

400 F.3d 640

[Briefs and Other Related Documents](#)

United States Court of Appeals,
Eighth Circuit.
UNITED STATES of America, Appellant,
v.
James William ROGERS, Appellee.
No. 04-1461.
Submitted: Dec. 16, 2004.
Filed: March 16, 2005.

Background: Defendant pled guilty in the United States District Court for the Western District of Missouri, Scott O. Wright, J., to being a felon in possession of a firearm. Government appealed the sentence.

Holdings: The Court of Appeals, [Benton](#), Circuit Judge, held that:
(1) defendant did not establish extraordinary or atypical rehabilitation as required to justify downward departure, and
(2) downward departure to sentence of probation was not reasonable.

Reversed and remanded.

West Headnotes


[1] [KeyCite Notes](#) 

- ↳ [350H](#) Sentencing and Punishment
 - ↳ [350HIV](#) Sentencing Guidelines
 - ↳ [350HIV\(F\)](#) Departures
 - ↳ [350HIV\(F\)3](#) Downward Departures
 - ↳ [350Hk859](#) Offender-Related Factors
 - ↳ [350Hk869](#) k. Rehabilitation. [Most Cited Cases](#)
(Formerly 350Hk866)

Defendant who pled guilty to being a felon in possession of a firearm did not establish extraordinary or atypical rehabilitation as required to justify downward departure; reuniting with family and remaining drug-free was not extraordinary or atypical. [U.S.S.G. § 5K2.0](#), p.s., 18 U.S.C.A.; [18 U.S.C.A. § 922\(g\)\(1\)](#).

[2] [KeyCite Notes](#) 

- ↳ [350H](#) Sentencing and Punishment
 - ↳ [350HIX](#) Probation and Related Dispositions
 - ↳ [350HIX\(B\)](#) Grounds and Considerations in General
 - ↳ [350Hk1832](#) k. Protection and Deterrence. [Most Cited Cases](#)

- ↳ [350H](#) Sentencing and Punishment [KeyCite Notes](#) 
 - ↳ [350HIX](#) Probation and Related Dispositions
 - ↳ [350HIX\(D\)](#) Factors Related to Offender
 - ↳ [350Hk1872](#) Other Arrests, Charges or Convictions
 - ↳ [350Hk1872\(1\)](#) k. In General. [Most Cited Cases](#)

Downward departure to sentence of probation for five years for defendant who pled guilty to being a felon in possession of a firearm was not reasonable; firearm possession was defendant's second parole violation in eight months, second violation illustrated that parole or probation was not an adequate deterrence, defendant's earlier parole violation was for trespassing which did not demonstrate respect for law, probation would not protect public from criminal conduct, and probation did not adequately address defendant's history and characteristics which included drug use, stealing, assault, and resisting arrest. [18 U.S.C.A. §§ 922\(g\)\(1\), 3553\(a\)](#).



[3] [KeyCite Notes](#)

- ↳ [350H](#) Sentencing and Punishment
 - ↳ [350HIV](#) Sentencing Guidelines
 - ↳ [350HIV\(A\)](#) In General
 - ↳ [350Hk651](#) k. Operation and Effect of Guidelines in General. [Most Cited Cases](#)
(Formerly 350Hk652)



- ↳ [350H](#) Sentencing and Punishment [KeyCite Notes](#)
 - ↳ [350HIV](#) Sentencing Guidelines
 - ↳ [350HIV\(B\)](#) Offense Levels
 - ↳ [350HIV\(B\)3](#) Factors Applicable to Several Offenses
 - ↳ [350Hk720](#) k. In General. [Most Cited Cases](#)

The sentencing guideline range no longer dictates the final sentencing result but instead is an important factor that the sentencing court is to consider along with the other statutory factors to be considered in imposing a sentence in reaching the sentencing result. [U.S.S.G. § 1B1.1](#) et seq., 18 U.S.C.A. ; [18 U.S.C.A. § 3553\(a\)](#).



[4] [KeyCite Notes](#)

- ↳ [350H](#) Sentencing and Punishment
 - ↳ [350HIV](#) Sentencing Guidelines
 - ↳ [350HIV\(A\)](#) In General
 - ↳ [350Hk651](#) k. Operation and Effect of Guidelines in General. [Most Cited Cases](#)
(Formerly 350Hk652)



- ↳ [350H](#) Sentencing and Punishment [KeyCite Notes](#)
 - ↳ [350HIV](#) Sentencing Guidelines
 - ↳ [350HIV\(F\)](#) Departures
 - ↳ [350HIV\(F\)1](#) In General
 - ↳ [350Hk800](#) k. In General. [Most Cited Cases](#)

A sentencing court must consider the sentencing guidelines, determine the applicable range, but may depart from the suggested guideline range. [U.S.S.G. § 1B1.1](#) et seq., 18 U.S.C.A.



[KeyCite Notes](#)

[5]

- ↳ [110](#) Criminal Law
 - ↳ [110XXIV](#) Review

- [110XXIV\(L\)](#) Scope of Review in General
- [110K1134](#) Scope and Extent in General
- [110K1134\(3\)](#) k. Questions Considered in General. [Most Cited Cases](#)



Sentences are reviewed for unreasonableness as outlined in statute regarding factors to be considered in imposing a sentence. [18 U.S.C.A. § 3553\(a\)](#).

***641** [Philip M. Koppe](#), argued, Assistant U.S. Attorney, Kansas City, MO ([Todd P. Graves](#), U.S. Atty., on the brief), for appellant.

[David R. Mercer](#), argued, Assistant Federal Public Defender, Springfield, MO ([Raymond C. Conrad, Jr.](#), Fed. Public Defender, Kansas City, MO., on the brief), for appellee.

Before MELLOY, [BOWMAN](#), and [BENTON](#), Circuit Judges.




[BENTON](#), Circuit Judge.

  [1] [2] The district court granted James William Rogers's motion for a downward departure under [U.S.S.G § 5K2.0](#), after he pled guilty to being a felon in possession of a firearm, [18 U.S.C. § 922\(g\)\(1\)](#). The United States appeals, claiming an absence of extraordinary or atypical rehabilitation. Jurisdiction being proper under [18 U.S.C. § 3742\(b\)](#) and [28 U.S.C. § 1291](#), this court reverses and remands.

Eight months after Rogers was paroled on a state felony drug charge, a conservation agent found him in possession of a rifle after he had been deer hunting. Despite Rogers's pleas, the agent confiscated the rifle and contacted the parole officer.

The pre-sentence report assigned a total offense level 17 and criminal history category VI, resulting in a sentence range of 51 to 63 months. Rogers moved for a downward departure based on extraordinary post-offense rehabilitation. At sentencing, he presented 13 letters from friends and family stating that he had turned his life around by caring for his dying father, rebuilding his fiancée's home (which the insurance company paid him to do), and remaining drug-free for four years (including completion of drug-rehabilitation and group-therapy programs). A petition signed by 186 persons recited that Rogers "has changed his life," and asked for leniency in sentencing. The district court granted Rogers's motion, imposing five years probation.

After an adjustment--per the plea agreement--under [U.S.S.G § 3E1.1](#) for acceptance of responsibility, the district court based its departure on [U.S.S.G § 5K2.0](#), extraordinary rehabilitation. The government appeals.

   [3] [4] [5] While this appeal was pending, the Supreme Court held that the Federal Sentencing Guidelines are no longer mandatory. [United States v. Booker, --- U.S. ----, 125 S.Ct. 738, 756-57, 160 L.Ed.2d 621 \(2005\)](#). The guideline range "no longer dictates the final sentencing result but instead is an important factor that the sentencing court is to consider along with the factors contained in [§ 3553\(a\)](#) in reaching the sentencing result." [United States v. Rodriguez, 398 F.3d 1291, 2005 WL 272952, at *9 \(11th Cir. Feb.4, 2005\)](#), citing [Booker, 125 S.Ct. at 764-65](#). A sentencing court must consider the Guidelines, determine the applicable range, but may depart from the suggested Guideline range. [United States v. Mares, --- F.3d ----, ----, 2005 WL 503715, at *7 \(5th Cir.2005\)](#). Sentences are reviewed for unreasonableness. [Booker, 125 S.Ct. at 765-66](#). The standard guiding unreasonableness is [18 U.S.C. § 3553\(a\)](#). *Id.*

A departure under [section 5K2.0](#) is proper where a district court finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission." [18 U.S.C. § 3553\(b\)](#), see also [U.S.S.G § 5K2.0\(a\)\(3\)](#). Because the Commission accounted for ordinary post-offense rehabilitation under [section 3E1.1](#), a defendant's rehabilitation must be exceptional ***642** enough to be atypical. See [§ 5K2.0\(d\)\(2\)](#), [United States v. DeShon, 183 F.3d 888, 889 \(8th Cir.1999\)](#). The district court must explain any extraordinary or atypical factors justifying departure. [§ 5K2.0\(e\)](#), citing [18 U.S.C. § 3553\(c\)\(2\)](#).

The facts in this case do not show extraordinary or atypical rehabilitation justifying a downward departure. Rogers's reuniting with family and remaining drug-free, while commendable, are not extraordinary or atypical. See [United States v. Patterson 315 F.3d 1044, 1049 \(8th Cir.2003\)](#). In the absence of extraordinary or atypical post-offense rehabilitation, the departure was impermissible.

However, because the Guidelines are not mandatory, the sentence is reviewed for unreasonableness. The sentence is unreasonable when measured against the factors of reasonableness set forth in [section 3553\(a\)](#). The possessing-rifle-after-hunting is Rogers's second parole violation in eight months. Earlier, Rogers was found trespassing in a restricted area at Truman Dam, while two men--also on probation for manufacturing a controlled substance--fished nearby with his son in a no-fishing area. Trespassing with felons does not demonstrate respect for the law. See [18 U.S.C. § 3553\(a\)\(2\)\(A\)](#).

Rogers's second parole violation illustrates that parole/probation is not adequate deterrence. See [18 U.S.C. § 3553\(a\)\(2\)\(B\)](#). He understood the terms of parole, yet knowingly possessed the rifle. Moreover, as the violations show, probation would not protect the public from criminal conduct. See [18 U.S.C. § 3553\(a\)\(2\)\(C\)](#).

The sentence of probation does not adequately address the history and characteristics of the defendant. See [18 U.S.C. § 3553\(a\)\(1\)](#). Aside from (admitted) use of marijuana, cocaine, and methamphetamine, Rogers has convictions for assault, stealing, resisting arrest, attempting to manufacture methamphetamine, and trespassing. While the district court was not bound to the suggested range of 51 to 63 months imprisonment, probation is unreasonable.

The sentence of probation does not properly consider Congress's desire to avoid unwarranted sentencing disparities. See [18 U.S.C. § 3553\(a\)\(6\)](#). It is unreasonable to expect that defendants with similar records, guilty of similar conduct, would receive probation.

By the factors in [section 3553\(a\)](#), the district court's sentence was unreasonable. The judgment is VACATED and REMANDED for re-sentencing.

C.A.8 (Mo.),2005.

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Briefs and Other Related Documents [\(Back to top\)](#)

- [04-1461](#) (Docket) (Feb. 25, 2004)
- [2004 WL 2749726](#) (Appellate Brief) Appellee's Brief (2004)[Original Image of this Document \(PDF\)](#) 

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