

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

CRIMINAL NO. 93-CR-017

v.

PEDRO ROMAN

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ORDER

AND NOW, this *1st* day of May, 2001, upon consideration of Defendant's Motion to Modify Term of Imprisonment Pursuant to 18 U.S.C. 3582(c) (2) (Docket #33), the government's response and subsequent filings, IT IS HEREBY ORDERED that said motion is DENIED for the following reasons.

Defendant Pedro Roman was indicted by a federal grand jury on January 11, 1993 and charged with: (1) possession of a firearm by a convicted felon, in violation of 18 U.S.C. §922(g)(1); (2) possession of an unregistered weapon, in violation of 26 U.S.C. §5861(d); and (3) possession of a controlled substance, in violation of 21 U.S.C. § 844.¹ On March 10, 1993, the defendant

¹ The facts surrounding the defendant's conviction are as follows: On April 15, 1992, at approximately 1:00 a.m., a Philadelphia police officer was stopped at the corner of Orianna and Susquehanna in Philadelphia, Pennsylvania, by a male who informed the officer that a Hispanic male was in the area armed with a shotgun. Before the officer traveled too far, he was stopped by another male, who informed the officer that he has just been robbed by a Hispanic male who stuck a sawed-off shotgun in his side and demanded that he empty his pockets. The robber then told the victim to take off his coat and vest and left with

pled guilty to all charges. On May 27, 1993, he was sentenced after a full sentencing hearing. Mr. Roman's base offense level was determined pursuant to the provisions of **U.S.S.G. §2K2.1**. Section 2K2.1 provides for an increase in the base offense level where the sentencing court determines that the possession of a firearm was in connection with a crime of violence.

Defendant Roman used and possessed a shotgun in the robbery of an individual. See Fn.1. As a result, his base offense level was given a four-point enhancement for a total level of 27. Based on the defendant's offense level, he was sentenced as follows: Count One, 120 months, Count Two, 42 months to **run** consecutively with Count One; and Count Three, **36** months to run concurrent with Counts One and **Two**.

Presently, the defendant contends that he is entitled to a reduction pursuant to 18 U.S.C. § 3582(c)(2). Specifically he argues that he was improperly given a four-point enhancement under the United States Sentencing **Guidelines**. The defendant **submits that a** November 2000 Amendment to the guidelines

the victim's clothing and a few dollars.

The officer had the complainant sit in the **back of the** patrol car as he **drove around the area in** search of the **robber**. The officer soon **spotted** the defendant holding a shotgun and two articles of clothing in an alley. **As the** officer opened his car door, the defendant ran. After a brief pursuit, the defendant was **eventually** apprehended **with** four dollars in his hand. A search of the area resulted in the recovering of the shotgun and the clothing taken from the victim.

prohibits a four-point enhancement under U.S.S.G. §2K2.1(b)(5) if the defendant was convicted of the underlying offense of being a felon in possession of a firearm pursuant to 18 U.S.C. §922(g)(1).

The government argues that the defendant is mistaken; the guidelines bar enhancement of offense levels in limited circumstances, and the defendant's situation does not fall into those specific categories. A reading of the applicable statutes and guidelines provisions, supports the government's position.

Pursuant to U.S.S.G. § 2K2.1(b)(5):

{i}f the defendant used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense, increase by 4 levels.

U.S.S.G. § 2K2.1(b)(5). A four-point enhancement under §2K2.1 is warranted when the "defendant used or possessed any firearm or ammunition in connection with another felony offense." **U.S.S.G. § 2K2.1(b)(5).** "As used in subsections (b)(5) and (c)(1), 'another felony offense' and 'another offense' refer to offenses other than explosives or firearms possession or trafficking offenses." U.S.S.G. § 2K2.1 app. n.18.

There are limited circumstances in which the **four-point** enhancement is not applicable. Pursuant to U.S.S.G. § 2K2.4, if

a defendant is convicted of crimes under 18 U.S.C. § 844(h), 18 U.S.C. § 924(c), or 18 U.S.C. § 929(a), a court cannot impose a four-point enhancement.

If the explosive or **weapon** that was **possessed**, brandished, **used**, or discharged in the course of the underlying offense also results in a conviction that would subject the defendant to an enhancement under ... §2K2.1(b) (5) (pertaining to **possession** of any firearm or ammunition in connection with another felony offense), do not apply that enhancement. A sentence under this guideline accounts for the conduct covered by these enhancements because of the relatedness of the conduct to the conduct that forms the basis for the conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a). For example, if in addition to a conviction for an underlying offense of bank robbery, the defendant was convicted of being a felon in possession under 18 U.S.C. § 922(g), the enhancement under §2K2.1(b) (5) would not apply.

U.S.S.G. § 2K2.4 **app.** n. 2. Based on the application notes, in order to bar imposition of an enhancement in this case, defendant Roman must have been charged with violating one of the following statutes: 18 U.S.C. § 844(h), § 924(c), or § 929(a). The defendant was not so charged.'

²In support for his argument that an enhancement was improperly applied, the defendant quotes language from the Sentencing Commission's statements regarding amendments to the commentary section of U.S.S.G. § 2K2.4. The provision, titled "Reason for Amendment," states:

The amendment directs that no guideline weapon enhancement should be applied when determining the sentence for the crime of violence or drug trafficking offense underlying the 18 U.S.C. §924(c) conviction, nor for any conduct with respect to that offense for which the defendant is accountable under §1B1.3

Defendant Roman was charged with and convicted of three crimes: (1) possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1); (2) possession of an unregistered firearm in violation of 26 U.S.C. 5861(d); and (3) possession of a controlled substance in violation of 21 U.S.C. 844. Defendant's crimes are not included in the provisions cited **in U.S.S.G. §2K2.4.**

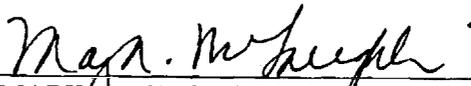
The crime of violence that warranted the four-point enhancement was not based on the aforementioned statutes, but instead arose from the robbery defendant committed. The sentencing guidelines state that "[f]elony offense," as used in subsection [2K2.1](b)(5), means any offense (federal, state, or local) punishable by imprisonment for a term exceeding **one** year, whether or not *a criminal charge was brought, or conviction obtained.*" **U.S.S.G. § 2K2.1 app. n. 7** (emphasis added). Although the defendant has not raised this issue, the fact that defendant **was** not charged with the crime that was **responsible for** the enhancement is inconsequential. In short, the sentencing judge properly applied a four-point enhancement to the defendant's base

(Relevant Conduct).

U.S.S.G., App. C, No. 599. The quoted section refers to an amendment made to U.S.S.G. §2K2.4, which as mentioned before, only disallows enhancement in circumstances where *the* defendant is convicted of crimes under 18 U.S.C. §§ 844(h); 924(c); 929(a).

offense level, and as such the sentence imposed based on that determination is valid.

BY THE COURT:



MARY D. McLAUGHLIN, J.