

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

UNITED STATES OF AMERICA,))	CRIMINAL ACTION NO.
)	
Plaintiff,)	3:94-CR-004-G
)	
v.)	
)	
XXXX XXXX XXXX,))	
)	
Defendant.)	
_____)	

**UNOPPOSED¹ MOTION FOR DOWNWARD DEPARTURE
AND MEMORANDUM OF LAW IN SUPPORT THEREOF**

I. INTRODUCTION

As set forth in the Presentence Investigation Report (the "PSI") prepared in this case, XXXX XXXX's presumptive guideline imprisonment range according to the United States Sentencing Guidelines is 57-71 months. See PSI at *f* 49. Nevertheless, the parties in this case entered a Plea Agreement pursuant to Fed. R. Crim. P. 11(e)(1)(C) agreeing that twenty-four months imprisonment was the appropriate sentence in this case and giving Mr. XXXX the right to argue that a lesser sentence was also appropriate. See Plea Agreement at *f* 4. The Court accepted the Plea Agreement in this case at Mr. XXXX's arraignment.

This Memorandum of Law provides support for the Court's decision to accept the Plea Agreement in this case. The Memorandum of Law also provides support for Mr. XXXX's argument that a sentence of twelve months and one day imprisonment is the appropriate sentence in this case. "It is important...to realize that departures are an important part of the sentencing process because they offer the opportunity to ameliorate, at least in some aspects, the

¹ This motion is unopposed to the extent it supports a downward departure to twenty-four months imprisonment.

rigidity of the Guidelines themselves. District judges, therefore, need not shrink from utilizing departures when the opportunity presents itself and when circumstances require such action to bring about a fair and reasonable sentence." United States v. Gaskill, 991 F.2d 82, 86 (3rd Cir. 1993).

II. BACKGROUND

Mr. XXXX is a Vietnam Veteran. See PSI at *f* 39. During his two year service to his country, Mr. XXXX earned a Bronze Star and two Purple Hearts. Id. As a result of his service, Mr. XXXX lost his left eye and is considered to be ninety percent disabled. Id. at *f* 35.

Mr. XXXX obtained the two guns involved in this case in approximately August 1992. He obtained the guns for self-protection and they were kept unloaded in the bottom of a locked tool box in his home. See PSI at *f* 7.² Significantly, between August 1992 and January 1993,

²Prior to Mr. XXXX buying a new home in October of last year, he lived in a dangerous neighborhood where several robberies took

when the guns were confiscated by ATF, Mr. XXXX never fired the guns. Mr. XXXX was extremely cooperative with ATF and remained free for almost a year before he voluntarily surrendered himself upon ATF's request. Since the offense, Mr. XXXX has gotten married, bought a new home in a new neighborhood, and plans to adopt two of his wife's three children. *Id.* at *f* 33.

Despite the fact that Mr. XXXX is considered to be ninety percent disabled, from May 1988 to January 1994 he was employed by the Quail Creek Apartments as a maintenance man. The manager of the 276 unit apartment complex informed the Federal Public Defender's Office that Mr. XXXX was always on time, that he was reliable, that he was an extremely hard worker who always went beyond his duties and that he received consistent raises. *See* Transcript of Detention Hearing at 5-6. The manager, Carolyn Taylor, also told the Federal Public Defender's Office that Mr. XXXX was "loved" by the residents of the complex. *Id.* Unfortunately, Mr. XXXX lost that six year job due to the instant arrest, but immediately found another job, indicating his desire to be a productive member of our society and his desire to be able to support his new family.

Mr. XXXX has prior convictions for murder and attempted murder both arising out of the same domestic dispute in 1976. *See* PSI at *ff* 23-24. Mr. XXXX also has an aggravated assault conviction from 1985 arising out of a fight between him and another person. *Id.* at *f* 25. Since 1985, Mr. XXXX has lived a crime free life.

III. MOTION FOR DOWNWARD DEPARTURE

A. U.S.S.G./5K1.1

The United States Sentencing Commission has noted in the Sentencing Guidelines Manual, "[t]he Commission intends the sentencing courts to treat each guideline as carving out a heartland,' a set of typical cases embodying the conduct that each guideline describes." U.S.S.G., Chapter 1, Part A, / 4(b). Nevertheless, the Commission has emphasized that "[w]hen a court

finds an atypical case, one to which a particular guideline linguistically applies, but where conduct significantly differs from the norm, the Court may consider whether a departure is warranted." Id. "The Introduction [to the Sentencing Guidelines] thus makes clear that (with a few exceptions) a case that falls outside the linguistically applicable guidelines heartland' is a candidate for departure." United States v. Rivera, 994 F.2d 942, 947 (1st Cir. 1993) (emphasis in original). U.S.S.G./5K2.11 further provides:

In [some] instances, conduct may not cause or threaten the harm or evil sought to be prevented by the law proscribing the offense at issue. For example, where a war veteran possessed a machine gun or grenade as a trophy, or a school teacher possessed controlled substances for display in a drug education program, a reduced sentence might be warranted.

Of course, the purpose of the felon in possession statute is to prevent violent crime and combat violence. Huddleston v. United States, 415 U.S. 814 (1974), quoting, S. Rep. No. 1501, 90th Cong., 2d Sess. 22 (1968), U.S. Code Cong. & Admin. News 1968, p. 4410. See also United States v. Pruner, 606 F.2d 871, 874 (9th Cir. 1979).

In two very recent cases, United States Courts of Appeals have had an opportunity to consider atypical gun cases in the context of downward departure determinations. In December of last year, in United States v. White Buffalo, 10 F.3d 575 (8th Cir. 1993), the United States Court of Appeals for the Eighth Circuit considered a case in which police found a gun on the floorboard of the defendant's car when he was stopped for driving while intoxicated. The gun was an unloaded .22 single-shot bolt-action rifle with a shortened barrel. Id. at 576. White Buffalo pled guilty to the unlawful possession of an unregistered firearm. Id. White Buffalo had used the gun to kill animals around his home. Id. The District Court downward departed from an 18-24 month guideline imprisonment range to a sentence of three years probation. Id. The departure was based upon U.S.S.G./5K2.11. Id. Indeed, the District Court found "that White

Buffalo's actions were not the kind of misconduct and danger sought to be prevented by the gun statute." Id.

The district court observed that although White Buffalo had the gun in his van, the gun was not loaded and there was no ammunition in the van or in White Buffalo's possession. The district court also noted that there was no evidence that White Buffalo ever brandished the gun or used it in a threatening way, White Buffalo had no criminal record, and White Buffalo's use of the weapon to shoot animals did not pose any quantifiable risk of accidental harm to others because he lived in a remote area of the reservation.....As for the harm targeted by the gun statute, the district court decided the law is meant to protect people from crime and violence, and not to protect predatory animals or restrict the lawful use of weapons.

Id. The Government appealed the downward departure in White Buffalo, but the Eighth Circuit affirmed the District Court's sentence. The Court of Appeals held that U.S.S.G. / 5K2.11 authorizes downward departures in gun possession cases in which the possession is only "technically unlawful." Id.

In United States v. Hadaway, 998 F.2d 917 (11th Cir. 1993), the United States Court of Appeals for the Eleventh Circuit also considered an "atypical" gun case. In that case, a sawed-off shotgun was found in the defendant's home following a consent search. Id. at 919. The defendant claimed that he had the "sawed-off shotgun for reasonable purposes with no intent to use it in the fashion that our gun laws are designed to deter" because he was only "intending to keep it as a curiosity or use for parts." Id. at 919-20. The District Court, however, had not believed it had the power to depart on the grounds that the offense was "atypical." The Eleventh Circuit reversed:

Because it is clear that the district court had the authority to depart downward if it were persuaded that Hadaway's case truly was "atypical...where conduct significantly differs from the norm," U.S.S.G. Ch. 1, Pt. A, n. 4(b), or that Hadaway's conduct threatened lesser harms, U.S.S.G. / 5K2.11, we vacate the sentence. On remand, the district court should acknowledge that it possesses authority to depart downward on this basis and determine whether a downward departure is warranted in this case.

Id. at 920.

Given that Mr. XXXX brought the two firearms for his protection and the fact that the unloaded guns were kept locked away in his home and the fact that he never fired them, it is clear that Mr. XXXX did not threaten the type of harm designed to be eradicated by the felon in possession statute. Therefore, as in White Buffalo and Hardaway, a downward departure is appropriate in this case.

B. Rehabilitation

Several cases support a court's power to grant a downward departure in post offense rehabilitation case not involving drug abuse. In a very instructive case, a district court downward departed in a fraud case where the defendant was working full time, had a wife and six children and had rehabilitated himself by embarking on Talmudic studies and psychiatric treatment. See United States v. Neiman, 828 F. Supp. 254 (S.D. N.Y. 1993). See also United States v. Pascarella, 1991 WL 148287 (N.D. Okla. 1991) (Downward departure applicable in an aggravated assault case where defendant disassociated himself with Skinhead group and enlisted in the Naval Service.). The discussion of one court, albeit involving drug rehabilitation, is very relevant to this case:

I would consider it senseless, destructive and contrary to the objectives of the criminal law to now impose a year's jail term on this defendant. In my view, the reasons for such a term are feeble and are clearly outweighed by the reasons favoring a non-jail sentence. The rehabilitation of a drug addict by his act of will is no mean accomplishment. Because of it, his children and wife have recovered their father, husband and provider, and society has regained a productive citizen. It appears society has nothing to fear from him, as it seems most unlikely he will now throw away his rehabilitation and return to drugs. The imposition of a year's jail sentence would serve no end, but ritualistic punishment with a high potential for destruction. Indeed, putting the defendant in jail for a year would be the cause most likely to undo his rehabilitation.

United States v. Rodriguez, 724 F. Supp. 1118, 1119 (S.D. N.Y. 1989) (enclosed).

In this case, since the offense, Mr. XXXX has cooperated fully with ATF. He has married and made plans to adopt his wife's children. He immediately found a new job after an exemplary six year record at his old job and he has successfully completed home monitoring as part of his pretrial release. A long jail sentence will not only destroy Mr. XXXX, but it will deprive his family and the young children a provider.

C. Military Service

It is true that ordinary military service is not a basis for a downward departure. U.S.S.G. /5K1.11; See also, United States v. Peters, 978 F.2d 166, 170-71 (5th Cir. 1992). Nevertheless, extraordinary military service to his country may warrant a downward departure. See, e.g., United States v. McCaleb, 908 F.2d 176, 179 (7th Cir. 1990). Clearly, Mr. XXXX's service to one's country was extraordinary. As noted above, he was awarded a Bronze Star and two Purple Hearts during his two years of service in Vietnam. Even more significantly, Mr. XXXX lost the complete use of his left eye and was rendered ninety percent disabled as a result of his service. Given these circumstances, the Court has the power to downward depart based upon extraordinary military service, as well as the other grounds set forth above.

IV. CONCLUSION

There is no denying that earlier in his life, Mr. XXXX committed some very serious crimes. Nevertheless, it appears to all concerned that Mr. XXXX has been rehabilitated and has turned his life around. Mr. XXXX has had steady employment over the last several years and has not been content to rely upon his disability pay. Mr. XXXX now has a wife and family that stand behind him.

Mr. XXXX acknowledges his crime of being a felon in possession of a firearm. Nevertheless, it is clear that he did not possess the firearms for criminal purposes. Like many Metroplex homeowners, Mr. XXXX had these firearms for protection and, but for his felony record, Mr. XXXX's actions would have been lawful. That fact notwithstanding, Mr. XXXX accepts full responsibility for his actions.

Clearly U.S.S.G. / 5K2.11 provides support for a downward departure in this case consistent with the reasoning of the Courts of Appeals in White Buffalo and Hardaway. In addition, Mr. XXXX's rehabilitation and extraordinary military service, alone and in combination, provide further grounding for a downward departure.

Mr. XXXX acknowledges that he must be punished for his actions, despite the fact that this was a victimless crime. The government has agreed to a downward departure to twenty four months and has given Mr. XXXX the right to argue that a further downward departure is warranted. Based upon the foregoing as well as the cost to society in imprisoning a productive member of the workforce, the undersigned counsel sincerely believes that a sentence of twelve months and one day represents the appropriate sentence in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, F. Clinton Broden, certify that on June ____, 1994, I caused a copy of Defendant's Unopposed Motion for Downward Departure and Memorandum of Law in Support Thereof to be hand-delivered to Larry Jarrett, Assistant United States Attorney, at 1100 Commerce Street, Third Floor, Dallas, Texas.

F. Clinton Broden

CERTIFICATE OF CONFERENCE

Pursuant to Local Rule 5.1 of the Northern District of Texas, I, F. Clinton Broden, certify that a conference on the attached motion was held between the undersigned and Larry Jarrett, the Assistant United States Attorney assigned to the case. During the conference, it was determined that:

The Government does not oppose the Motion. See, note 1.

F. Clinton Broden