firearm or ammunition in connection with another felony offense.” USSG § 2K2.1(b)(6)(B). Four levels were added to Mr. Hale’s base offense level under USSG § 2K2.1(b)(6)(B) because he allegedly possessed the firearm in connection with the offenses of criminal copyright and unlawful possession of a controlled substance with the intent to sell/deliver. (See draft PSR, ECF No. 32, PageID 66.) Neither of these offenses provide a basis upon which to apply the Section 2K2.1(b)(6)(B) enhancement.

The application notes for USSG § 2K2.1(b)(6)(B) explain that the enhancement is to be applied if the firearm facilitated, or had the potential of facilitating, another felony offense or another offense. USSG § 2K2.1 cmt. n.14(A) (2021). In the case of a drug trafficking offense, the application notes provide that it is to be applied where a firearm is found in close proximity to drugs, drug manufacturing materials or drug paraphernalia. Id. at cmt. n.14(B)(ii) (2021). Application note 14(B) contains a narrow version of what the Sixth Circuit has commonly called the “fortress theory.” See United States v. Seymour, 739 F.3d 923, 930 (6th Cir. 2014). The

fortress theory “presume[s] that, under certain circumstances, guns in close proximity to drugs warrant the § 2K2.1(b)(6)(B) enhancement.” Id. at 929.

The second reason given in the draft PSR for application of the enhancement relies upon the fortress theory. The fortress theory applies “if it reasonably appears that the firearms found on the premises controlled or owned by a defendant and in his actual or constructive possession are to be used to protect the drugs or otherwise facilitate a drug transaction.” United States v. Angel, 576 F.3d 318, 321 (6th Cir. 2009) (quoting United States v. Ennenga, 263 F.3d 499, 503 (6th Cir. 2001)). It rests on the commonsense rationale that “drug transactions” are “potentially dangerous,” United States v. Herron, 554 F. App'x 388, 394 (6th Cir. 2014), and thus that keeping guns near one’s drugs might not only serve to protect the drugs, see, e.g., Angel, 576 F.3d at 321; Ennenga, 263 F.3d at 503, but might also “embolden the offender to carry a large amount of drugs, to show up at a location where the parties on the other side of the transaction are armed, and to ensure . . . that both the money and the drugs change hands,” United States v. Shields, 664 F.3d 1040, 1043 (6th Cir. 2011).

The Sixth Circuit has turned to “the fortress theory to uphold applications of the firearm enhancement where the defendant was engaged in drug trafficking or simply in a house associated with drug trafficking,” but has generally done so in cases in which (1) large quantities of drugs have been found (2) “in close proximity to” the relevant guns themselves. See Seymour, 739 F.3d at 930 (citing cases); Shields, 664 F.3d at 1046 (discussing the importance of the “quantity” and “value” of the drugs at issue for assessing whether the enhancement should apply); Angel, 576 F.3d at 321 (discussing the importance of “proximity” and “easy access” for assessing whether the enhancement should apply).

For example, the Sixth Circuit upheld the imposition of the enhancement in Angel after agents found in the defendant's "upstairs bedroom . . . 81.2 grams of processed marijuana in two containers on the floor, drug paraphernalia, assorted ammunition, and three firearms—a 12-gauge shotgun, a loaded .22 caliber pistol, and a .32 caliber handgun with an altered serial number." 576 F.3d at 319; see id. at 322. The Circuit upheld the enhancement in Hardin after a gun was found next to a bag of marijuana and in the same room as 54 grams of cocaine. United States v. Hardin, 248 F.3d 489, 491 (6th Cir. 2001). And, the Sixth Circuit upheld the enhancement in Herron after authorities discovered "'numerous handguns, large amount of crack cocaine, as well as a large amount of powder cocaine' and 'several hundred dollars,'" 554 F. App'x at 390, inside the defendant's small house, id. at 393.

By contrast, the Circuit has ruled application of the enhancement procedurally unreasonable where "[f]irst, Defendant had only a small amount of drugs in his possession, and the government admit[ted] that nothing in the record show[ed] that Defendant was engaged in any sort of narcotics trafficking," and "[s]econd, . . . Defendant was attempting to sell"—rather than keep for protection or intimidation—"his handgun," Seymour, 739 F.3d at 930-31.

In the present case, 28.2 grams of marijuana was found in what looks to be a jar in a closet however the vast majority of the marijuana was actually legal CBD.. (See draft PSR, ECF No. 32, PageID 63. The firearm was found outside in Mr. Hale's Camero. Thus, it is not a felony offense. See Tenn. Code Ann. §§ 39-17-418(b), (c)(1). In the second, Mr. Hale would not require a firearm to protect such a small amount of marijuana. And finally, the firearm was out in the car, not in the residence where it could be easily retrieved to protect the marijuana.

As for possession of the firearm in connection with the offense of criminal copyright, Mr. Hale had three packages labeled and ready to ship in the trunk of his car. (See draft PSR, ECF No.

32, PageID 63.) The firearm was found on the passenger-side floorboard and belonged to his father. Id. Though Mr. Hale was aware that the firearm was in the vehicle, there simply is no potential that the firearm facilitated, or had the potential of facilitating the mundane task of delivering three packages of DVDs for shipment. The firearm was simply there by coincidence.

For these reasons, Mr. Hale respectfully requests the Court to refrain from applying the four-level enhancement under USSG § 2K2.1(b)(6)(B).

IV. Position as to Sentencing

If Mr. Hale's base offense level is lowered to 20, § 2K2.1(b)(6)(B)'s four-level enhancement is not applied, and three levels are subtracted for acceptance of responsibility, Mr. Hale's total offense level falls to 17. Being in criminal history category IV, this would bring his advisory Guidelines range down to 37 to 46 months of imprisonment. As will be discussed more fully at the sentencing hearing, Mr. Hale respectfully requests the Court consider a downward variance from the low end of this range. He also requests the Court run any sentence imposed concurrently with the anticipated sentence in Shelby County Criminal Court No. 25-02440. This represents the state case for this matter. In further support of the requested sentence, Mr. Hale provides the following with respect to the § 3553(a) factors.

A. 18 U.S.C. § 3553(a) Factors.

(1) Nature and Circumstances of Offense and the History and Characteristics of the Defendant.

(a) Nature and Circumstances of the Offense.

Mr. Hale pleaded guilty to criminal copyright infringement and being a felon in possession of a firearm. He understands these are very serious charges and he deeply regrets his actions.

(b) History and Characteristics of the Defendant.

(i) Family Circumstances/Childhood:

Mr. Hale's parents were married when he was born and stayed that way until his mother died from pneumonia in 2019. (See draft PSR, ECF No. 32, PageID 72.) Mr. Hale was raised with his older sister, who remains in Memphis. Id.

Growing up, Mr. Hale's family was impoverished. He reported living in the Orange Mound and East Memphis areas. Id. He reported witnessing a lot of crime in his neighborhoods. Id. His family struggled financially and sometimes went a day or two without food or utilities. Id. He said he wore the same clothes day after day. Id. Indeed, in the 1990s, there were high rates of drugs, crime, and violence as a result of the poverty in the Orange Mound area. See Fox13 Memphis News Staff, Memphis residents work to restore and strengthen Orange Mound community, Fox13 (Feb. 11, 2021).¹

In any event, it appears that Mr. Hale avoided many of the pitfalls that come from growing up in such neighborhoods. He stayed active in sports and graduated from high school. (See draft PSR, ECF No. 32, PageID 73.) He indicated that he has a great relationship with his family today. Id. at PageID 72.

Mr. Hale has never been married, but he is engaged. Id. His fiancée has two adult children from a previous relationship. Id. She described Mr. Hale as a loving and quiet man. Id. at PageID 72-73. She reported that Mr. Hale works a lot to provide as much as he can. Id. In fact, she thinks his drive to try to provide financial support for the family played a role in Mr. Hale's decision to take the DVDs from Technicolor. Id. at PageID 73.

¹ Available at: https://www.fox13memphis.com/archives/memphis-residents-work-to-restore-and-strengthen-orange-mound-community/article_4af8bff4-b887-5cf6-b87c-1626a7f384fe.html

Mr. Hale has a 17-year old daughter from a previous relationship. Id. at PageID 72. She lives with her mother in Memphis and Mr. Hale stays in regular contact with her. Id. Mr. Hale has a good co-parenting relationship with his daughter's mother. Id. While not ordered to pay child support, Mr. Hale provides his daughter with \$50.00 per week for financial support. Id.

(ii) Mental Health/Emotional Health/Substance Abuse:

Mr. Hale reported that he was diagnosed with attention deficit hyperactivity disorder ("ADHD") as a child. Id. at PageID 73. He was prescribed medication, but he did not take it because he did not understand what it was for. Id. Mr. Hale has no other history of mental health issues. Id.

On the advice of counsel, Mr. Hale has not discussed whether he has a history of substance abuse or treatment. Id.

(c) Other pertinent 18 U.S.C. §3553(a) factors.

(i) reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense

Mr. Hale submits that he understands the seriousness of the offense and he does respect the law. He has accepted responsibility for the DVD thefts, and he has acknowledged that he should not have been in possession of a firearm. Id. at PageID 65.

(ii) afford adequate deterrence to criminal conduct

The requested sentence will afford adequate deterrence to further criminal conduct. The sentence will show other similarly situated offenders that they should never steal from their employer or be in possession of a firearm. As for Mr. Hale's specific deterrence, he has learned a very harsh lesson. He already understood that he could not be in possession of a firearm, though he did not necessarily understand constructive or joint possession. He does now. He also knew that he should not be stealing from his employer. But with the added federal conviction for

copyright infringement, he knows that he has committed a very serious crime. He does not ever intend to repeat the offense conduct again.

(iii) protect the public from further crimes of the defendant

The sentence will also adequately protect the public from any further crimes. While he has been on pre-trial release, Mr. Hale has not committed any further crimes and he has been compliant with all court-ordered conditions. (See draft PSR, ECF No. 32, PageID 61.) Moreover, Mr. Hale's offense of copyright infringement is a financial crime that did not put the public in danger. And since being released from prison for armed robbery in 2016, Mr. Hale has not committed any violent crimes that would put the public in danger. Although he has admitted to possessing the firearm, it was never his intention to use it. It was simply in his car. Yes he had knowledge that it was there and certainly he should have asked his father to remove it before deciding to drive.

(iv) provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner

Mr. Hale obtained his high school diploma, and he has a Bachelor of Science degree in Business Management. Id. at PageID 73. The Bureau of Prisons ("BOP") will be unlikely to afford Mr. Hale any further educational opportunities.

Mr. Hale appears to be a hard worker and has maintained steady employment since 2016. Id. at PageID 74. He wants to provide for his family, but his jobs are relatively low paying. Id. He might be able to benefit from vocational training while incarcerated.

Mr. Hale is healthy. Id. at PageID 73. He will require only routine and as needed care while imprisoned.

(d) Fines.

The draft PSR provides that Mr. Hale does have the ability to pay a fine, id. at PageID 76, but a fine is not recommended, (see draft Sent’g Recommend., ECF No. 32-1, PageID 83, 85.) Mr. Hale therefore respectfully requests the Court refrain from imposing any fines upon him, including the costs of prosecution and supervised release services. (See draft PSR, ECF No. 32, PageID 79-80.)

(e) Restitution.

The PSR provides that restitution is mandatory pursuant to 18 U.S.C. § 3663A. Id. at PageID 80. The Government bears the burden of showing the actual loss amount by a preponderance of the evidence before restitution may be imposed. United States v. White, 492 F.3d 380, 418 (6th Cir. 2007). So far, no victim impact statements have been received. (See draft PSR, ECF No. 32, PageID 80.) Assuming the government does establish the actual loss amount by a preponderance of the evidence, Mr. Hale respectfully requests the Court to order nominal periodic payments with no interest because his current financial situation, as well as that for the foreseeable future, does not allow for full restitution under a payment plan.

(f) The kinds of sentences available, and the sentencing guideline range.

The sentences available are otherwise set forth in the draft PSR. Id. at PageID 76-79.

(2) The Need to Avoid Unwarranted Disparities

The federal courts have historic authority to fashion sentences based upon the individual characteristics of the offender before them:

It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue. Underlying this tradition is the principle that the punishment should fit the offender and not merely the crime.

Pepper v. United States, 131 S. Ct. at 1239-40 (2011). Mr. Hale respectfully requests a custodial sentence that is sufficient and no greater than necessary to achieve sentencing goals. He requests the Court consider the unique circumstances of his case.

Mr. Hale grew up in poverty, in neighborhoods where he was exposed to criminal activity. The family sometimes went without food or utilities, and Mr. Hale wore the same clothes day after day. This could not have been easy. Nonetheless, the family stayed intact, and Mr. Hale reports a very close relationship with them.

Despite having ADHD Mr. Hale graduated from high school and has an undergraduate degree. Since being released from prison for armed robbery in 2016, he has been steadily employed, even while getting his undergrad degree. He wants to support his family the best way he can. Unfortunately, he made a very poor choice in stealing from Technicolor. Nonetheless, he is currently employed and back to being a productive member of the community.

In these circumstances, a reasonable sentence, along with any other special conditions this Court wishes to impose—perhaps to address decision-making skills—would not create an unwarranted sentencing disparity. The punishment instead would fit this offender, not merely his crime.

B. Requests for Recommendations.

Mr. Hale requests the Court recommend that he be housed at a BOP facility as close to Memphis as possible to facilitate visitation with his loved ones. He also requests the Court recommend that he attend BOP occupational training while he is incarcerated.

V. Conclusion

For the foregoing reasons, and for reasons that will be more fully explained at the sentencing hearing, Mr. Hale requests the Court to grant him a variance from the low end of his

recalculated advisory Guidelines range. He also requests the Court run any sentence imposed concurrently with the anticipated sentence in Shelby County Criminal Court No. 25-02440.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Position Paper was forwarded via the Court's electronic filing system to:

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This, the 14th day of August 2025.

s/ Needum L. Germany
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