NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 10a0322n.06

No. 09-5209

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
May 27, 2010
LEONARD GREEN, Clerk

TONY CROWDER,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	ON APPEAL FROM THE UNITED
	)	STATES DISTRICT COURT FOR
UNITED STATES OF AMERICA,	)	THE EASTERN DISTRICT OF
	)	TENNESSEE
Respondent-Appellee.	)	
	)	
	)	

Before: MARTIN, RYAN, and KETHLEDGE, Circuit Judges.

KETHLEDGE, Circuit Judge. Tony Crowder appeals his 235-month sentence for being a felon in possession of a firearm. We affirm.

I.

On September 29, 2001, Crowder and his brother had a physical confrontation. Crowder's brother kicked down the door to Crowder's house, then punched Crowder in the head. In response, Crowder grabbed a rifle from his bedroom closet and shot his brother in the foot.

Based on Crowder's possession of the rifle, the government charged him with being a felon in possession of a firearm. A jury convicted him after a one-day trial. The district court calculated Crowder's Guidelines range to be 262 to 327 months, based in part on an enhancement for possessing the firearm "in connection with . . . a crime of violence[.]" U.S.S.G. § 4B1.4(b)(3)(A). The court sentenced Crowder to 262 months' imprisonment.

Crowder appealed, arguing that the enhancement was improper because there was no crime of violence—he shot his brother in self-defense, he said. We concluded that the district court had not made a specific factual finding about the circumstances of the shooting, and thus that it was unclear whether the enhancement was appropriate. We remanded for the district court to make a finding on the factual issue and resentence Crowder accordingly. *See United States v. Crowder*, No. 06-5542 (6th Cir. May 25, 2007).

On remand, the district court found that Crowder had indeed acted in self-defense. The court therefore eliminated the enhancement and re-calculated Crowder's Guidelines range as 235 to 293 months. The court then sentenced Crowder to 235 months' imprisonment.

This appeal followed.

II.

Crowder now raises two additional sentencing arguments. "We review the district court's application of the Sentencing Guidelines de novo and its findings of fact for clear error." *United States v. Deitz*, 577 F.3d 672, 698 (6th Cir. 2009).

First, Crowder challenges the court's calculation of his Guidelines range. Specifically, he asserts that the court improperly enhanced his criminal-history category from IV to VI based on U.S.S.G. § 4B1.4(c)(2). That provision—just like the one in Crowder's prior appeal—applies only if the defendant possessed a firearm in connection with a crime of violence. But this time the provision had no effect on Crowder's Guidelines range. His prior convictions placed him in criminal-history category VI regardless of whether he possessed the firearm in connection with a

crime of violence. *See* U.S.S.G. § 4B1.4(c)(1). Thus, the district court properly calculated his Guidelines range.

Second, Crowder asserts that he should have received a downward departure under U.S.S.G. § 5K2.10, which allows the court to reduce a sentence if "the victim's wrongful conduct contributed significantly to provoking the offense behavior[.]" We have previously held that the "decision to deny a downward departure is unreviewable unless the lower court incorrectly believed that it lacked authority to grant such a departure." *United States v. Madden*, 515 F.3d 601, 610 (6th Cir. 2008). Here, the district court expressly recognized its authority to grant a departure, but did not think Crowder deserved one. *See* Snt'g Tr. at 16 ("[T]o the extent defendant . . . is suggesting the granting of a variance or a downward departure, the court . . . does not believe such a variance is warranted"). Thus, Crowder's argument is unreviewable.

Crowder also raises a number of issues in a *pro se* brief that he filed before we appointed an attorney for him. He is now represented by counsel, so we will not review the issues in his *pro se* submission. *See United States v. Martinez*, 588 F.3d 301, 328 (6th Cir. 2009).

The district court's judgment is affirmed.