

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
DARRIN TALLEY,)
)
Defendant.)
_____)

No. 04-10194-01-WEB

Memorandum and Order

This matter came before the court on the defendant’s objections to the Presentence Report (PSR). The court ruled orally on the objections at the sentencing hearing of February 22, 2005. This written memorandum will supplement the court’s oral ruling.

1. *Defendant’s objection No. 1*: Defendant first objects to the use of a base offense level of 14 in ¶ 22 of the PSR. The PSR applied this level based on based upon a finding that the defendant was a “prohibited person” at the time of the offense. *See* USSG 2K2.1(a)(6) & (7). Defendant points out that the parties stipulated in the plea agreement that the defendant was not a prohibited person at the time of the offense.

Based on the parties’ stipulation in the plea agreement, the court will sustain the defendant’s first objection. The court determines that a base offense level of 12 should apply, with a resulting total offense level of 21 instead of 23.

2. Defendant's objection No. 2: Defendant's second objection concerned the application of a 4-level enhancement pursuant to USSG 2K2.1(b)(5) for possession of a firearm in connection with another felony offense.

At the February 22, 2005 sentencing hearing, defense counsel announced that the defendant was withdrawing his objection concerning this 4-level enhancement. Accordingly, the court will deny the objection as moot. Alternatively, the court finds by a preponderance of the evidence, as shown by the ATF agent's report recounting the defendant's statements to authorities after his arrest, that the enhancement is appropriate.

Conclusion.

Defendant's first objection, relating to the applicable base offense level, is SUSTAINED. The court will apply the base offense level in USSG 2K2.1(a)(7). Defendant's second objection, relating to the 4-level enhancement in USSG 2K2.1(b)(5), is DENIED. Pursuant to *United States v. Booker*, 125 S.Ct. 738 (2005), the court considers the resulting guideline range in this case to be advisory, and the court has considered the guidelines together with all of the other factors in 18 U.S.C. § 3553(a) in determining the sentence.

The Probation Officer in charge of this case shall see that a copy of this order is appended to any copy of the Presentence Report made available to the Bureau of Prisons.

IT IS SO ORDERED this 23rd Day of February, 2005, at Wichita, Ks.

s/Wesley E. Brown
Wesley E. Brown
U.S. Senior District Judge