

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JEFFREY JAMES McFALL,

Defendant.

No. 3:06-cr-0604-JAJ

ORDER

This matter comes before the court pursuant to a sentencing hearing set in this matter on December 21, 2007. The defendant was present and represented by Al Willett. The government was represented by Assistant United States Attorney Melisa Zaehring.

Although there were a number of objections to the presentence report, three (3) issues were presented at the evidentiary hearing. First, the government contended and the defendant denied that he was subject to a two (2) level enhancement pursuant to United States Sentencing Guideline §2D1.1(b)(1) for possession of a firearm. Second, the government seeks a six (6) level increase alleging that the defendant's activities created a substantial risk of harm to the life of a minor, pursuant to U.S.S.G. §2D1.1(b)(10)(D). Finally, the government seeks a four (4) level increase, alleging that the defendant was the organizer or leader of a group with five (5) or more participants.

If the government succeeds on the above-described enhancements, the defendant's sentencing guideline range would be from 360 months to the rest of the defendant's natural life in prison. If the defendant were to prevail on all three, his guideline range of imprisonment would be between 108 and 135 months. If any part of the defendant's guideline sentencing range falls below 240 months, the court then needs to resolve the issue of whether the defendant's August 26, 2005, conviction for possession for intent to deliver schedule III controlled substances can be used to increase the mandatory minimum

sentence from 10 to 20 years pursuant to 21 U.S.C. § 841(b)(1)(A). The defendant contends that this conviction cannot be used to enhance the sentence for his conspiracy conviction as the conduct giving rise to the earlier conviction is part of the conspiracy's relevant conduct. The court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The defendant, Jeffrey James McFall, pleaded guilty to engaging in a conspiracy to manufacture and distribute methamphetamine between June 2004 and January 2005. As part of the factual basis for this plea, the defendant admitted that during the conspiracy he manufactured methamphetamine at more than five (5) locations on more than thirty (30) occasions. During this time, police recovered at least four (4) methamphetamine laboratories or components of a laboratory tied to the defendant. The defendant admitted that the total amount of methamphetamine manufactured and distributed during the course of the conspiracy was at least 500 grams.

On January 21, 2005, the defendant and his co-defendant, Carisa Letz, made methamphetamine at the North Liberty, Iowa, residence of Lois Hoover. Ms. Hoover provided consent for the officers to search the residence. The defendant and Letz were in the back bedroom making methamphetamine. The most disturbing part of this particular manufacture was that the residence was immediately adjacent to a daycare center. See Gov't Exhibit 1. That is, the methamphetamine was manufactured only feet from where the children ordinarily play.

The defendant's wife was subpoenaed to testify at the hearing. She stated that every time the defendant made methamphetamine in their attached garage, she took the kids out of the house. Other credible testimony admitted at the hearing showed that this was not always true. After the conspiracy had been terminated by the police, police were directed back to the McFall residence because they were told that a tank containing some anhydrous

ammonia was still present in the garage. In the rafters above the garage, police found a storage tank containing about three inches of anhydrous ammonia. See Gov't Exhibits 4-6. An expert and specialist in clandestine methamphetamine laboratories testified to the dangerousness of storing anhydrous ammonia in this manner, especially given the dramatic changes in pressure in such a container from even slight increases in temperature. Further, the defendant disposed of waste chemicals by flushing them down the toilet. This can be another very dangerous situation as unreacted lithium in a methamphetamine cook, when combined with water, can produce an explosion and fire.

The defendant's closest friend, George Stieglitz, testified at the hearing. Mr. Stieglitz testified that he was medicated for emotional problems and his unusual affect was apparent to everyone. Mr. Stieglitz was an assistant to the defendant, primarily helping the defendant by gathering pseudoephedrine pills at the defendant's direction. On November 18, 2004, Stieglitz and the defendant made methamphetamine in the kitchen of the Stieglitz residence. Police searched the residence that day and found all of the items typically associated with the manufacture of methamphetamine. In addition, a small quantity of methamphetamine was found in Stieglitz's bedroom, together with two shotguns, one of which was loaded. Mr. Stieglitz testified that the guns were present due to the paranoia associated with making and keeping methamphetamine. One of the shotguns came from the defendant's family. One of them was loaded at the time it was seized out in plain view in the bedroom.

The defendant was clearly an organizer or leader of this criminal activity. The defendant decided when to cook and how much. He directed a number of individuals, well in excess of the five (5) required by sentencing guideline U.S.S.G. §3B1.1, to get the ingredients necessary to make methamphetamine. For that assistance, they would, receive part of the methamphetamine that was manufactured. As a part of the conspiracy, the

defendant taught at least two (2) others how to manufacture methamphetamine. There were, however, people like George Stieglitz who depended on the defendant to know how to manufacture methamphetamine. In planning these manufacturing episodes, the defendant would choose from a number of locations controlled by him, his father or his friends. The defendant was clearly at the center of this conspiracy. While Carisa Letz was a roughly equal participant, even she was there to assist the defendant.

CONCLUSIONS OF LAW

1. *Enhancement for Possession of a Firearm in Connection with a Narcotics Offense*

Under U.S.S.G. § 2D1.1(b)(1), Defendant is subject to a two-level increase of his base level offense if the Court finds that Defendant possessed a dangerous weapon in connection with a narcotics crime. “The enhancement . . . reflects the increased danger of violence when drug traffickers possess weapons. The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense.” U.S.S.G. § 2D1.1.(b)(1), app. n. 3 (2007). In order for this sentencing enhancement to apply, there must be a temporal and spacial relation between the weapon, the drug trafficking activity, and the Defendant. United States v. Lopez, 384 F.3d 937, 944 (8th Cir. 2007) (internal citations omitted). “‘The government has the burden to show by a preponderance of the evidence both that the weapon was possessed by the defendant and that it was not clearly improbable that the weapon was connected with the offense.’” United States v. Mendoza, 341 F.3d 687, 694 (8th Cir. 2003) (internal citations omitted). “Constructive possession suffices ‘if it is reasonably foreseeable that a co-conspirator would have possessed a weapon.’” Mendoza, 341 F.3d at 694.

The government proved by a preponderance of the evidence that there was a temporal and spatial relation between the gun, Defendant, and the manufacturing of

methamphetamine. The two shotguns, the drugs, and Defendant were all present in Stieglitz's house during the time period that Stieglitz and Defendant cooked methamphetamine on November 18, 2004. Defendant argues that it was not reasonably foreseeable to Defendant that Stieglitz possessed a weapon in the house. However, testimony by Stieglitz at the sentencing hearing demonstrated that if Defendant did not already know that Stieglitz possessed two shotguns in connection with Defendant's manufacturing of methamphetamine, that fact was, at the very least, reasonably foreseeable to Defendant. Most tellingly, Stieglitz testified that he possessed the two shotguns specifically because he was paranoid about manufacturing methamphetamine, an endeavor he undertook solely with Defendant. Officers seized one of the shotguns from plain view in the bedroom during the November 18, 2004, search of Stieglitz's home. Finally, Stieglitz testified that one of the shotguns he possessed in his home belonged to Defendant's family. Thus, for all the reasons listed above, Stieglitz's possession of the two shotguns was reasonably foreseeable to Defendant. Because a temporal and spacial relation existed between the weapon, the drugs, and Defendant, and because it is not "clearly improbable" that the Defendant constructively possessed the two shotguns in connection with cooking methamphetamine, this Court will apply the two-level sentencing enhancement under U.S.S.G. § 2D1.1.(b)(1).

2. Enhancement for Creating a Substantial Risk of Harm to the Life of Minor

Under U.S.S.G. § 2D1.1(b)(10)(D), Defendant is subject to a six-level increase in the base offense level if the offense created a substantial risk of harm to the life of a minor. According to Application Note 20(A) to U.S.S.G. § 2D1.1(b)(10)(D), this Court should consider the following factors when determining whether to apply the substantial risk of harm to minor enhancement.

- (i) The quantity of any chemicals or hazardous or toxic substances found at the laboratory, and that manner in which the chemicals or substances were stored.
- (ii) The manner in which hazardous or toxic substances were disposed, and the likelihood of release into the environment of hazardous or toxic substances.
- (iii) The duration of the offense, and the extent of the manufacturing operation.
- (iv) The location of the laboratory (e.g. whether the laboratory is located in residential neighborhood or a remote area), and the number of human lives placed at a substantial risk of harm.

U.S.S.G. § 2D1.1.(b)(10)(D), app. n. 20A (2007). The Note 20(A) factors are not the exclusive consideration, but they “‘may not be ignored and . . . the details of the particular offense are important.’” United States v. Patterson, 481 F.3d 1029, 1033 (8th Cir. 2007) (internal citations omitted).

Taking into consideration the factors listed in Application Note 20(A) and the “details of the particular offense,” this Court finds that the enhancement for creating a substantial risk to a minor is appropriate. In regard to Factor (I), police found a storage tank with three inches of anhydrous ammonia inside it in the rafters above the garage attached to his home. The placement of this tank in the garage presented a risk of explosion in a home located in a residential neighborhood of Iowa City, Iowa. In regard to Factor (ii), Defendant disposed of waste chemicals by flushing them down the toilet, and placing them in garbage receptacles at gas stations. In regard to Factor (iii), Defendant admitted to manufacturing methamphetamine more than thirty (30) times at more than five (5) locations during a seven-month time period. In regard to Factor (iv), Gov. Ex. 1 demonstrated that another of Defendant’s manufacturing sites was inside a residence that was immediately adjacent to a daycare facility. At least three witnesses testified that one of Defendant’s manufacturing sites was a garage attached to his Iowa City home in which his two minor children lived. Additionally, another witness testified that he manufactured

methamphetamine with Defendant at the witness's home, which is located in a residential neighborhood and near a high school, on approximately twelve (12) occasions. This defendant is unusual mostly because his manufacturing activity was in densely populated areas. For all the reasons listed above, this Court will apply the six-level sentencing enhancement under U.S.S.G. § 2D1.1(b)(10)(D).

3. Enhancement for Role as a Leader or Organizer in the Offense

Under U.S.S.G. 3B1.1(a), the Defendant is subject to a four-level increase in the offense level if he was “an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive[.]” Under Application Note 4 to U.S.S.G. 3B1.1(a), this Court should consider the following factors when distinguishing between a “leadership and organizational role” as addressed in U.S.S.G. 3B1.1(a) from one of “mere management or supervision” as addressed in U.S.S.G. 3B1.1(b).

[T]he exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of illegal activity, and the degree of control and authority exercised over others.

U.S.S.G. § 3B1.1.(a), app. n.4 (2007). “[O]ne’s status as a distributor of narcotics would not, standing alone, transform one into a manager or supervisor[.]” United States v. Marquez-Alvarado, 501 F.3d 971, 975 (8th Cir. 2007) (citing United States v. Plancarte-Vazquez, 450 F.3d 848, 853 (8th Cir. 2006)). The “adjustment for being an organizer or leader is intended to reflect relative responsibility compared to other participants in the crime.” United States v. Villareal-Amarillas, 454 F.3d 925, 931 (8th Cir. 2006) (citing United States v. Rodriguez, 112 F.3d 374, 377 (8th Cir. 1997)). In the Eighth Circuit, the terms “organizer” and “leader” are interpreted broadly. United States v. Yah, 500 F.3d 698, 702 (8th Cir. 2007) (internal citations omitted).

Taking into consideration the factors listed in Application Note 4 to U.S.S.G. 3B1.1(a) and (b), this Court finds that the enhancement for an organizing or leadership role is appropriate. Witnesses at the sentencing hearing testified that Defendant possessed decision making authority, deciding the time and location that he, with the assistance of others, would manufacture methamphetamine. Witnesses also testified that Defendant directed more than the requisite five (5) individuals to acquire the precursors necessary to cook methamphetamine. Witnesses testified that during cooks, Defendant was the person with the knowledge of all the manufacturing steps. Other persons assisting Defendant would help him at certain steps in the manufacturing process. Defendant taught at least two (2) others persons the process for cooking methamphetamine. For all the reasons listed above, this Court will apply the four-level sentencing enhancement under U.S.S.G. § 3B1.1(a).

4. Enhancement of the Mandatory Minimum

Because the resulting guidelines suggest a sentence well in excess of the mandatory minimum term of incarceration provided for by 21 U.S.C. § 841(b)(1)(A), the issue as to whether the government can enhance the conspiracy conviction with the defendant's August 2005 conviction is now a moot issue. Accordingly, it need not be decided.

Upon the foregoing,

IT IS ORDERED

That the court finds that the defendant has a total offense level of 41, a criminal history category of III, yielding a guideline range of imprisonment from between 360 months to the rest of his natural life. It is the court's current intention to vary downward from the minimum end of the guideline range.

DATED this 31st of December, 2007.



JOHN A. JARVEY
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF IOWA