

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 9th day of September, two thousand four.

PRESENT: HON. DENNIS JACOBS,
 HON. ROSEMARY S. POOLER,
 HON. SONIA SOTOMAYOR,
 Circuit Judges.

- - - - -X
UNITED STATES OF AMERICA,

Appellee,

-v.-

04-0267

TONY ROBERTS,

Defendant-Appellant.

- - - - -X

APPEARING FOR APPELLANT: James Roth, Hurwitz,
 Stampur & Roth, New York,
 NY

APPEARING FOR APPELLEE: **Harry Sandick**, Assistant
United States Attorney, Of
Counsel, New York, NY
(Deborah Landis, Assistant
United States Attorney, Of
Counsel on the brief)

Appeal from the United States District Court for the Southern District of New York (Lynch, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court is **AFFIRMED** in part, and the appeal in remaining part is **DISMISSED**.

Tony Roberts appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York (Lynch, J.), after a jury convicted him as a felon in possession of a firearm. Familiarity is assumed as to the facts, the procedural context, and the specification of appellate issues.

On appeal, this court must "review *de novo* the legal issues presented by a motion to suppress," and "accept the district court's factual findings unless clearly erroneous, [viewing] those facts in the light most favorable to the government." United States v. Casado, 303 F.3d 440, 443 (2d Cir. 2002); see also United States v. Peterson, 100 F.3d 7, 11 (2d Cir. 1996). The district court's factual conclusions are sufficiently supported by the record. Substantially for the reasons stated by the district court, Roberts' motion to suppress was properly denied.

As to the Allen charge, Roberts' counsel did not object to the wording or timing of the district court's instructions to the jury. Absent plain error, of which there is none, Roberts cannot raise the issue for the first time on appeal. See United States v. Pastore, 537 F.2d 675, 678 (2d Cir. 1976).

Finally, we dismiss for lack of jurisdiction the portion of Roberts' appeal claiming that the district court erred in refusing to grant him a downward departure under the sentencing guidelines. "[A] district court's

refusal to depart downwardly is not appealable unless the guidelines were misapplied, the court misapprehended its authority or imposed an illegal sentence." United States v. Haynes, 985 F.2d 65, 68 (2d Cir. 1993); accord United States v. Aponte, 235 F.3d 802, 803 (2d Cir. 2000) (per curiam). Roberts' appeal presents none of these issues.

For the foregoing reasons, the judgment of the district court is hereby **AFFIRMED** in part, and the appeal in remaining part is **DISMISSED**.

The mandate in this case will be held pending the Supreme Court's decision in United States v. Booker, No. 04-104, and United States v. Fanfan, No. 04-105 (to be argued October 4, 2004). Should any party believe there is a need for the district court to exercise jurisdiction prior to the Supreme Court's decision, it may file a motion seeking issuance of the mandate in whole or in part. Although any petition for rehearing should be filed in the normal course pursuant to Rule 40 of the Federal Rules of Appellate Procedure, the court will not consider the waiver or substance of any issue concerning defendant's sentence until after the Supreme Court's decision in Booker and Fanfan. In that regard, the parties will have until fourteen days following the Supreme Court's decision to file supplemental petitions for rehearing in light of Booker and Fanfan.

FOR THE COURT:
ROSEANN B. MACKECHNIE, CLERK
By:

Lucille Carr, Deputy Clerk