



United States v. Doll

2004 | Cited 0 times | D. Kansas | December 15, 2004

SENTENCING FINDINGS

The defendant on September 15, 2004, entered a plea of guilty to count two that charged him with conspiracy to possess with the intent to distribute methylenedioxyamphetamines ("MDMA") commonly known as ecstasy.

Pursuant to the plea agreement, the government agreed to not oppose the maximum adjustment for acceptance of responsibility and a sentence at the low end of the guideline range. Since his arrest, the defendant has been in federal custody.

The Presentence Report ("PSR") recommends a base offense level of 28 after converting 835.8 grams of MDMA to 417.9 kilograms of marijuana and applying the drug equivalency table at U.S.S.G. § 2D1.1(c)(6). With a criminal history category of two and a total offense level of 25 following the acceptance of responsibility adjustment, the PSR suggests a guideline range of 63 to 78 months.

The defendant has filed a sentencing memorandum which raises several objections (Dk. 27) to which the government has filed a response (Dk. 28). FIRST OBJECTION: The defendant's sentencing memorandum raises several points with respect to the PSR's calculation of the drug amount. The revised PSR appears to address most of these points, but its addendum shows one objection remaining, that is, the PSR should convert the amount of the pure drug found on the laboratory rather than the net weight of the mixture or substance containing MDMA.

Ruling: In calculating the base offense level, the court will use the 800 grams of MDMA which was the amount that the parties settled on in their plea agreement. Note A to the drug quantity tables provides that the weights set forth in the tables refer "to the entire weight of any mixture or substance containing a detectable amount of the controlled" unless specified otherwise. Note B explains that the use of "actual" in the tables refers "to the weight of the controlled substance, itself, contained in the mixture or substance" and that the court is to use whichever offense level is greater, mixture or actual. The drug equivalency tables at application note ten provide that 1 gram of MDMA is equivalent to 500 grams of marijuana; therefore, 800 grams of MDMA is equivalent to 400 kilograms of marijuana that results in a base offense level of 28. There is no indication in application note ten that the equivalency tables are based on actual or pure MDMA. As reflected in application note eleven, the Guideline Commission's practice is to be overt when referring to weights of actual or pure controlled substances. The court overrules the defendant's objection to the calculated base offense level of 28.



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SECOND OBJECTION: The defendant generally disputes the criminal history point scored for the criminal trespass conviction in ¶ 31 and specifically challenges the driving while impaired conviction in ¶ 35 based on the lack of legal representation.

Ruling: The court finds that the conviction and sentence described in ¶ 31 is properly scored with one point pursuant to U.S.S.G. §§ 4A1.2(c)(1) and 4A1.1 It is unnecessary to rule on the objection to the conviction in ¶ 35, because a favorable ruling would not change the defendant's criminal history category or the applicable sentencing guideline range.

REQUEST FOR DOWNWARD DEPARTURE

The defendant's sentencing memorandum includes a single sentence that he "feels that the calculated criminal history overstates the likelihood of recidivism and therefore should not be considered." (Dk. 27). The defendant bears the burden of proving he is entitled to a downward departure. *United States v. Constantine*, 263 F.3d 1122, 1128-29 (10th Cir. 2001). By the terms of U.S.S.G. § 4A1.3(b)(1), a departure on this ground must be based on "reliable information" and is justified when the defendant's criminal history category substantially over-represents (1) "the seriousness of the defendant's criminal history" or (2) "the likelihood that the defendant will commit other crimes." In short, "[t]he purpose of U.S.S.G. § 4A1.3 is to allow a district court to deviate from the otherwise applicable guideline range where a defendant's criminal history, likelihood of recidivism, or both, differ significantly from the typical offender for whom the Sentencing Commission formulated the applicable criminal history category." *United States v. Caldwell*, 219 F.3d 1186, 1195 (10th Cir. 2000) (citation omitted). Based on what is argued in the defendant's memorandum, the court finds that he has not carried his burden of proving he is entitled to a downward departure. The request is denied subject to reconsideration upon additional proof or arguments.

IT IS THEREFORE ORDERED that the defendant's objections to the PSR and request for a downward departure (Dk. 27) is denied.

Dated this 15th day of December, 2004, Topeka, Kansas.

Sam A. Crow, U.S. District Senior Judge

