

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

MELVIN LEE VITKO,)
)
 Petitioner,)
)
 v.) 1:08-cr-00171-JAW
)
 UNITED STATES OF AMERICA,)
)
 Respondent.)

RESENTENCING ORDER

On April 14, 2009, the Court sentenced Michael Vitko to 188 months of incarceration, no fine, five years of supervised release, and a \$100.00 special assessment for possession of a firearm by a person previously convicted of a felony. *Indictment* (ECF No. 1); *J.* (ECF No. 27). Under then existing caselaw, Mr. Vitko was subject to the enhanced penalties of the Armed Career Criminal Act (ACCA). *See Order Den. the Recommended Decision of the Magistrate Judge and Granting Relief under 28 U.S.C. § 2255* at 1 (ECF No. 88) (*Order*). On June 26, 2015, the United States Supreme Court decided *Johnson v. United States*, holding that imposing an increased sentence under the residual clause of the ACCA violates the Constitution’s guarantee of due process. 135 S. Ct. 2551 (2015). On April 18, 2016, the Supreme Court handed down *Welch v. United States*, holding that *Johnson* is . . . a substantive decision and so has retroactive effect . . . in cases on collateral review.” 136 S. Ct. 1257, 1265 (2016).

On April 18, 2014, Mr. Vitko placed a 28 U.S.C. § 2255 motion in the prison

mailing system and his motion was filed with the Court on April 23, 2014. *See Mot. to Vacate, Set Aside or Correct Sentence* (ECF No. 32). The exact pathway to the order granting Mr. Vitko's § 2255 motion is not particularly relevant to the merits of this resentencing order. *See Order* at 2-8. After the Court issued its initial order on April 4, 2016, granting the § 2255 motion, the Government moved for reconsideration on April 7, 2016, and after briefing, the Court issued a decision on May 19, 2016 denying the motion for reconsideration and noting that the case was in order for resentencing. *Gov't's Mot. for Reconsideration of Order Den. the Recommended Decision of the Magistrate Judge and Granting Relief under 28 U.S.C. § 2255* (ECF No. 91); *Order on Mot. for Reconsideration* (ECF No. 97) (*Recons. Order*).

In anticipation of resentencing, on April 5, 2016, the United States Probation Office (PO) prepared a report that recalculated Mr. Vitko's non-ACCA guideline sentence. On April 15, 2016, the Government filed a sentencing memorandum that proposed a time-served sentence for Mr. Vitko. *Gov't's Sentencing Mem.*, at 3 (ECF No. 95). The original guideline sentence, based on the ACCA, was 188 to 235 months, a fine range between \$15,000 and \$150,000, five years of supervised release, and a \$100 special assessment. *Tr. of Proceedings (Sentencing Proceedings)*, 7:9-8:9 (ECF No. 44). The recalculated guideline sentence is:

- (1) A base offense level of 14 under United States Sentencing Guideline (U.S.S.G.) § 2K2.1(a)(6)(A);
- (2) A two-level increase under U.S.S.G. § 2K2.1(b)(1)(A) because the offense involved five firearms;

- (3) A two-level increase under U.S.S.G. § 2K2.1(b)(4)(A) because the offense involved stolen firearms;
- (4) A four-level increase under U.S.S.G. § 2K2.1(b)(6)(B) because the Defendant possessed the firearms in connection with another felony offense;
- (5) The adjusted offense level equals 22;
- (6) The Defendant accepted responsibility for the offense and the offense level is reduced three levels to 19 under U.S.S.G. § 3E1.1;
- (7) The total offense level is 19.

Mr. Vitko has nine criminal history points. At the time of his original sentencing, he received two additional points because he committed the offense within two years of being released from prison. However, this two-level enhancement is no longer authorized by the guidelines. Therefore, Mr. Vitko's new criminal history category is IV. For an offense level of 19 and a criminal history of IV, the guideline range for imprisonment is 46 to 57 months, the fine range is \$6,000 to \$60,000, the guideline range for supervised release is one to three years, and the special assessment of \$100 is unchanged. According to the PO, Mr. Vitko has now served in excess of ninety months of incarceration.

Also, in anticipation of resentencing, the PO – with Mr. Vitko's consent – filed a request for modifying the conditions of his supervised release to add a 120 day period of community confinement to allow Mr. Vitko to transition from prison. *Req. for Modifying the Conditions or Term of Supervision with the Consent of the Offender*

(ECF No. 93); Attach. 1 *Supplement* (ECF No. 93). The Court granted the PO request on April 12, 2016. *Order Granting the Pet. to Modify Supervised Release* (ECF No. 94).

Taking into consideration the newly-calculated guideline ranges and the factors under 18 U.S.C. § 3553(a), the Court imposes the following sentence:

- (1) A term of incarceration of time served plus five days;
- (2) No fine;
- (3) A term of supervised release of three years with all the previously imposed conditions, including specifically the newly added condition of 120 days of community confinement;
- (4) A special assessment of \$100.

SO ORDERED.

/s/ John A. Woodcock, Jr.
JOHN A. WOODCOCK, JR.
UNITED STATES DISTRICT JUDGE

Dated this 20th day of May, 2016