

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

UNITED STATES OF AMERICA
Plaintiff,

v.

Case No. 21-CR-174

JUSTIN STOKES
Defendant.

STATEMENT OF REASONS MEMORANDUM

Defendant Justin Stokes pleaded guilty to two counts of possessing a firearm as a felon, and I set the case for sentencing. In imposing sentence, the district court must first correctly calculate the advisory sentencing guideline range; then consider the arguments of the parties and the factors set forth in 18 U.S.C. § 3553(a); and, finally, after settling on the appropriate sentence, adequately explain the chosen sentence. United States v. Settles, 43 F.4th 801, 805 (7th Cir. 2022); United States v. Pankow, 884 F.3d 785, 793 (7th Cir. 2018). In this memorandum, I set forth the reasons for the sentence imposed on defendant Stokes.

I. GUIDELINE CALCULATIONS

Defendant's pre-sentence report ("PSR") grouped the two counts pursuant to U.S.S.G. § 3D1.2(c). The PSR then set a base offense level of 26 given defendant's prior convictions for a crime of violence and a controlled substance offense, and his possession of a firearm capable of accepting a large capacity magazine. U.S.S.G. § 2K2.1(a)(1). The PSR further included a 4-level enhancement under U.S.S.G. § 2K2.1(b)(6)(B) because defendant possessed the firearm involved in the first incident in connection with the felony offense of possession with intent to distribute controlled substances, and a 2-level enhancement under

U.S.S.G. § 3C1.2 based on his reckless flight from the police during the second incident. After subtracting 3 levels for acceptance of responsibility, U.S.S.G. § 3E1.1, the report settled on a final offense level of 29. Coupled with defendant's criminal history category of III, this produced an imprisonment range of 108-135 months. I adopted these calculations without objection.

II. SECTION 3553(a)

A. Sentencing Factors

Section 3553(a) directs the sentencing court to consider:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the [advisory sentencing guideline range;]
- (5) any pertinent policy statement . . . issued by the Sentencing Commission[;]
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a).

After considering these factors, the court must “impose a sentence sufficient, but not

greater than necessary, to comply with the purposes” of sentencing: just punishment, deterrence, protection of the public, and provision of needed correctional treatment. Id. While the court must as part of its analysis consider the sentence recommended by the guidelines, the court retains discretion “to select an appropriate sentence for the individual defendant and the surrounding circumstances.” United States v. Musgraves, 883 F.3d 709, 715 (7th Cir. 2018). “The sentencing judge may not perfunctorily impose a guidelines sentence or even presume that such a sentence is appropriate in a given case.” United States v. Warner, 792 F.3d 847, 855 (7th Cir. 2015). Judges are also free to disagree with the guidelines on policy grounds, United States v. Corner, 598 F.3d 411, 415 (7th Cir. 2010) (en banc)), and/or to analyze the facts of a case differently under § 3553(a) than when considering an enhancement. United States v. Ramos, 769 Fed. Appx. 383, 386 (7th Cir. 2019) (citing United States v. Hatch, 909 F.3d 872, 875-76 (7th Cir. 2018)).

B. Analysis

On January 19, 2021, at approximately 3:15 a.m., police pulled defendant over for driving without headlights. While speaking to defendant, the officer saw a jar containing plastic baggies of marijuana on the floor next to defendant’s leg. The officer had defendant and his passenger exit the vehicle. Officers then searched the vehicle and found a loaded 9mm extended magazine with a 30-round capacity in the driver’s door and a 9mm pistol with an extended magazine under the driver’s seat. In the center console, officers found a digital scale, an empty 9mm magazine, a baggie containing marijuana residue, and a baggie containing a number of pills, some of which contained methamphetamine. Officers also found multiple jars containing a total of 66 grams of marijuana throughout the vehicle. While the officer was searching the vehicle, defendant made numerous comments in the back of the squad car about

going to jail, being caught with weed and a gun.

Defendant was initially charged in state court, but those charges were dismissed when, on August 17, 2021, the government obtained an indictment charging him with felon in possession of a firearm, possession with intent to distribute methamphetamine and marijuana, and possession of a firearm in furtherance of a drug trafficking offense. On September 13, 2021, defendant failed to appear before the magistrate judge for his arraignment, and the court issued a bench warrant for his arrest.

On May 31, 2022, at around 9:35 p.m., a police officer attempted to conduct a traffic stop on defendant for speeding and having a defective driver's side headlight. Defendant failed to stop and fled from the officers. During the pursuit, officers used stop sticks, which hit the front passenger side tire, but defendant continued to flee. The pursuit lasted 3.7 miles and reached speeds of 103 mph. After his car crashed, defendant fled on foot but was soon taken into custody. Officers searched the vehicle and found a loaded 9mm pistol on the driver's side floorboard, \$186, a taser, two cell phones, a scale, and a small baggie of marijuana.

The government then obtained a superseding indictment adding another felon in possession count based on the gun recovered during the May 2022 stop. The State of Wisconsin also charged defendant with fleeing and recklessly endangering safety based on the May 2022 flight incident, and in December 2022 the state court sentenced him to 18 months in prison.

Defendant pleaded guilty to the two felon in possession counts in this court, with the government agreeing to dismiss the other counts. In his statement to the PSR writer, defendant admitted to committing the offenses and acknowledged he was around negative associations and possessing drugs and guns. He stated he should have avoided both. He

explained that he had firearms because he had been the victim of a robbery, and he believed his life was threatened. He also reported using drugs on a frequent basis leading up to his arrest. In the future, he planned to change his thinking and make better decisions, work and stay home with his family, and quit using controlled substances and avoid his old associations.

Thirty-one years old at the time of sentencing, defendant had compiled a fairly significant prior record, including a 2011 conviction for robbery, for which he was sentenced to 3 years in prison; possession with intent to distribute THC in 2018, for which he was sentenced to probation, which he was able to complete (although not without problems); marijuana possession in 2019, receiving a fine in municipal court; and then the fleeing case arising out of his arrest in May 2022, for which he received an 18-month state term. Defendant admitted regular use of marijuana and, more recently, Percocet leading up to his arrest in May 2022.

It appeared that defendant had a decent childhood, and that his family was a good influence. Although he struggled in school with ADHD, also getting into fights, there were positives in his background, including a two-year stint in the Job Corp. during which he earned certificates in masonry and carpentry. He also had an HSED and some history of employment, although mostly short-term jobs. He did have any children.

As indicated, the guidelines called for a term of 108-135 months, and I agreed that a period of confinement was needed in this case. These were serious offenses. On two separate occasions, defendant unlawfully possessed a firearm. The first instance was aggravated by his concurrent drug possession, and the second by his reckless flight from the police. He was not deterred by his January 2021 arrest from again possessing a gun some 17 months later. Nor had he been deterred by his numerous prior contacts with the criminal justice system, including a period of imprisonment. Specific deterrence and promoting respect for the

law were important in this case. There was also a need to protect the public. While defendant's prior violent offense was remote, possessing drugs and guns is harmful to the community, and his reckless flight created significant danger.

Defendant asked for a fully concurrent 20 month sentence, which would require an adjustment of about 8 months to reflect the time he had served on the state sentence. I agreed that since the state sentence was for relevant conduct, the instant sentence should be concurrent, and that since the time he had served on it would not be credited by the BOP, I should take this 8 month period into account in deciding the sentence here. See U.S.S.G. § 5G1.3(b).¹

In considering the seriousness of the offenses, I acknowledged that defendant possessed a relatively small amount of marijuana; that there was no evidence he intended to use the guns to hurt anyone; and that no one was injured during the car chase (although this was a matter of luck). I also noted his statement that he did not intend to distribute the pills.

In considering deterrence, defendant noted that he experienced immediate consequences after his second arrest and had not left custody since then. I agreed that, as a general matter, swift punishment is likely to have a greater deterrent impact than punishment delayed. See, e.g., Daniel S. Nagin, Deterrence in the Twenty-First Century, 42 Crime & Just. 199, 205-06 (2013). The aggravating circumstance here was that this was defendant's second arrest for gun possession within a 17 month period. He had a federal indictment pending when he again possessed a firearm.

¹I also considered the impact of a federal detainer on the manner in which his state sentence would be executed. Defendant's concerns about BOP programming, or the absence thereof, were more speculative.

I also took into account that defendant had twice previously completed terms of supervision, and that the need to protect the public could, in part, be satisfied with a significant period of supervised release. He appeared to have plans for the future, as well as some positives to build on, including Job Corp, his HSED, and his work history.

I partially agreed with defendant's criticism of the guideline, U.S.S.G. § 2K2.1. Under the facts of this case, the guideline overstated defendant's risk with a gun and the need to protect the public, given the remoteness of his violent predicate offense, which occurred when he was 19 and involved his possession of a BB gun, and the non-violent, low level nature of his drug offense predicate. See United States v. Fogle, 694 F. Supp. 2d 1014, 1017-18 (E.D. Wis. 2010). The guideline also effectively "double counts" prior convictions, relying upon them to enhance the base offense level and to construct the criminal history category; this approach lacks an empirical basis. See Lynn Adelman & Jon Deitrich, Improving the Guidelines Through Critical Evaluation: An Important New Role for District Courts, 57 Drake L. Rev. 575, 587-88 (2009) (noting that the findings of a working group supported enhanced sentences based on characteristics such as actual or intended use of the weapon, drug-related conduct, or possession of particularly deadly weapons, yet the Commission elected to increase the offense level based on prior convictions).

The 4-level enhancement for possessing the gun in connection with another felony also somewhat overstated the seriousness of the instant offense, as it was predicated on defendant's possession of a small amount of marijuana with intent distribute. He did not possess the gun in connection with violent or other aggravated conduct.

I disagreed with the defense criticism of the high capacity magazine enhancement. As defendant noted, this provision was implemented to align with a statutory ban, which has since

expired, and thus was not the product of the Sentencing Commission's typical role. Nor did the Commission provide much of a rationale for maintaining the enhancement. See United States Sentencing Commission, United State Sentencing Commission Guidelines Manual - Appendix C 176 (Amendment 691). Defendant further argued that the previous ban on high capacity magazines did not reduce shootings or fatalities.

Courts have not been very receptive to these sorts of arguments. As noted in United States v. Marceau, 554 F.3d 24, 29 (1st Cir. 2009), the Commission adopted Amendment 691 to clear up confusion as to whether the expired ban still supported the enhancement, an issue that had split the courts. The Marceau court also held that the Commission's decision did not conflict with any congressional directive; the higher penalties did not apply with legal weapons, per se, but to prohibited persons who possess them. Id. at 30. Absent such a conflict, the Commission enjoys significant discretion in formulating guidelines and has the authority to enhance sentences for conduct that it determines makes an already unlawful act more severe. See United States v. Little, 780 Fed. Appx. 719, 724 (11th Cir. 2019) (collecting cases). And as the court explained in United States v. Barron, 557 F.3d 866, 871 (8th Cir. 2009), the decision to sentence persons who possess these high capacity weapons more severely makes sense, given that they are likely more dangerous than other kinds of weapons. Defendant noted that such magazines are now legal to possess and increasingly popular, but guns themselves are legal for non-felons; this enhancement is designed to target the increased danger posed when a felon possesses such an item in connection with a firearm.

I was also unpersuaded by defendant's claim that the offense was less serious because the nation is saturated with guns and possession has become easier. If anything, this would counsel in favor of longer sentences to deter felons from acquiring one of the many guns

floating around the country. See, e.g., United States v. Gupta, 904 F. Supp. 2d 349, 355 (S.D.N.Y. 2012) (noting that general deterrence would suggest a longer sentence for crimes easy to commit but difficult to detect).² Similarly, the gaps in our guns laws, pointed out in the defense memo, are hardly a reason to less vigorously enforce the laws we do have.

Nor was I persuaded that defendant's sentence should be reduced because he felt the need to arm himself for protection. This is a common argument in these kinds of cases and rarely a convincing one. Certainly, no one was made safer with defendant driving around armed at 3:15 a.m. with distribution amounts of marijuana.

The defense ultimately supported its recommendation with a hypothetical guideline range of 18-24 months, constructed with a base offense level of 14 plus 2 levels for the flight. As indicated, I agreed that some of the increases under the range set forth in the PSR overstated the seriousness of the offenses and the risk defendant posed with a gun. However, I had to take into account a number of aggravating factors the defense approach overlooked: that defendant possessed a particularly dangerous weapon in the first instance; that he did so in connection with another felony offense, albeit a less serious one; and that he committed this same offense twice. As the government noted at sentencing, defendant's approach would have added just one month to the state sentence for each of the two counts of conviction. The need to promote respect for the law and provide deterrence demanded more.

Under all the circumstances, balancing these factors, and considering the 18-month state sentence and the 8 months already served on it, I found a sentence of 34 months

²William Paley, The Principles of Moral and Political Philosophy 377 (Liberty Fund 2002) (1785) (“[T]he uncertainty of punishment must be compensated by the severity. The ease with which crimes are committed or concealed, must be counteracted by additional penalties and increased terrors.”).

sufficient but not greater than necessary to satisfy the purposes of sentencing. This sentence was based on § 3553(a) and would have been the same regardless of the guidelines.

III. CONCLUSION

I therefore committed defendant to the custody of the Bureau of Prisons for 34 months on each count running concurrently with each other and concurrently with the sentence in the state case. I further imposed a 3 year term of supervised release to ensure that defendant was monitored, treated, and maintained legitimate employment. Other terms and conditions of the sentence appear in the judgment.

Dated at Milwaukee, Wisconsin, this 30th day of January, 2023.

/s/ Lynn Adelman
LYNN ADELMAN
District Judge