

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA**

UNITED STATES OF AMERICA : **CASE NO. 1:08-cr-23**
:
v. :
:
WILLIAM HORACE (“BILLY”) LONG : **JUDGE MATTICE/LEE**
:

**REPLY TO GOVERNMENT’S RESPONSE TO DEFENDANT’S
MOTION FOR APPLICATION OF THE SAFETY VALVE**

Comes the defendant, **WILLIAM HORACE (“BILLY”) LONG**, by and through counsel, and respectfully submits this Reply to the Government’s Response to the Defendant’s Motion for Application of the Safety Valve. (Doc. 31). The defendant will also reference the Memorandum filed in Support of the Motion for Application of the Safety Valve and the transcript from the recordings of February 2, 2008, which is attached to the Memorandum. (Doc. 22).

FACTS

Initially, the defendant would reply to the facts as set out in the Government’s motion. The defendant’s statements which the Government chose to include in its fact section are irrelevant to the issue before the Court, and the Government knew it when it included them. The Government is trying to distract the Court from the real issue before it - whether the defendant’s service weapon was possessed in connection with the drug offense that occurred on February 2, 2008 and that is charged in Count 27 of the indictment - because the facts surrounding the service weapon and the drug transaction support the application of the safety valve in this case.

Another example of the Government trying to adjust the facts to make them more

favorable to them is when the Government stated that the defendant “volunteered to load 10 kilograms of cocaine into the CW’s vehicle.” (Doc. 31, p. 3). The transcript of the conversation that was attached to the defendant’s Memorandum shows that the CW told the defendant “[j]ust pick that up and put it in the car for me.” (Doc. 22-2, p. 3). This statement was made while the CW was wearing a cast on his arm under the ruse that he had broken his arm in a car accident. The defendant has accepted responsibility for this offense. However, the Government continues to manipulate the facts just as it manipulated the circumstances surrounding this offense to get the defendant to commit this drug trafficking offense that included an amount that would trigger a ten year mandatory minimum sentence and that it hopes will trigger an enhancement for possession of a firearm.

Another fact alleged by the Government that is not supported by the transcript is the statement that

[CW] further said he was comforted while transporting the cocaine by the fact that the defendant had his firearm available in case of trouble. The defendant did not deny the assertion by the CW that he indeed had his firearm ready in the event of trouble. Moreover, the defendant told the CW that he would get him another gun.

(Doc. 31, p. 4). After they returned from the CW making the drop and the defendant giving the CW a ride back, the CW is talking about what “Chico” told him to do with the drugs and then says “then I wasn’t too worried anyway. You had your gun. If anybody come in here that tried to start some stuff, I ain’t worrying about that.” (Doc. 22-2, p. 14). The defendant says nothing in response to the CW’s statement regarding his service weapon and says nothing that would allow the Government to assert that the defendant “had his firearm ready in the event of trouble.”

Additionally, the Government fails to look at the context in which this statement was made. The reference to the defendant's gun is interjected by the CW, likely at the direction of the FBI, while the defendant is concentrating on counting money. The transcript of the conversation surrounding the reference to the defendant's service weapon shows that the CW is talking at length on different issues with one sentence responses coming from the defendant. (Doc. 22-2).

LAW AND ARGUMENT

A. Application under U.S.S.G § 2D1.1(b) and § 5C2.1

Although the plea agreement states that the parties agree that “whether the facts of the instant case support the application of U.S.S.G. § 2D1.1(b)(1) for possessing a firearm in connection with drug trafficking shall be determined by the Court,” the Government submits its argument for the application of the enhancement in its response. The Government then suggests that the defendant “glosses” over § 2D1.1 and sought to shift the burden to the Government on the safety valve issue. (Doc. 31, p. 6).

The defendant did not “gloss over” § 2D1.1. The defendant's motion was in regard to applying the safety valve, and although, the Government asserts that the enhancement and the safety valve are connected, the defendant submits that they are not and will further discuss this below. The defendant is prepared to argue against the two-point gun enhancement under § 2D1.1, only the defendant was waiting until the issue was raised, which would be when the presentence report is completed if it includes such an enhancement.

However, because the Government cannot separate the enhancement and the safety valve issues, the defendant will address U.S.S.G. § 2D1.1(b). Under United States Sentencing Guidelines §2D1.1(b)(1), there is a two point enhancement for possession of a dangerous weapon (including a firearm). The third application note under the Commentary to §2D1.1 provides the

following: “The enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. The adjustments should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense.”

An enhancement under §2D1.1(b)(1) is “proper only if the government establishes, by a preponderance of the evidence, that (1) the defendant possessed a dangerous weapon (2) during the commission of a drug-trafficking offense.” United States v. Moses, 289 F.3d 847, 850 (6th Cir. 2002) (citing United States v. Hill, 79 F.3d 1477, 1485 (6th Cir. 1996)). If the Government proves both of the above factors, the gun will be presumed to be connected to the defendant’s offense. Id. However, the defendant can rebut the presumption by showing that it is “clearly improbable that the weapon was connected with the offense.” Id.; see also U.S.S.G. §2D1.1 comment. n.3; cf United State v. Peroceski, No. 07-1336, 2008 WL 819082, at *3 (8th Cir. Mar. 28, 2008) (stating that it respectfully disagrees with the circuits that hold that the commentary shifts the burden of proof to the defendant because the burden is always on the government to prove a defendant is subject to a sentencing enhancement).

The first factor is satisfied. The defendant had his service weapon in his truck but never on his person. Knowingly possessing a firearm in a car satisfies the first factor. See United States v. Nance, 40 Fed. Appx. 59 (6th Cir. 2002)(stating that the Sixth Circuit has concluded that the proper inquiry is whether the firearm was physically transported).

The second factor however is not so clear. “As for ‘during and in relation to’ the drug trafficking offense, the firearm ‘must have some purpose or effect with respect to the drug trafficking crime,’ and ‘at least must “facilitate, or have the potential of facilitating,” the drug trafficking offense.’” United States v. Nance, 40 Fed. Appx. 59 (6th Cir. 2002) (quoting United States v. Layne, 192 F.3d 556, 571 (6th Cir. 1999)). In order to satisfy this requirement, the

evidence must show that the firearm “furthered the purpose or effect of the crime and that its presence or involvement was not the result of coincidence.” Id. (quoting United States v. Warwick, 167 F.3d 965, 971 (6th Cir. 1999)).

The defendant submits that the possession of the gun was solely related to his job as sheriff and that his possession of the gun did nothing to further the purpose or effect of this crime created by FBI agents. The CW makes a statement after the delivery of the drugs that he was not scared because the defendant had his gun if anyone came in there and tried to start something. (Doc. 22-2, p. 14). However, this statement is misleading - first because the gun was not inside with the sheriff but remained in his car where he kept it, and secondly because FBI agents had undoubtedly instructed the CW to work something about the defendant’s service weapon into the conversation. The gun is never mentioned until the CW brings it up, unprompted by anything that the defendant said.

The defendant did not even know when he arrived that day at the CW’s place of business that the CW would have drugs that the CW was going to transport. No mention was made of this prior to the defendant’s arrival, and the CW had told the defendant on a previous occasion that they would never have to touch any drugs if they became involved with the Mexicans and money laundering. (Transcript being prepared).

Even if this court determines that the Government was able to prove these two factors, the defendant can rebut the presumption by showing that it was clearly improbable that the weapon was connected with the offense. A court is to consider various factors when determining if the firearm is related to a particular drug offense which include: (1) the proximity of the firearm to the drugs; (2) the type of firearm involved; (3) whether the firearm was loaded, and (4) any alternative purpose for the firearm. United States v. Moses, 289 F.3d 847, 850 (6th Cir. 2002).

These factors, especially the fourth factor, support only one conclusion in this case - that the gun was not connected with the drug trafficking offense in any way, shape or form.

With regard to the first factor of proximity, the defendant always kept his service weapon in his car. Even when the defendant would go home at night, the service weapon remained in the car. (Attachment 1 - Joy Long's Affidavit). Wherever the car went, the service weapon went also. Additionally, the drugs were never in the same car as either the defendant or as the service weapon.

The drugs were part of an undercover FBI operation involving only the CW and the defendant. When the defendant arrived at the funeral home on the morning of his arrest, the CW told the defendant to load a box into the CW's car. The CW perpetuated a ruse thought up by FBI agents that the CW had a broken arm by wearing a splint or cast on his arm. The CW attempted to pick up the box and then told the defendant to put it into the CW's car. The CW directed the defendant to follow him within a couple of blocks of his destination to drop off the box. The defendant waited at a nearby parking lot a couple of blocks away from the location where the car and drugs were being dropped off. Prior to this occasion, the defendant and CW had never transported drugs. The defendant had no reason to believe that they would be doing so on that day until he arrived.

The gun was never mentioned prior to the transportation or during the transportation of the drugs. It was not until they returned the funeral home and entered the office, when the CW mentions that he was glad the defendant had his gun. When that statement was made, the service weapon was still in the car, where the defendant always kept it. (Attachment 1 - Joy Long's affidavit). The defendant's possession of his service weapon did nothing to offer security or promote the offense in any way. This crime was created by the FBI and was being observed by

the FBI. The defendant's gun was in no way furthering this crime and was not in any way providing protection to allow the drug trafficking to proceed.

The second factor focuses on whether the firearm is the type typically used in drug trafficking. The gun was a .32 Industria Nacional de Armes revolver. This gun was a service weapon. Although revolvers may be used in drug trafficking, service weapons are not.

The third factor is whether the firearm was loaded during the drug offense. Although the gun was loaded, it was always loaded. The firearm was the defendant's service weapon that was loaded for reasons relating to the defendant's position as sheriff and had nothing to do with the offense.

The last factor examines whether the defendant has offered any alternative explanation for the presence of the firearm. This factor is the most relevant and the strongest factor in support of the defendant's position. This was his service weapon. He was the acting sheriff of Hamilton County. He kept his service weapon in his car at all times as part of his occupation as sheriff, not for drug trafficking.

In United States v. Nance, the Sixth Circuit upheld the district court's refusal to apply a two level enhancement under § 2D1.1(b)(1), because it was clearly improbable that the weapons were connected with the offense of possession with the intent to distribute cocaine. 40 Fed. Appx. 59, 68 (6th Cir. 2002). The reasons for refusing to apply this enhancement were that (1) the drugs were never inside Nance's car, (2) there was no testimony to show that his car was ever used for drug trafficking, (3) the guns were only in Nance's car because he was in the process of moving, (4) there was no testimony that anyone ever saw Nance sell drugs or use a gun while selling them, and (5) the only evidence that made this a drug trafficking crime was the testimony of an expert stating the amount of crack Nance had was consistent with trafficking. Id. When

the facts of Nance are compared to this case, it is clear that the enhancement should not apply because (1) the drugs and service weapon were never in the same car, (2) the car containing the service weapon was never used in drug trafficking, and (3) the gun was only in the defendant's car because he was the acting sheriff.

In addition to the above arguments against this enhancement, the defendant submits (not so subtly as before) that this enhancement cannot apply because he was entrapped into possessing his service weapon near the scene where drugs were present. Although the Government argued in its response that a quasi-entrapment argument is untimely and the defendant has accepted responsibility by pleading guilty, the guidelines do provide for such an entrapment argument. (Doc. 31, p. 11). “A two-level sentence enhancement under U.S.S.G. § 2D1.1(b)(1) for possession of a gun during a drug-trafficking crime is not applicable where the defendant shows by a preponderance of the evidence that he was entrapped into possessing the gun.” United States v. Parrilla, 114 F.3d 124 (9th Cir. 1997).

The defendant was entrapped into having his gun at the location where the CW and FBI had arranged for drugs to be present. The CW did not mention that there was going to be cocaine present when the defendant arrived and did not mention that he was going to ask the defendant to follow him in his car with his service weapon to a location near the drop off point. The Government created this drug situation on February 2, 2008, so that the defendant would be present where drugs were present while driving his official vehicle that contained his service weapon.

“For purposes of the advisory guidelines, the defendant is responsible under principles of ‘relevant conduct’ for acts of others that were taken in furtherance of jointly undertaken criminal activity, if they are reasonably foreseeable by the defendant in connection with that criminal

activity.” United States v. Delgado-Paz, 506 F.3d 652, 654 (8th Cir. 2007). The fact that drugs were going to be there that day or that the confidential witness was going to ask the defendant to follow him to a location near the drop off was not reasonably foreseeable to the defendant. The confidential witness had previously told the defendant that they would not have to touch any of the drugs, and they had never transported any drugs before that day.

In the Government’s response, it stated that the defendant’s reliance on Colbert is misplaced. (Doc. 31, p. 9). However, the Government fails to recognize the importance of Colbert, which the defendant was trying to point out to the Court. Within the last 7 months, a circuit court of appeals as interpreted the meaning of “in connection with” as it applies to a gun enhancement under the guidelines. Despite the fact that Colbert involved counterfeit money instead of drugs, the case did address what it means to possess a weapon “in connection with” an offense. In that case, as the Government notes, the Fourth Circuit held that the defendant was subject to the enhancement when he possessed counterfeit money in the trunk of his car and weapons in the passenger compartment. The Government, however, fails to recognize a very important factual distinction between Colbert and this case: that the weapons and the drugs were never in the same car. Drugs were never in the defendant’s car. The defendant’s service weapon never left his car and was never in the car that transported the drugs. It is not uncommon for a court to look to other sections of United States Sentencing Guidelines to determine the meaning of words or phrases that are common to multiple sections, and the Government itself relied on one of these cases from 2001 when discussing 18 U.S.C. §924(c). (Doc. 31, p. 12); see United States v. Hardin, 248 F.3d 489 (6th Cir. 2001).

Based on the arguments above, the defendant has shown that it is clearly improbable that the weapon was connected to the offense. Therefore, the defendant was rebutted the presumption, and the enhancement under § 2D1.1(b) should not be applied.

B. Clear Improbability under § 2D1.1 and § 5C1.2

The Government asserts that the “defendant has to show that the nature of the weapon found or the circumstances under which it was found make it extremely unlikely that the weapon had anything to do with the defendant’s drug trafficking offense.” (Doc. 31, p. 9). We addressed this above as the last factor that a Court considers when determining if a firearm is related to a particular offense: whether there is any alternative purpose for the firearm.

The Government cannot dispute that the defendant was sheriff or that as sheriff he was authorized to carry a service weapon. The defendant has been in law enforcement for nearly 30 years and has carried a service weapon in that capacity. The reasons given by the Government do not rebut the defendant’s assertion that the gun was carried in connection with his position as sheriff.

The Government first asserts that because the defendant gave the CW a gun that “shooting someone to protect drug money was clearly an option for the defendant.” The Government then states that the defendant was blood-thirsty and that it could be inferred that he would use his gun to protect his drug money and his drugs. This argument by the Government suggests ridiculous inferences based on statements taken out of context. The fact that the defendant provided a gun to the CW about a month and half before February 2, 2008, does not show that the defendant would shoot someone to protect drug money. The Government has no evidence that the defendant ever brought his service weapon into the CW’s funeral home when money was picked up. The Government has no evidence that the defendant ever used violence or

credible threats of violence against anyone. The Government's reference to "his drugs" when talking about the defendant, is also completely false. The only drugs involved on the day of the offense or at all in this whole investigation were drugs supplied by the FBI to the CW. Finally, the Government is attempting to mislead the Court by attempting to make the "statements made with a blood-thirsty disposition" seem to be something more than what they were. The statements were made in jest between the defendant and the CW, and many times were instigated by the CW. The excerpts attached to the Government's response show that the CW and the defendant were laughing. These were neither serious nor credible threats towards anyone but were simply "locker room talk." Assistant United States Attorney Humble told defense counsel in a telephone call on July 30, 2008, that other than the tape recorded statements attached to the Government's Response (Doc. 31-2, p. 1-5), the Government has no evidence or testimony that the defendant used violence or made any credible threats of violence against anyone. This concession shows that issue before the Court under the safety valve of § 5C1.2 is whether the defendant possessed a firearm in connection with the offense.

The Government's second argument is that because the gun was readily accessible to the defendant when the CW went to make the drop, the defendant's response was unremarkable when the CW later expressed comfort in knowing the defendant had his gun. First, although the service weapon was in the defendant's car, the drugs were not. The drugs were in a separate car that went to a separate location. The defendant went to a drug store down the street from where the CW took the drugs and waited to give the CW a ride back to the funeral home. The defendant never removed the service weapon from his car.

Secondly, the Government says that "it is no argument that the defendant did not know he was going to be involved in drug trafficking that day. He did know that he was going to pick up

approximately \$24,000 as his share of earlier drug trafficking.” (Doc. 31, p. 10). However, the defendant believes it to be a very good argument. It does matter that the defendant did not know that drugs were going to be present that day when he arrived and it does matter that the FBI and the CW had worked out a plan for transporting the drugs in a way that would get the defendant to follow the CW in his own vehicle which they knew would contain his service weapon.

The third argument made by the Government is that the defendant’s possession of the firearm had the potential for facilitating the “crime he believed to be occurring.” The drugs were not really being trafficked. The defendant’s actions were not facilitating any trafficking of drugs and did not have the potential to facilitate the trafficking of drugs. Every move of the CW and defendant was supposedly under the watchful eyes of the FBI, and the defendant’s driving his car to a separate location to give the CW a ride back did not facilitate this bogus transaction set up by the FBI.

The Government states that an “armed sheriff clearly gives the person transporting the drugs a legitimate sense of security, and therefore, make it more likely that the undertaking would be carried out.” (Doc. 31, p. 11). However, the Government seems to gloss over a few things: (1) the sheriff was not armed, (2) the gun was left in his car, (3) Overstreet received no sense of security from the defendant’s gun being in his car, and (4) the service weapon being in the defendant’s car did nothing to make it more likely that this crime was carried out. Overstreet’s security was in knowing that the FBI was watching, and Overstreet was willing to carry out this crime regardless of the gun being present. The Government also asserts that the defendant’s role “throughout the course of his dealings with the CW was to offer protection.” (Doc. 31, p. 11). There is no evidence that the defendant’s role on February 2, 2008 was to offer protection.

The Government submits many conclusory arguments that it cannot support with facts. The Government argues that “there can be no question that the defendant’s firearm gave him the confidence necessary to assist in transporting the cocaine and emboldened him to do so.” There is nothing that the Government can reference that supports this argument. The defendant did not bring the gun with him that day because of the drug trafficking - he always had the gun in the car and did not know that drugs were going to be there when he arrived. There is no evidence that Long ever mentions that he was glad he had his service weapon or even thinks about his service weapon that day. Overstreet brings up the service weapon, likely after being coached by the FBI to connect the gun to the offense. Also, Long did not insist on bringing his car, Overstreet suggested that Long follow in his own car and park down the street.

The Government also refers to the “fortress theory” when attempting analogize the defendant’s behavior to 18 U.S.C. §924(c). The defendant believes it is important to note that the cases cited by the defendant deal with an enhancement under U.S.S.G. § 2K2.1(b)(5) and not the safety valve or § 2D1.1(b). The defendant also believes it is important to note that the cases cited by the Government in support of its argument are factually distinct from this case. In Hardin, the defendant had cocaine and a gun located in the same bedroom. United States v. Hardin, 248 F.3d 489, 500 (6th Cir. 2001). In Trotter, the defendant had marijuana, cocaine, and weapons inside the defendant’s car and on his person. United States v. Trotter, 69 Fed. Appx. 239, 241, 2003 WL 21375475 (6th Cir. 2003)

Lastly, the Government argues that it is no defense that the defendant had a legitimate purpose for having the firearm because “[i]f he were not a sheriff at the time, but a common drug dealer, there would be no question about whether the enhancement would apply.” (Doc. 31, p. 13). It is a total defense to provide an alternative explanation for why the gun was in the

defendant's car. If the defendant was not the sheriff and was only a common drug dealer, it would be a more difficult argument to make that he possessed the gun for a legitimate purpose not connected to the offense. However, the defendant was the sheriff and did legitimately possess the service weapon as part of his employment. The defendant also was not a common drug dealer. The "clearly improbable" standard may be a difficult burden to meet, but the defendant has done it in this case.

C. Application of §2D1.1 and Safety Valve

The defendant is aware of the "apparent" split of authority in the Sixth Circuit with regard to the Johnson, Bolka, and Patterson cases as mentioned by the Government. United States v. Patterson, 145 Fed. Appx. 988, 2005 WL 2077507 (6th Cir. 2005); United States v. Bolka, 355 F.3d 909 (6th Cir. 2004); United States v. Johnson, 344 F.3d 562 (6th Cir. 2003). However, the defendant submits there really is no split and that Bolka controls. In Johnson, the Sixth Circuit made a conclusory statement that because the 2 point enhancement under § 2D1.1 was applied, the defendants were ineligible for the safety valve without discussing or citing any cases. Johnson, 344 F.3d at 565, 567. In Bolka, a different panel of the Sixth Circuit held that conduct warranting the enhancement under § 2D1.1 does not necessarily foreclose application of the safety valve reduction and provided that Johnson was limited to the particular facts of that case. Bolka 355 F.3d at 913 n.3 & 914. Bolka did discuss the different burdens of proof for the safety valve and the 2D1.1 enhancement. Id. at 914. Bolka provides that

A defendant may be unable to prove that it is clearly probable that the firearm was not connected to the offense-the logical equivalent of showing that it is clearly improbable that the firearm was connected to the offense - so as to defeat a § 2D1.1(b)(1)

enhancement. However, that same defendant may, nevertheless, be able to prove by a preponderance of the evidence that the firearm was not connected to the offense so as to satisfy § 5C1.2(a)(2). The “clearly improbable” standard is a higher quantum of proof than that of the “preponderance of the evidence” standard. It does not deductively follow from a defendant’s failure to satisfy a higher quantum of proof on a particular issue that he cannot satisfy a lower quantum of proof on that same issue.

Bolka, 355 F.3d at 914 (citations omitted). In Patterson, a case not recommended for full text publication, a third panel of the Sixth Circuit determined that Bolka improperly attempted to overrule circuit precedent and that there must be a Supreme Court or the Sixth Circuit sitting en banc to overrule a published decision of an earlier panel. Patterson, 145 Fed. Appx. at 993. However, one of the judges on the Patterson panel filed a concurring opinion in which he disagreed with the conclusion Patterson was overruling Bolka. Judge Cole wrote:

Because I believe our decision in United States v. Bolka, 355 F.3d 909 (6th Cir. 2004), is not inconsistent with United States v. Johnson, 344 F.3d 562 (6th Cir. 2003), I disagree with the majority’s decision to ignore our precedent in Bolka and therefore write separately.

. . . The Court in Johnson did not consider or decide whether the imposition of a firearm enhancement always precludes application of safety-valve relief. Rather, the Court, after discussing the facts surrounding the possession of the specific

firearm at issue in that case, and noting the “great deference” granted to the district court’s determination that the defendant’s story regarding possession of the firearm was not credible, stated “[a]s we have held that the two-level enhancement applied pursuant to § 2D1.1(b)(1) was properly applied to both defendants, both are ineligible for ‘safety-valve’ status.” Johnson, 344 F.3d at 567. This conclusion appears in one sentence at the end of the opinion without any legal analysis about the interplay of the two statutes.

Additionally, the Sixth Circuit continues to cite Bolka as the controlling law on this issue. See United States v. Jeffrey Dixon, No. 07-3153, 2008 WL 282745, at *7 (6th Cir. Feb. 1, 2008).

CONCLUSION

The defendant submits that because two different burdens of proof apply to the enhancement and to the safety valve that the finding of the enhancement will not preclude the safety valve. Regardless, the defendant submits that in this case, the defendant has met both burdens showing (1) that the enhancement does not apply by rebutting the presumption and (2) that the safety valve should apply. WHEREFORE, the defendant respectfully requests that the Court award the defendant the safety valve reduction in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2008, a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. Mail. Parties may access this filing through the Court's electronic filing system.

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