

MAR 06 2009

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSHUA KAWUKI MUWANGUZI,

Defendant - Appellant.

No. 08-30234

D.C. No. 4:07-CR-00132-SEH-1

MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Sam E. Haddon, District Judge, Presiding

Submitted February 18, 2009**

Before: BEEZER, FERNANDEZ, and W. FLETCHER, Circuit Judges.

Joshua Kawuki Muwanguzi appeals the 39-month sentence imposed following his guilty plea to fraud in connection with identification documents, in violation of 18 U.S.C. § 1028(a)(3), and aggravated identity theft, in violation of

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

18 U.S.C. § 1028(a)(1). Muwanguzi contends, and the government concedes, that the district court erred in making an upward adjustment under U.S.S.G.

§ 2L2.2(b)(3) when he never used or obtained a United States passport. We have jurisdiction under 28 U.S.C. § 1291, and we vacate the district court's judgment.

In reviewing a sentence, we first consider whether the district court committed significant procedural error, including an incorrect Sentencing Guidelines determination. *United States v. Carty*, 520 F.3d 984, 993 (9th Cir.) (en banc), *cert. denied*, 128 S. Ct. 2491 (2008). We next consider whether, in light of the factors set forth in 18 U.S.C. § 3553(a), the district court abused its discretion by imposing a substantively unreasonable sentence. *Id.* We review the district court's interpretation of the Guidelines de novo, its application of the Guidelines to the facts for an abuse of discretion, and its factual findings for clear error. *United States v. Garro*, 517 F.3d 1163, 1167 (9th Cir. 2008).

The Sentencing Guidelines provide for a four-level adjustment “[i]f the defendant fraudulently obtained or used . . . a United States passport.” U.S.S.G. § 2L2.2(b)(3). “The term ‘used’ is to be construed broadly and includes the attempted renewal of previously-issued passports.” U.S.S.G. § 2L2.2, comment. (n.3).

The record shows that Muwanguzi attempted fraudulently to obtain a United States passport in the name of another person. The district court concluded that an application for a new passport was similar to an attempt to renew a previously-issued passport, and that Muwanguzi's conduct therefore warranted the upward adjustment as to Count 1, fraud in connection with identification documents in violation of 18 U.S.C. § 1028(a)(3).

As the parties agree, the use of a passport is different from the attempt to obtain one. *See United States v. Valenzuela*, 495 F.3d 1127, 1133 (9th Cir. 2007) (stating that the “plain meaning of unambiguous language in a guideline provision controls”). We therefore vacate the district court's judgment and remand for resentencing.

VACATED and REMANDED.