

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 30 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

EUGENE ARTHUR BROWN,

Defendant - Appellant.

No. 08-30182

D.C. No. CR-05-00218-WFN

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of Washington
Wm. Fremming Nielsen, Senior Judge, Presiding

Submitted January 5, 2009

Before: McKEOWN and CLIFTON, Circuit Judges, and SCHWARZER***,
District Judge.

Eugene Brown appeals the factual finding made by the district court and the
resulting reimposition of the same sentence, on limited remand from this court, for

* 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).

*** The Honorable William W. Schwarzer, Senior United States District
Judge for the Northern District of California, sitting by designation.

his conviction by guilty plea of possessing a firearm after having been convicted of a felony in violation of 18 U.S.C. § 922(g)(1). We previously remanded the matter to the district court for it to determine whether the victim did in fact apprehend harm as required for a violation of assault in the second degree under Washington law, in order to justify the four-level increase in Brown's base offense level under the advisory Sentencing Guidelines. *United States v. Brown*, 259 Fed.Appx. 944 (9th Cir. 2007).

The factual finding made by the district court on remand, that the victim did apprehend harm, was not clearly erroneous. As we noted in our first decision, there was evidence to support the finding.

Brown's contention that he was denied allocution is unpersuasive. Even if we assumed that there is a right to allocution on such a limited remand – a question we do not decide – Brown was allowed to address the court. Indeed, the court heard Brown's statement before it reimposed his sentence. Thus, the court's adherence to the parties' stipulation – that the court should resolve the factual issue on the existing record with no new submissions by either side – does not bear on Brown's right to allocution.

By its own explicit terms, *Cunningham v. California*, 549 U.S. 270 (2007), did not overrule *United States v. Booker*, 543 U.S. 220 (2005), or invalidate “the advisory system the *Booker* Court had in view.” *Cunningham*, 549 U.S. at 292.

Application of the four-level enhancement was not inconsistent with *United States v. Valenzuela*, 495 F.3d 1127, 1134 (9th Cir. 2007). Assault in the second degree, under Washington law, is not a firearms possession or trafficking offense. The presence of a firearm is not an element of that crime.

The remaining issues raised by Brown either were withdrawn or are irrelevant.

AFFIRMED.