

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	No. 07-10022-01 WEB
v.)	
)	
ROBERT C. LALIBERTE,)	
)	
Defendant.)	
_____)	

Memorandum and Order

This matter came before the court on June 25, 2007, for a hearing on the defendant's objections to the Presentence Report, the defendant's Motion for Downward Departure, and for sentencing. The defendant orally withdrew the objections to the Presentence Report. The court orally denied the defendant's Motion for Downward Departure in the course of the sentencing hearing. This written memorandum will supplement the court's oral ruling.

I. Motion for Downward Departure.

The defendant cites the plea agreement, specifically, Section 5, the Government's agreement. The defendant relates to the court there was no agreement between the parties regarding the possible application of U.S.S.G. § 3B1.1 and the government did not indicate it would be seeking a supervisor/leader enhancement. The defendant does not provide argument regarding the significance of the application of U.S.S.G. § 3B1.1 in regard to the Motion to Depart.

The defendant requests a downward departure of his Criminal History Category from

Level II to Level I. The defendant argues Criminal History Category II significantly over represents the seriousness of his criminal history.

The sentencing guidelines explicitly acknowledge that over-representation of a defendant's criminal history is an appropriate consideration for downward departure. However, the defendant's criminal history is not overstated. The DUI conviction is correctly included in the Presentence Report, and the defendant's criminal history is correctly calculated. [See Note 5, Conviction for driving while intoxicated or under the influence (and similar offenses by whatever name they are known) are counted. Such offenses are not minor traffic infractions within the meaning of § 4A1.2(c).] The court notes the numerous offenses committed by the defendant, starting at age 19. The defendant has numerous other court contacts which resulted in some form of court action. The district court can consider prior convictions which are not included in criminal history calculation because of their age, when assessing whether risk of recidivism was represented by defendant's calculated criminal history score. *U.S. v. Jackson*, 903 F.2d 1313, (10th Cir.1990). Further, the defendant has numerous contacts with law enforcement. Due to the age of the defendant when his arrests began, his numerous contacts with law enforcement, and his criminal convictions, the court finds the defendant's likelihood of recidivism is high. The court finds a departure in this case is not warranted.

II. Conclusion

The defendant's Motion for Downward Departure (Doc. 65) is DENIED. The court imposes a sentence within the advisory guideline range of 151 months in the Bureau of Prisons.

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 27th day of June, 2007, at Wichita, Kansas.

s/Wesley E. Brown

Wesley E. Brown

U.S. Senior District Judge