

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

ROBERT BURSE
Petitioner-Defendant

v.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari from the
United States Court of Appeals for the Fifth Circuit.
Fifth Circuit Case No. 17-60682

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the district court erred by applying the Sentencing Guidelines cross reference under U.S.S.G. § 2K2.1(c)(1)(A).

PARTIES TO THE PROCEEDING

All parties to this proceeding are named in the caption of the case.

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I. OPINIONS BELOW

On January 25, 2017, the Grand Jury for the Southern District of Mississippi returned an Indictment charging Mr. Burse with felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The district court case number is 3:17cr6-DCB-FKB. He accepted responsibility for his actions by pleading guilty to this charge.

The district court sentenced Mr. Burse to serve 100 months in prison. The court entered a Final Judgment reflecting this sentence on October 5, 2017. The district court's Final Judgment is attached hereto as Appendix 1.

Mr. Burse filed a timely Notice of Appeal to the United States Court of Appeals for the Fifth Circuit on October 6, 2017. The Fifth Circuit case number is 17-60682. On appeal, he argued that the district court erred by applying the cross reference provision contained in U.S.S.G. § 2K2.1(c)(1)(A), which increased his sentencing range under the United States Sentencing Guidelines. The Fifth Circuit affirmed the district court via an Opinion entered on June 14, 2018. The court filed a Judgment on the same day. The Fifth Circuit's Opinion and Judgment are attached hereto as composite Appendix 2. The Opinion was not designated for publication in the Federal Reporter, but it appears in the Federal Appendix at 727 Fed. App'x 83. A copy of the Opinion as it appears in the Federal Appendix is attached hereto as Appendix 3.

II. JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit filed both its Opinion and its Judgment in this case on June 14, 2018. This Petition for Writ of Certiorari is filed within 90 days after entry of the Fifth Circuit's Judgment, as required by Rule 13.1 of the Supreme Court Rules. This Court has jurisdiction over the case under 28 U.S.C. § 1254(1).

III. SENTENCING GUIDELINES PROVISION INVOLVED

(c) Cross Reference

(1) If the defendant used or possessed any firearm or ammunition cited in the offense of conviction in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm or ammunition cited in the offense of conviction with knowledge or intent that it would be used or possessed in connection with another offense, apply--
(A) § 2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above[.]

U.S.S.G. 2K2.1(c)(1)(A).

IV. STATEMENT OF THE CASE

A. Basis for federal jurisdiction in the court of first instance.

This case arises out of a criminal count levied against Mr. Burse for felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The court of first instance, which was the United States District Court for the Southern District of Mississippi, had jurisdiction over the case under 18 U.S.C. § 3231 because the criminal charges levied against Mr. Burse arose from the laws of the United States of America.

B. Statement of material facts.

1. Introduction.

This case involves a conviction for felon in possession of a firearm, but the conviction itself is not at issue. In fact, Mr. Burse accepted responsibility for his actions by pleading guilty to the charge. At issue is the sentence enhancement imposed by the district court because Mr. Burse purportedly possessed the gun in relation to another crime – drug trafficking. This enhancement was applied under the cross reference provision contained in U.S.S.G. § 2K2.1(c)(1)(A).

2. Relevant facts.

On October 22, 2015, the Jackson Police Department (hereinafter “JPD”) had an outstanding arrest warrant for Mr. Burse. JPD officers saw car that was missing the passenger mirror and had tinted windows pull into a hotel on Beasley

Road in Jackson. They pulled in behind the car and determined that the driver was Mr. Burse. The officers arrested him.

During the arrest, officers asked Mr. Burse if he had a gun, and he voluntarily responded that he did. To make sure that the officers did not feel threatened, he removed the pistol from his pants with two fingers and a thumb, and the officers took possession of it without incident. According to court documents, during this entire incident “Burse gave no resistance and complied with all of the officers’ directions.”

JPD officers searched the car that Mr. Burse was driving both at the scene of the arrest and after the car was towed and impounded. They found drugs in the car and had them analyzed by the JPD Forensic Science Unit. The lab report indicated the following drug types and quantities: 43.34 grams of methamphetamine; 85 tablets of Oxycodone; 1.07 grams of Morphine; 23 Dilaudid pills; and 25 Alprazolam pills. Officers also found \$1,262 on Mr. Burse. Significantly, what was not found in the car was anything related to dealing drugs, such as scales, baggies for packaging distributable amounts of drugs or cutting devices to separate or dilute the drugs.

During interviews with JPD officers, Mr. Burse freely admitted that he possessed the handgun at issue. He also admitted that “he had a methamphetamine

problem[.]” The latter admission is consistent with the fact that officers found a glass bulb pipe on Mr. Burse.

Mr. Burse admitted that he put the Dilaudid pills in the car. He told officers that he was taking them to a friend in the hospital. On investigation by Greg King of the Federal Public Defenders Office, a female named Chloe claimed that the Dilaudid belonged to her.

Mr. Burse denied knowing about any of the other drugs found in the car. This denial is consistent with three undisputed facts. First, the Dilaudid that Mr. Burse admitted to placing in the car was found in a different location than the other drugs. The Dilaudid “was recovered from the driver’s door pocket.” All of the other drugs “were located in the middle armrest console.” Second, the car did not belong to Mr. Burse. It was registered to a female from Meridian, Mississippi. Third, the name on the prescription bottle containing the Oxycodone was Mr. Alesandrelli.

3. The sentencing hearing.

Prior to sentencing, Mr. Burse objected to applying the cross reference provision of U.S.S.G. § 2K2.1(c)(1)(A). This issue was again the subject of a lengthy objection, testimony and argument at the sentencing hearing. The district court overruled the objection and applied the cross reference. This, of course, increased Mr. Burse’s offense level under the Guidelines as well as the resulting

prison sentence. Of particular importance to the argument presented below is the fact that the district court affirmatively stated that it considered Mr. Burse's prior criminal history when it decided to deny the defense's objection to the cross reference.

V. ARGUMENTS

A. Review on certiorari should be granted in this case.

As stated in Rule 10 of the Supreme Court Rules, “[r]eview on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons.” The issue in Mr. Burse’s case represents a “compelling reason” to grant certiorari.

As this Court is aware, lengthy prison sentences have come under fire in recent years. At issue is whether such sentences serve any benefit to rehabilitation of the defendant or to society in general. Especially troubling is when a sentence is significantly enhanced based on a very subjective fact finding determination, such as in Mr. Burse’s case.

Granting certiorari in this case will give the Court an opportunity to establish limits on the exercise of discretion in relation to sentencing. For this reason, Mr. Burse asks this Court to grant his Petition for Writ of Certiorari.

B. The district court erred by applying the Sentencing Guidelines cross reference stated in U.S.S.G. § 2K2.1(c)(1)(A).

The Guidelines provision at issue is U.S.S.G. § 2K2.1(c)(1)(A). This provision states:

- (c) Cross Reference
 - (1) If the defendant used or possessed any firearm or ammunition cited in the offense of conviction in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm or

ammunition cited in the offense of conviction with knowledge or intent that it would be used or possessed in connection with another offense, apply-- (A) § 2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above[.]

Id. (Emphasis added).

In Mr. Burse's case, the Presentence Investigation Report (hereinafter "PSR") specifically states the "other offense" that purportedly warrants applying § 2K2.1(c)(1)(A). The purported triggering offense is "Possession with Intent to Distribute Controlled Substances[.]" Possession with intent to distribute controlled substances is criminalized by 21 U.S.C. § 841, which states in relevant part:

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance[.]

(Emphasis added). The elements of this crime are "(1) knowing, (2) possession, (3) with intent to distribute." *United States v. Munoz*, 957 F.2d 171, 174 (5th Cir. 1992) (emphasis added; citation omitted).

One of the focuses of Mr. Burse's argument is that there was no proof that he possessed the firearm "in connection with" possession with intent to distribute illegal drugs. The other focus is whether he had the requisite "intent" to possess controlled substances for the purpose of distributing them. These two concepts are closely related and intertwined to a degree.

First addressed is the intent issue. Without proof of intent, the essential elements of possession with intent to distribute are not met. Thus, application of the § 2K2.1(c)(1)(A) cross reference was error because he did not possess the subject gun in connection with any other offense.

Since possession with *intent* to distribute is at issue, we must determine the factors that prove or disprove *intent*. In *United States v. Skipper*, 74 F.3d 608, 611 (5th Cir. 1996), the Fifth Circuit reversed a conviction for possession with intent to distribute under § 841(a). Factors that the court considered were “the presence of distribution paraphernalia, large quantities of cash, or the value and quantity of the substance.” *Id.* (citations omitted). Significant to the facts in Mr. Burse’s case, the *Skipper* Court also held “[p]araphernalia that could be consistent with personal use does not provide a sound basis for inferring intent to distribute.” *Id.*

In Mr. Burse’s case, officers found a glass pipe in his possession which is consistent with personal drug consumption, particularly consumption of methamphetamine. Under *Skipper*, this fact bodes against a finding of intent, as does the fact that Mr. Burse admitted that he has a problem with methamphetamine use.

Another fact to consider is the presence or absence of drug distribution paraphernalia, such as scales for weighing drugs, baggies for packaging distributable amounts of drugs or cutting devices to separate or dilute the drugs. A

close review of the entire PSR, the plea hearing transcript and the sentencing hearing transcript indicates that no such drug distribution paraphernalia was found on Mr. Burse or in his car. This fact supports a finding that he had no intent to distribute drugs.

As to the \$1,262, defense counsel pointed out at the sentencing hearing that Mr. Burse had a job to earn money. As to the value of the drugs, no evidence of this factor was presented in the PSR or at either the plea hearing or the sentencing hearing. Therefore, these facts do not support the finding of intent.

We finally consider the amount of drugs found. ATF agent Micah Snyder testified at the sentencing hearing. He testified on direct examination that possession of 180 Oxycodone pills indicated that Mr. Burse had intent to distribute this drug because a doctor would not prescribe such a large quantity.

On cross-examination, however, Agent Snyder admitted that the prescription on the bottle did in fact say that 180 pills were prescribed. He also admitted that only 85 pills were actually found. He admitted that he did not survey any doctors to determine if this was an unusually large prescription amount. After making all of these admissions, Agent Snyder had to finally admit that he did not know if it was common for a doctor to prescribe 180 Oxycodone pills in a single prescription. Therefore, the quantity of Oxycodone pills does not support a finding of intent to distribute drugs.

To summarize, the district court had insufficient proof of Mr. Burse’s “intent” to distribute a controlled substance to find that the subject cross reference should be applied. Next considered is whether the drugs were possessed “in connection with” illegal distribution of drugs. As stated above, these two legal concepts are very closely related and sometimes indistinguishable. Therefore, most of the analyses that apply to one of the concepts apply to the other as well.

In *United States v. Mitchell*, 166 F.3d 748, 753 (5th Cir. 1999) the Fifth Circuit addressed whether illegal possession of a firearm was “in connection with” another offense under § 2K2.1(c)(1)(A), the same Guidelines provision at issue in this case. The “other offense” was “possession of a distribution quantity of crack cocaine in a locked box.” *Id.* The *Mitchell* Court found that there was “a clear error in the finding of the required connection” between the firearm and the drugs. *Id.* at 756. So the Court vacated the sentence and remanded the case to district court for resentencing. *Id.*

Reaching its conclusion, the *Mitchell* Court held that neither Congress, the Sentencing Commission nor other courts

have gone so far as to create or recognize an *ipso facto* nexus rule between firearms and illicit drugs every time a defendant who is convicted of the abuse of one has some relationship with the other, no matter how attenuated. In other words, there is no conclusive presumption, either statutory or jurisprudential, that a “connection” exists automatically between drugs and guns—certainly not in Guideline § 2K2.1(c)(1), given its express requirement of a connection between possession of the firearm and commission or attempted commission of another offense.

Mitchell, 166 F.3d at 756 (footnote omitted).

Mitchell stands for the proposition that there must be a very close relationship between illegal possession of a firearm and the other offense, which in our case is possession with intent to distribute drugs. That is, the connection between the two can't be "attenuated." All of the following facts indicate that the connection between Mr. Burse's admitted possession of a gun and the purported drug distribution crime are too attenuated to support applying § 2K2.1(c)(1)(A):

- Mr. Burse admitted that he had a drug problem, which supports possession of drugs for personal consumption;
- The officers found a glass pipe in Mr. Burse's possession, which is consistent with personal consumption of drugs;
- Mr. Burse admitted placing the Dilaudid pills in the car, but the pills were owned by a lady named Chloe;
- Mr. Burse denied knowledge of all of the other drugs in the car that were of a measurable quantity;
- Mr. Burse's denial of knowledge of all drugs other than the Dilaudid is consistent with the fact that he did not own the car that the drugs were found in;

- Mr. Burse’s denial of knowledge of all drugs other than the Dilaudid is consistent with the fact that the Dilaudid was found in the door pocket of the car, and the other drugs were found in another location – the center console of the car; and
- The name on the Oxycodone prescription bottle was Mr. Alesandrelli, not Mr. Burse.

All of these facts support a finding that the connection between Mr. Burse’s alleged possession of drugs and his possession of the gun was too attenuated to find that he possessed a gun “in connection with” drug distribution.

Finally we consider the district court’s rationale for applying § 2K2.1(c)(1)(A). The court relied in substantial part on Mr. Burse’s criminal history. The court stated, “[n]ow, let’s look at the criminal history of this defendant. The court recognizes that the criminal conduct of this defendant with intent to distribute is rather convincing.” The court went on to state, “[h]e has nine criminal convictions, four of which are related to drugs and at least one with possession with intent to distribute.” Defense counsel specifically objected to using Mr. Burse’s prior criminal history to support applying the cross reference.

The district court’s reliance on a purported prior conviction for distribution was wholly misplaced. Paragraph 26 of the initial PSR stated that Mr. Burse had a prior conviction for drug distribution. This resulted in a base offense level of 20.

Defense counsel objected to this conclusion, arguing that although Mr. Burse was charged with a distribution offense, his conviction in that case was for drug possession, not distribution. Accordingly, defense counsel argued that the base offense level should be 14 rather than 20. The probation officer agreed and reduced the base offense level to 14.

By granting the above described objection to the PSR, the probation officer agreed that Mr. Burse had no prior drug distribution convictions. The district court erred by finding otherwise.

Further, the prior possession of drug convictions cannot support a finding that Mr. Burse intended to distribute drugs or that he possessed the firearm in connection with drug distribution. But even if Mr. Burse did have a prior conviction for drug distribution, “[p]ast sales alone is insufficient to prove intent to distribute.” *Holland v. State*, 656 So.2d 1192, 1196 (Miss. 1995).

VI. CONCLUSION

Based on the arguments presented above, Mr. Burse asks the Court to grant his Petition for Writ of Certiorari in this case.

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