NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2017

ADAM BRAKE,

PETITIONER

V.

UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the district court erred when, based on impermissible double counting, it incorrectly applied a higher guideline range. In calculating Petitioner's GSR, the court imposed a four-level enhancement for stealing a firearm during a burglary and a two-level enhancement because the firearm he possessed was stolen. U.S.S.G. §2K2.1 (b)(6)(B) and U.S.S.G. § 2K2.1 (b)(4). This error was impermissible double counting because both guideline enhancements derive from the same facts and bear on the same sentencing consideration: the stolen nature of the firearm.

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The Petitioner, Adam Brake, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on September 14, 2018.

OPINION BELOW

On September 14, 2018, the Court of Appeals entered its Opinion affirming the Petitioner's conviction and sentence. Judgment is attached at Appendix 1.

JURISDICTION

On September 14, 2018, the United States Court of Appeals for the First Circuit entered its Opinion affirming Petitioner's conviction and sentence. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitutional Amendment V:

> No person shall…be deprived of life, liberty or property without due process of law…

STATEMENT OF THE FACTS

This is a Petition for Certiorari following a conviction after plea and sentence, in docket number 17-1979, to one count of Felon in Possession of a Firearm, 18 U.S.C.§§ 922(g)(1) and 924 (a)(2) and in docket number 17-1978, with Revocation of Supervised Release, 18 U.S.C. § 3583 (e)(3). In docket number 17-1979, Appellant waived indictment and was charged in a one-count information, entered on June 5, 2017 (D.E. 17-cr-65 at 2, No. 3).

On the same date, June 5, 2017, Appellant pled guilty to count one of the information (D.E. 17-cr-65 at 2, No. 10) and admitted to multiple violations of supervised release. (D.E. 13-cr-160 at 4, No. 29)

Introduction

On May 31, 2016, the Berwick Police Department (BPD) responded to a report of a burglary. The BPD stopped Petitioner who was driving a car matching a description of a car in the crime bulletin. (Revised Presentence Report, 8/17/17, at 3, para. 2, [Hereinafter "RPSR at ___"]). After a consent search of the trunk of the car, Petitioner admitted to committing several burglaries in the area. (RPSR at 3, para 2). Later that same day, Petitioner post-Miranda admitted to committing eight to ten burglaries in the Berwick area. Petitioner stated that items stolen in the burglaries were secreted at his girlfriend's parents' house in Berwick. The BPD recovered nine firearms

among other items at the location described by Petitioner. (RPSR at 3 para 3). Petitioner, who had a prior federal felony conviction for Possession with Intent to Distribute OxyContin and Oxycodone, (this conviction gave rise to Petitioner's violation of supervised release charged in Docket number 13-cr-160) was charged by information with Felon in Possession of a Firearm. (RPSR at 4, para 4).

Change of Plea and Final Revocation Hearing.

On June 5, 2017, the district court held a Change of Plea and Final Revocation Hearing. (Waiver of Indictment and Plea and Final Revocation Hearing, June 5, 2017, at 1, [Hereinafter "Plea and Revocation at__"]). Petitioner admitted to four violations of his supervised release on his 2013 conviction for Possession with Intent to distribute. (Plea and Revocation at 7). The revocation of his supervised release was based in part on the new criminal conduct of the burglaries in the Berwick area. (Plea and Revocation at 5). Petitioner also waived indictment and pled guilty pursuant to a plea agreement, to an information in 17-1979, charging Petitioner as a felon in possession of a firearm. (Plea and Revocation at 14,15).

In his plea agreement, Petitioner waived his right to appeal any sentence that does not exceed 60 months. (Plea and Revocation at 22).

According to the terms of the agreement, the government agreed to recommend a three-point acceptance of responsibility reduction and that the sentences in the Felon in Possession case should run concurrent to any sentence received on the revocation of supervised release. (Plea Agreement, 6/5/17 at 2-3).

Presentence Investigation Report

On July 24, 2017, probation filed a presentence report. Probation calculated Petitioner's base offense level as 20, added four levels for possession of more than 8 but less than 24 firearms (§2K2.1 (b)(1)(B)), two levels because the firearms possessed by Petitioner were stolen, under §2K2.1 (b)(4)), decreased three levels for acceptance of responsibility (§3E1.1(a) (b), for a total offense level of 23. (Presentence Investigation Report, 7/24/17 at 5, [Hereinafter "PSR at ___"]). Petitioner's criminal history category was a VI, resulting in a guideline sentencing range of 92-115 months imprisonment. (PSR at 19). On August 7, 2017, Petitioner filed numerous objections to the PSR. (Defendant's Objections to the Government's Presentence Investigation Report, 8/7/17, at 1-4).

On August 17, 2017, probation filed a revised PSR. Among other changes, on its own initiative, Probation added an additional four level enhancement. In paragraph 11A of the revised report probation increased

Petitioner's base offense level four levels under §2K2.1((b)(6)(B) because Petitioner possessed the firearm in connection with another felony offense, i.e. Petitioner's burglaries of the Berwick residences. (Addendum to RPSR at 2). The previous enhancements remained the same. This change resulted in a higher total offense level of 27 and sentencing guideline range of 130 to 162 months. (RPSR at 20). The enhancement under §2K2.1((b)(6)(B) resulted in a guideline sentencing range which exceeded the statutory maximum sentence of 10 years. (RPRS at 20). Petitioner objected to the imposition of §2K2.1((b)(6)(B) as retaliation for Petitioner filing multiple objections to the PSR. (Defendant's Second Objections to the Government's Presentence Investigation Report, 8/23/17, at 2).

Sentencing

On September 25, 2017, the court held a Sentencing Hearing on the revocation of supervised release and on the Felon in Possession of a Firearm conviction. (Sentencing Hearing, 9/25/2017, at 2, 7[Hereinafter "Sentencing at ___"]). Petitioner and his counsel stated that Petitioner was a heroin addict and that Petitioner committed multiple burglaries to get money to feed his heroin addiction. (Sentencing at 9, 12).

The court calculated Petitioner's guideline sentencing range. The court found the calculations as set out in the RPSR.

> The base offense level is 20. He was in possession of nine firearms, increasing the offense level to 24. The firearms were stolen, offense level is increased to 26. The defendant stole the firearms during the course of his commission of a series of felony burglaries, offense level is increased to 30. He has accepted responsibility, reducing the offense level to 27. He has a criminal history category of VI. The guideline range is 120 months. (Sentencing at 18).

The government had no objections. Petitioner reserved his earlier objections to sentence. (Sentencing at 19).

The Court sentenced Petitioner to concurrent terms of imprisonment of 84 months on the Felon in Possession count and 24 months on the supervised release count. (Sentencing at 21, 24)

Appeals Court Decision

The First Circuit Court of Appeals affirmed Petitioner's sentence. The Court held, in a case of first impressions in the First Circuit, that it is not double counting to apply a both §2 K2.1(b)(4)(A) and § 2K2.1 (b) (6)(B). (United States v. Adam Brake, Docket Nos. 17-1978, 17-1979, September 14, 2018)

REASON FOR GRANTING THE WRIT

The district court erred when, based on impermissible double counting, it incorrectly applied a higher guideline range. In calculating Petitioner's GSR, the court imposed a four-level enhancement for stealing a firearm during a burglary and a two-level enhancement because the firearm he possessed was stolen. U.S.S.G. §2K2.1 (b)(6)(B) and U.S.S.G. § 2K2.1 (b)(4). This error was impermissible double counting because both guideline enhancements derive from the same facts and bear on the same sentencing consideration: the stolen nature of the firearm.

Standard of Review

In present case the issue was not preserved below, and review is for plain error. Id. Under the plain error standard, Appellant must demonstrate: "(1) that an error occurred (2) which was clear or obvious and which not only (3) affected the defendant's substantial rights, but also (4) seriously impaired the fairness, integrity, or public reputation of judicial proceedings." United States v. Ramos-Mejia, 721 F.3d 12, 14 (1st Cir. 2013). Even under this stringent standard, Petitioner should prevail.

Argument

A sentencing court engages in impermissible double counting when it uses a single factor more than once to impose multiple increases in a Petitioner's sentence. United States v. Maisonet-Gonzalez, 785 F.3d 757,

763-64 (1st Cir.1994) (Double counting involves the use of a single factor more than once to calculate the Guideline sentencing range), United States v. Romero-Galindez, 782 F.3d 63, 72, n. 8 (1st Cir. 2015) (double counting is when the same underlying facts were applied via two separate Guideline provisions to separately enhance defendant's sentence). This Court has permitted multiple enhancements based on "common nucleus of operative facts" where the applied enhancements respond "to discrete [sentencing] concerns". United States v. Lilly, 13 F.3d 15, 19 (1st Cir. 1994), United States v. Fiume, 708 F.3d 59, 61, (1st Cir. 2013) ("It is not double counting if fact bears upon two separate sentencing considerations"). However, where the application of two guideline provisions are based on the same facts and address the same sentencing concern, applying both provisions is impermissible double counting. United States v. Sepulveda-Hernandez, 817 F.3d 30, 34-35 (1st Cir. 2016) (Double counting "in some iterations raise[s] fairness concerns"). In the present case, the court imposed both a four-level enhancement under USSG §2K2.1(b)(6)(B)[1], because Petitioner stole the firearms during the commission of a series of burglaries and a two-level

[1] The relevant portion of this provision states: "If the defendant- used or possessed any firearm or ammunition in connection with another felony offense; increase by 4 levels. USSG §2K2.1(b)(6)(B)

enhancement under USSG §2K2.1(b)(4)[2] because the firearms Petitioner possessed were stolen. (Sentencing at 18). In the present case, imposing increases to Petitioner's sentence under both enhancements was impermissible double counting because both enhancements were responding to the same sentencing concern: the stole nature of the firearm. United States v. Plaza-Garcia, 914 F.2d 345, 347 (1st Cir.1990) (two separate increases to defendant's offense level, both based on victim's age, is double counting), Fiume, 708 F.3d 61 (Multiple sentencing adjustments may derive from "the same nucleus of operative facts" if each is "responding to discrete sentencing concerns").

"In the world of criminal sentencing, double counting is a phenomenon that is less sinister than the name implies" and double counting is "often perfectly proper", Fiume, 708 F.3d at 61, citing United States v. Zapata, 1 F.3d 46, 47 (1st Cir.1993). This Court has stated that sentencing courts may increase a defendant's sentence multiple times for the same set of facts if the multiple increases to a defendant's sentence are "responding to discrete sentencing concerns." Fiume, 708 F.3d at 61, citing United States v. Lilly, 13 F.3d 15, 19 (1st Cir. 1994).

[2] The relevant portion of this provision states: "If any firearm was stolen, increase by two levels."

Ordinarily, the two sentencing enhancements at issue here address discrete sentencing considerations. For example, both 2K2.1 (b)(4) and 2K2.1(b)(6)(B) may both be applied without impermissibly double counting where a defendant uses a stolen gun during the commission of a criminal threatening offense. United States v. Colby, 882 F.3d 267 (1st Cir.2018). In this situation each enhancement addresses a discrete sentencing concern. Imposing an enhancement under §2K2.1(b)(6)(B) punishes a defendant for using the gun to criminally threaten someone. Id. at 273. Imposing an enhancement under §2K2.1(b)(4) punishes a defendant for the stolen nature of the weapon. Id. at 271.

In the present case, however, the two sentencing enhancements as applied are responding to the same sentencing consideration. This is because of the particular iteration of §2K2.1(b)(6)(B) which the court applied in the present case. The application notes to §2K2.1 (b)(6)(B) provide that a defendant possesses a gun "in connection with another felony" where defendant commits a burglary and "during the course of a burglary, finds and takes a firearm, *even if defendant did not engage in any other conduct with that firearm during the course of the burglary*." USSG §2K2.1(b)(6)(B), Application note 14 (B). Thus, in this instance, a defendant receives the four-level increase because he stole the firearm during the

burglary. His stealing the firearm is how he "possessed the weapon in connection with another felony". USSG §2K2.1(b)(6)(B). The burglary is only relevant as a sentencing enhancement to the charge of Felon in Possession because of a defendant's action in stealing a firearm during the burglary.[3] The commission of a burglary, standing alone, has no power to increase defendant's sentence under §2K2.1(b)(6)(B). For the enhancement under this iteration of §2K2.1(b)(6)(B) to apply, *it is necessary that the firearm be stolen*. United States v. Brown, 169 F. 3d 89, 92-94 (1st Cir.1999). The stolen nature of the firearm is the sentencing concern addressed in this iteration of §2K2.1(b)(6)(B).

Likewise, the sentencing concern underlying a §2K2.1(b)(4) enhancement is the stolen nature of the firearm. Colby, 882 F.3d at 272 ("we define "stolen" to encompass all felonious or wrongful takings with the intent to deprive the owner of the rights and benefits of ownership") (internal quotations omitted). When the court and probation calculated Petitioner's guideline sentence to include an enhancement under both §2K2.1(b)(6)(B) and §2K2.1(b)(4) the court engaged in impermissible double counting because the §2K2.1(b)(6)(B) enhancement, as applied, has

[3] If a defendant steals only jewelry or computers, his guideline range could not be increased for the burglary.

already taken into account that the firearm was stolen.[4] Both enhancements serve the same purpose in the sentencing calculus.

The district court's application of an incorrect sentencing guideline was plain error. An error occurred, and it was clear. United State v. Paneto, 661 F.3d 709, 715 (1st Cir. 2011) (unpreserved error in imposing an incorrect higher guideline range was plain error. Sentencing court is "obligated to calculate the GSR correctly"). The error prejudiced Petitioner and affected his substantial rights. Molina-Martinez v. United States, 136 S. Ct. 1338, 1346-47 (2016) ("[A] defendant can rely on the application of an incorrect Guidelines range to show an effect on his substantial rights"). In the present case, the court calculated Petitioner's guideline range as 130-162 months. However, because the statutory maximum sentence of 120 months was lower than the calculated guideline range, the statutory maximum became the guideline term. (RPSR at 20, para 64). If Petitioner

[4] The First Circuit Court has stated that "the Commission's ready resort to explicitly stated prohibitions against double counting signals that courts should go quite slowly in implying further such prohibitions where none are written." Lilly, 13 F.3d at 20. It is true that §2K2.1 does not contain an explicit prohibition against double counting these two enhancements. United States v. McCarty, 475 F.3d 39, 46 (1st Cir.2007). However, when the Commission wrote this guideline many Courts of Appeals ruled that §2K2.1(b)(6)(B) did not apply to a defendant who stole guns during the commission of a burglary. It was not until 2006, that the Commission clarified the issue. U.S.S.G. §2K2.1(b)(6)(B) cmt. N. 14(b). Moreover, as the Lilly Court stated "[W]hen neither an explicit prohibition against double counting nor a compelling basis for implying such a prohibition exists clearly indicated adjustments…can be imposed". (emphasis added). In this case, there is a compelling basis for applying such a prohibition. Lilly, 13 F.3d. at 19.

had not received the 2k2.1(b)(4) enhancement for a stolen firearm, Petitioner's guideline sentencing range would have been 110-137 months. The properly calculated guideline sentencing range of 110-137 months is lower than the guideline term of 120 months, therefore Petitioner was prejudiced. Molina-Martinez, 136 S.Ct. at 1346-47 ("a defendant who has shown that the district court mistakenly deemed applicable an incorrect, higher Guidelines range has demonstrated a reasonable probability of a different outcome"). Molina-Martinez, 136 S.Ct. at 1347 ("When a defendant is sentenced under an incorrect Guidelines range – whether or not the defendant's ultimate sentence falls within the correct range - the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error."). The court's application of an incorrect guideline range, its understanding that Petitioner's guideline range calculation exceeded the statutory maximum, and its decision to depart downward from the statutory maximum of 120 months, all affected the imposition of the district court's ultimate sentence. Id. ("From the centrality of the Guidelines in the sentencing process it must follow that, when a defendant shows that the district court used an incorrect range, he should not be barred from relief on appeal simply

because there is no other evidence that the sentencing outcome would have been different had the correct range been used").

The district court's incorrect calculation of Petitioner's guideline range affected his substantial rights. Therefore, this case should be remanded for resentencing.

CONCLUSION

For the above reasons this Court should grant the Petition for a Writ of Certiorari.

Dated at Portland, Maine this 9th day of October 2018.

____/s/Jane E. Lee_____

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APPENDIX