No. __-_____

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES CASTLEMAN GIPSON,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

APPENDIX

INDEX TO APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

FORT WORTH DIVISION

UNITED STATES OF AMERICA,	)	CASE NO. 4:17-CR-025-A
	)	
Government,	)	
	)	FORT WORTH, TEXAS
VERSUS	)	
	)	JUNE 23, 2017
JAMES CASTLEMAN GIPSON,	)	
	)	
Defendant.	)	9:07 A.M.

VOLUME 1 OF 1
TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE JOHN McBRYDE
UNITED STATES DISTRICT COURT JUDGE

A P P E A R A N C E S:

FOR THE GOVERNMENT:
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Proceedings reported by mechanical stenography, transcript produced by computer.

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P R O C E E D I N G S

June 23, 2017 - 9:07 a.m.

COURT SECURITY OFFICER: All rise.

Hear ye, hear ye, hear ye, the United States District Court for the Northern District of Texas at Fort Worth is now in session, the Honorable John McBryde presiding.

Let us pray. God bless the United States and this Honorable Court. Amen.

Please be seated.

THE COURT: Good morning.

ALL PRESENT: Morning, Your Honor.

THE COURT: We're going to start with a sentencing and it's Case Number 4:17-CR-025-A. It's United States of America versus James Castleman Gipson.

And Mr. Weimer's here for the government, and Mr. Delgado is here for the defendant.

I'll have the defendant state his full name for the record.

THE DEFENDANT: James Castleman Gipson.

THE COURT: Okay. You appeared before me on March 10, 2017, when you entered a plea of guilty to the offense charged by a one-count indictment in this case and that was the offense of felon in possession of a firearm. Of course, we're here today for sentencing based on the conviction resulting from that plea of guilty.

Mr. Delgado, did you and your client receive in a timely manner the Presentence Report and the addendum to it?

MR. DELGADO: We did, Your Honor.

THE COURT: Okay. And did both of you read those items and then discuss them with each other?

MR. DELGADO: We did, Your Honor.

THE COURT: I believe the only objection had to do with the paragraphs of the Presentence Report that suggested the possibility of a sentence above the top of the guideline range.

Have I interpreted them correctly, Mr. Delgado?

MR. DELGADO: You have, Your Honor.

THE COURT: Okay. I'm going to hold that ruling on that in abeyance. I tentatively have concluded, and I think I told y'all in an order I issued on June 15, that the defendant should receive a sentence of imprisonment significantly above the top of the advisory guideline range, but I'm going to hear from you further on that.

In the meantime, there being no further objections, the Court adopts as the fact findings of the Court the facts set forth in the Presentence Report as modified or supplemented by the addendum, and adopts as the conclusions of the Court the conclusions expressed in the Presentence Report as modified or supplemented by the addendum, except in each instance I'm holding open or going to hear from the parties

further on the subject of a sentence above the top of the guideline range.

The Court concludes that the total offense level is 13; that the Criminal History Category is III; that the advisory guideline imprisonment range is 18 to 24 months; the supervised release range is 1 to 3 years; the fine range is $5,500 to $55,000; and that a special assessment of $100 is mandatory.

Do you have any evidence you want to offer, Mr. Delgado, on the subject of the possibility of a sentence above the top of the guideline range?

MR. DELGADO: Just one character witness, Your Honor.

THE COURT: Okay.

MR. DELGADO: That would be the defendant's mother, who is here.

THE COURT: Okay. Do you just want her to speak from the podium there, or do you want her to actually be sworn and testify?

MR. DELGADO: Speak from the podium.

THE COURT: Okay. Why don't your client and you can be --

MR. DELGADO: We call Mary Gipson.

THE COURT: She can come up now, if she would like.

MS. MARY GIPSON: Good morning, Your Honor.

THE COURT: Good morning. Why don't you say what your name is and what city you live in.

MS. MARY GIPSON: My name is Mary Gipson, and I live in Springtown, Texas.

THE COURT: Okay. And make whatever statement you would like to make on behalf of your son.

MS. MARY GIPSON: Well, my husband, R.C., and I, we've raised him to be around guns and to have respect for guns, and he's had respect all his life. In December, I was diagnosed with Guillain-Barre' Syndrome, so he had been helping around our place doing the chores that his dad was doing so that R.C. could help me. This is a very debilitating disease, and it's something that won't go away. I'll have it the rest of my life, so we had intended for him to help for however long I needed him.

THE COURT: Okay. Okay. Well, thank you for being here.

MS. MARY GIPSON: I'm sorry?

THE COURT: Thank you for being here.

MS. MARY GIPSON: Thank you.

THE COURT: Okay. You can come back to the podium with your client, Mr. Delgado.

You can make whatever statement you would like to make on behalf of your client at this time, Mr. Delgado, and include in it anything you want to say on the subject of a

possible sentence above the top of the guideline range.

MR. DELGADO: Thank you, Your Honor.

Mr. Gipson prepared some remarks that he would like me, instead of him, to read to the Court, and before I do that, I received two character letters after the deadline to submit the letters, so I did not submit them, but I would like to summarize them to the Court. They are from a friend of Mr. Gipson and a neighbor of the family.

And in the letters they describe how Mr. Gipson is the type of person that would do anything in his power to help those in need. For instance, when his neighbor met him, that person had lost her house, and Mr. Gipson didn't hesitate to offer help and a place to stay.

A few of the qualities that this person -- her name is Kimberly Reed -- would like to highlight for the Court is that Mr. Gipson, how his family, Mr. Gipson's family is very important to him. How his parents are the two most important people in the world to him. How he's very respectful, caring, giving, thoughtful, honest, and loyal, and how it is hard to find people with those qualities nowadays.

The other letter, in summary, from another friend of the family states how Mr. Gipson has never shown the writer of the letter, whose name is Shawn Wiggins, any signs of danger to him or to his family, and how Mr. Gipson has -- how Mr. Wiggins does not question Mr. Gipson's integrity and love

for his family.

Now, Mr. Gipson, himself, would like the Court to know, first off, that he would like to thank the Court for taking the time to hear these statements today and to consider what he has to say. He would like the Court, his family, and anyone affected by this situation to know that he is incredibly sorry.

When he -- they would bring him, he had -- was around guns and guns were a normal part of his life. His possession, he knows was wrong, but it was entirely for the purpose of shooting snakes in his parents' property.

And I think the Court is aware of this, but the property is out in Parker County. It's a rather large piece of land. Guns have been a normal part of his life, and to be honest, he -- it didn't occur to him that it would not be an option because they were so normal to him.

Regardless, he understands that it was wrong and unacceptable, and he fully accepts responsibility for his actions. He can only hope that the Court will consider what he has stated through me just now and how sorry, truly sorry he is, that this ever happened.

Now, in summary, Your Honor, from my part, I would just say that, as both his mother and Mr. Gipson stated, he grew up here in the state of Texas in Parker County where gun possession is normal, and in some instances encouraged for

self-protection and defense and for sporting. It's commonplace where he comes from and where we all live.

In this case, the gun at issue was not used in connection with any offense. It was found in his residence, stored. He didn't even have it on him outside of the residence. It was discovered while the agents were looking -- executing a search warrant, so it's not like they were looking for this particular gun because he had used it in a way that would be problematic. It was simply at the residence, and he has stated that he used it to shoot snakes at the property.

The guidelines take into account this kind of simple possession where the gun is not connected to any other activity, and it also -- they also take into account the device that was found on the property. We think that a sentence within the guidelines would be appropriate.

I would like to address the concerns the Court has with the -- I'm not sure if it's the criminal history, I think that's what it is, and I'm not sure if now is the right time to do it. I would like to do it --

THE COURT: Yes, I want you to go ahead at this time and say what you want to say on the possibility of a sentence above the top of the guideline range, and his criminal history is my main concern.

MR. DELGADO: Okay. And that's what I figured from

the Court's order and the PSR.

So there are three -- only three offenses that did not receive criminal history points and that were not taken into account into the guidelines calculation.

The PSR says that one of them was dismissed, and the PSR finds by a preponderance of the evidence that the offense did happen, and I know that the guidelines permit that to be the case. I would just point out for the Court two things, one perhaps more important than the other.

First, the offense was dismissed as part of a plea agreement. My understanding is that if he had been sentenced and convicted of both offenses, he probably would have been sentenced on the same day and that he would not have received criminal history points.

But more importantly, Your Honor, he has four criminal history points and that just places him in Criminal History Category III. He -- if he received two additional points for any one of these offenses, he would still be in Criminal History Category III, and we would have the same guidelines range.

Now, for the other offenses, one of them was no billed, meaning the grand jury did not think there was probable cause to go forward, so I think it would be hard now, looking at a cold record, and only a document, to conclude by a preponderance of the evidence, which is a higher standard,

that that offense did take place when a group of citizens receiving a presentation from the prosecutor and looking at the evidence concluded that they could not go forward.

And the third offense remains pending, and I have talked to the prosecutor in Parker County. They tell me that the investigation is ongoing and that they have not made a charging decision. There are only two paragraphs -- sorry. So I don't think it would be proper to consider that, especially when in the PSR he maintains that he did not participate in this burglary.

For those reasons, Your Honor, even if the Court is concerned that the criminal history points may not reflect prior misconduct, he's still -- he's barely in Criminal History Category III, so we still have two additional points for him to remain in that category and to be within that guidelines sentence.

THE COURT: Mr. Gipson, you have the right to make any statement or presentation you would like to make on the subject of mitigation, that is, the things you think the Court ought to take into account in determining what sentence to impose, or on the subject of sentencing more generally, and I'll invite you at this time to do that.

THE DEFENDANT: I just wanted to take the time to tell you I appreciate your time, and I apologize to the Court for anything I've done.

THE COURT: Okay. Thank you.

Well, I still have a concern about the criminal history. It starts -- of course, the offense of conviction, and then in paragraph 42 of the Presentence Report, it describes the conduct of the defendant, which apparently was currently, at the time of his apprehension, that involved distribution of methamphetamine, and apparently a regular distribution activity on his part and that's certainly a matter of concern.

The defendant is 38 years of age, and it was only 4 years ago, approximately, when he was 34 years of age, that he pleaded guilty to the offense of theft and received a -- really a slap on the wrist. It was an 18-month deferred adjudication, and he was put on deferred adjudication probation and then that was revoked, so he must have violated some condition of that, and then he got another light sentence, 90 days imprisonment.

And then at age 37, I guess, what, about a year ago, he was actually apprehended and pleaded guilty to the offense of possession of a controlled substance, and that's amphetamine in that case, and he got 180-day sentence of imprisonment.

And then at age 37, apparently he had been -- his criminal activity has picked up as he's grown older. He entered a -- he admitted his guilt of the offense of unlawful

carrying of a weapon as a part of a plea in bar, so he didn't get any criminal history points for that, but he admitted his guilt.

And then he has a -- that burglary of a habitation offense pending, and the description of that offense is in paragraph 17 -- let's see, I believe it's 17, and maybe other paragraphs, of the Presentence Report. Apparently he entered -- he says other people were the main ones that were involved in the burglary, but he entered the facility and removed a box labeled explosives, so in a sense he was involved in that same activity, and I can so find from a preponderance of the evidence.

And then again at age 37, he was charged with aggravated kidnapping for ransom reward. He was no billed on that, but when I read the description of the reports of his conduct, I can tell from a preponderance of the evidence that he committed a significant part of the activities that he was charged with then.

For example, I can tell from a preponderance of the evidence that the defendant struck somebody by the name of McCleary, and had a knife as he was hitting him, and then he stabbed McCleary in the right thigh. He engaged in some serious conduct and that's -- these things are recent.

And then he directed the person that he had assaulted to call his father and tell his father that they

wanted a ransom and finally the defendant said he was willing to accept the father's truck as a ransom, and I find from a preponderance of the evidence that those things happened.

So I do think the defendant should receive a sentence greater than the top of the advisory guideline range.

MR. DELGADO: Your Honor, before the Court imposes the sentence, given that we have already reviewed the criminal history, I would like to object to consideration of the nonrelevant conduct as violating the due process clause of the Fifth Amendment and his confrontation rights under the Sixth Amendment.

THE COURT: I had initially planned to have a sentence maybe twice the top of the advisory guideline range, but after having heard from his mother and the statements the defendant and you made, I'm satisfied that a sentence of 36 months imprisonment probably will get the job done, combined with a term of supervised release of 3 years. Of course, that starts when he's completed his sentence of imprisonment, and that would be combined with payment of a special assessment of $100. That's payable immediately.

I think a sentence of the kind I've described is one that does adequately and appropriately address all the factors the Court should consider in sentencing under 18 United States Code Section 3553(a). That's the sentence that in my view is sufficient, but not greater than necessary to achieve the

objectives of sentencing, particularly of punishment, deterrence, and protection of the public, so that's the sentence I'm going to impose.

The Court orders and adjudges that the defendant be committed to the custody of the Bureau of Prisons to serve a term of imprisonment of 36 months.

Now, he has a case pending, the one that I mentioned earlier that's in paragraph 50 of the Presentence Report. If he receives a sentence in that case, of course, this sentence that I'm imposing will be consecutive to that sentence.

I'm also ordering that the defendant serve a term of supervised release of 3 years, and the conditions of that will be the standard conditions -- and, of course, that will start when he's completed his sentence of imprisonment, and the conditions of that supervised release will be the standard conditions that will be set forth in the judgment of conviction and sentence, and the following additional conditions:

The defendant shall not commit another federal, state, or local crime.

He shall not unlawfully possess a controlled substance.

He shall cooperate in the collection of DNA as directed by the probation officer.

He shall participate in mental health treatment

services as directed by the probation officer until successfully discharged, and those services may include prescribed medications by a licensed physician, and he'll contribute to the cost of those services at the rate of at least $25 a month.

He shall refrain from any unlawful use of a controlled substance and shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter as directed by the probation officer.

And then the final condition, the defendant shall participate in a program approved by the probation officer for treatment of narcotic or drug or alcohol dependency that will include testing for the detection of substance use, and he shall abstain from the use of alcohol and all other intoxicants during and after completion of that treatment, and he'll contribute to the cost of those services at the rate of at least $25 a month.

I'm ordering that the defendant pay a special assessment of $100. That's payable immediately to the United States of America through the office of the clerk of court here in Fort Worth.

Mr. Gipson, you have the right to appeal from the sentence I've imposed, if you're dissatisfied with it. That appeal would be to the United States Court of Appeals for the Fifth Circuit.

You have the right to appeal in forma pauperis, that means without any cost to you, if you were to qualify for it, and presumably you would. You have the right to have the clerk of court file a notice of appeal for you, and the clerk would do that forthwith, if you were to specifically request it.

Let me double-check something here.

Okay. You and your attorney have been given a form that outlines certain rights and obligations in reference to an appeal. If you haven't already done so, I want the two of you to review that and be sure you understand it, and once both of you are satisfied you understand it, I want both of you to sign it and return it to the court coordinator.

Has that been done?

MR. DELGADO: Yes, Your Honor.

THE COURT: Okay. Okay. The defendant's remanded to custody, and the attorneys are excused.

MR. DELGADO: Your Honor, just for the record we do object to the sentence as procedurally and substantively unreasonable for the reasons stated in the objection I filed on June 26 and today at the hearing. Thank you.

(End of Proceedings)

REPORTER'S CERTIFICATE

I, Debra G. Saenz, CSR, RMR, CRR, certify that the foregoing is a true and correct transcript from the record of proceedings in the foregoing entitled matter.

I further certify that the transcript fees format comply with those prescribed by the Court and the Judicial Conference of the United States.

Signed this 16th day of September, 2017.

/s/ Debra G. Saenz

DEBRA G. SAENZ, CSR, RMR, CRR
Texas CSR No. 3158
Official Court Reporter
The Northern District of Texas
Fort Worth Division

CSR Expires: 12/31/17

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APPENDIX B

United States District Court

Northern District of Texas
Fort Worth Division

UNITED STATES OF AMERICA §

v. § Case Number: 4:17-CR-025-A(01)

JAMES CASTLEMAN GIPSON §

JUDGMENT IN A CRIMINAL CASE

The government was represented by Assistant United States Attorney Jay S. Weimer. The defendant, JAMES CASTLEMAN GIPSON, was represented by Federal Public Defender through Assistant Federal Public Defender Leandro Delgado.

The defendant pleaded guilty on March 10, 2017 to the one count indictment filed on February 15, 2017. Accordingly, the court ORDERS that the defendant be, and is hereby, adjudged guilty of such count involving the following offense:

Title & Section / Nature of Offense	Date Offense Concluded	Count
18 U.S.C. § 922(g)(1) Felon in Possession of Fircarm	January 26, 2017	1

As pronounced and imposed on June 23, 2017, the defendant is sentenced as provided in this judgment.

The court ORDERS that the defendant immediately pay to the United States, through the Clerk of this Court, a special assessment of $100.00.

The court further ORDERS that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence address, or mailing address, as set forth below, until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court, through the clerk of this court, and the Attorney General, through the United States Attorney for this district, of any material change in the defendant's economic circumstances.

IMPRISONMENT

The court further ORDERS that the defendant be, and is hereby, committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 36 months to run consecutively to any sentence imposed in the pending charge for Burglary of Habitation in the District Court in Parker County, Texas.

The defendant is remanded to the custody of the United States Marshal.

SUPERVISED RELEASE

The court further ORDERS that, upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years and that while on supervised release, the defendant shall comply with the following conditions:

1. The defendant shall not commit another federal, state, or local crime.

2. The defendant shall not unlawfully possess a controlled substance.

3. The defendant shall cooperate in the collection of DNA as directed by the U.S. Probation Officer, as authorized by the Justice for All Act of 2004.

4. The defendant shall participate in mental health treatment services as directed by the probation officer until successfully discharged, which services may include prescribed medications by a licensed physician, with the defendant contributing to the costs of services rendered at a rate of at least $25 per month.

5. The defendant shall refrain from any unlawful use of a controlled substance, submitting to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer pursuant to the mandatory drug testing provision of the 1994 crime bill.

6. The defendant shall participate in a program approved by the probation officer for treatment of narcotic or drug or alcohol dependency that will include testing for the detection of substance use, abstaining from the use of alcohol and all other intoxicants during and after completion of treatment, contributing to the costs of services rendered at the rate of at least $25 per month.

7. The defendant shall also comply with the Standard Conditions of Supervision as hereinafter set forth.

Standard Conditions of Supervision

1. The defendant shall report in person to the probation office in the district to which the defendant is released within seventy-two (72) hours of release from the custody of the Bureau of Prisons.

2. The defendant shall not possess a firearm, destructive device, or other dangerous weapon.

3. The defendant shall provide to the U.S. Probation Officer any requested financial information.

4. The defendant shall not leave the judicial district where the defendant is being supervised without the permission of the Court or U.S. Probation Officer.

5. The defendant shall report to the U.S. Probation Officer as directed by the court or U.S. Probation Officer and shall submit a truthful and complete written report within the first five (5) days of each month.

6. The defendant shall answer truthfully all inquiries by the U.S. Probation Officer and follow the instructions of the U.S. Probation Officer.

7. The defendant shall support his dependents and meet other family responsibilities.

8. The defendant shall work regularly at a lawful occupation unless excused by the U.S. Probation Officer for schooling, training, or other acceptable reasons.

9. The defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment.

10. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.

11. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

12. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the U.S. Probation Officer.

13. The defendant shall permit a probation officer to visit him at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the U.S. Probation Officer.

14. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer.

15. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

16. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

The court hereby directs the probation officer to provide defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, as contemplated and required by 18 U.S.C. § 3583(f).

FINE

The court did not order a fine because the defendant does not have the financial resource or future earning capacity to pay a fine.

STATEMENT OF REASONS

The "Statement of Reasons" and personal information about the defendant are set forth on the attachment to this judgment.

Signed this the 23rd day of June, 2017.

JOHN McBRYDE
UNITED STATES DISTRICT JUDGE

RETURN

I have executed the imprisonment part of this Judgment as follows:

_____

_____

_____

Defendant delivered on _____, 2017 to _____
at _____, with a certified copy of this Judgment.

United States Marshal for the
Northern District of Texas

By _____
Deputy United States Marshal

APPENDIX C

United States v. Gipson, 2018 U.S. App. LEXIS 23092

Copy Citation

United States Court of Appeals for the Fifth Circuit

August 20, 2018, Filed

No. 17-10753

Reporter

2018 U.S. App. LEXIS 23092 * | __ Fed.Appx. __ | 2018 WL 4002029

UNITED STATES OF AMERICA, Plaintiff - Appellee v. JAMES CASTLEMAN GIPSON, Defendant - Appellant

Notice: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: **[*1]** Appeal from the United States District Court for the Northern District of Texas.

Disposition: AFFIRMED.

Core Terms

district court, sentence, grand jury, sufficient indicia of reliability, kidnapping, arrest, no-bill, preponderance of evidence, aggravated kidnapping, activities, reliable, tattoos, indict, above-Guidelines, sentencing court, significant part, preponderance, exculpatory

Case Summary

Overview

HOLDINGS: [1]-The above-guidelines sentence imposed by the district court for aggravated kidnapping after the grand jury's no bill was proper because the district court's conclusion that from a preponderance of evidence that defendant committed a significant part of the activities he was charged with was plausible. The defendant's presentence report (PSR) bore sufficient indicia of reliability to support the district court's conclusion and bare fact that the victim did not positively identify defendant as his assailant in a photo lineup did not deprive the PSR of requisite indicia of reliability. The district court's determination rested on presumptively reliable factual findings contained in the PSR—was in no way irreconcilable with grand jury's decision not to indict defendant for a particular offense. Thus, district court did not clearly err in imposing

an above-Guidelines sentence.

Outcome
Decision affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Findings of Fact

HN1 **Clearly Erroneous Review, Findings of Fact**
An appellate court reviews a district courts factual finding for clear error. There is no clear error if the district court's finding is plausible in light of the record as a whole. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Evidence
View more legal topics

HN2 **Imposition of Sentence, Evidence**
Defendant's presentence report (PSR) generally bear sufficient indicia of reliability to be considered as evidence by the sentencing judge in making factual determinations required by the sentencing guidelines. However, the mere inclusion in the PSR does not convert facts lacking an adequate evidentiary basis with sufficient indicia of reliability into facts a district court may rely upon at sentencing. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Criminal Law & Procedure > Trials > Burdens of Proof > Defense
View more legal topics

HN3 **Burdens of Proof, Defense**
Once the initial indicia-of-reliability requirement is satisfied, the defendant bears the burden of showing that the information in the defendant's presentence report (PSR) relied on by the district court is materially untrue. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Criminal Law & Procedure > ... > Procedures > Return of Indictments > Refusal to Indict

HN4 **Return of Indictments, Refusal to Indict**
A grand jury's no-bill is a decision not to charge the accused with a particular offense, not a judgment that no unlawful conduct whatsoever occurred. Indeed, at Texas law, a Grand Jury's no-bill is merely a finding that the specific evidence brought before the particular Grand Jury did not convince them to formally charge the accused with the offense alleged. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Counsel: For UNITED STATES OF AMERICA, Plaintiff - Appellee: Jay Stevenson Weimer, Assistant U.S. Attorney, U.S. Attorney's Office, Northern District of Texas, Fort Worth, TX; James Wesley Hendrix, Assistant U.S. Attorney, U.S. Attorney's Office, Northern District of Texas, Dallas, TX.

For JAMES CASTLEMAN GIPSON, Defendant - Appellant: Kevin Joel Page, Federal Public Defender's Office, Northern District of Texas, Dallas, TX.

Judges: Before CLEMENT, HIGGINSON, and HO, Circuit Judges. STEPHEN A. HIGGINSON, Circuit Judge, dissenting.

Opinion

PER CURIAM:[*]

Appellant James Gipson pled guilty to being a felon in possession of a firearm. The district court subsequently imposed an above-Guidelines sentence, and made reference during sentencing to three prior offenses for which Gipson was charged but not convicted. One of those three offenses—an aggravated kidnapping charge—had been "no-billed": the grand jury heard evidence but declined to indict Gipson. Nonetheless, over objection from Gipson's attorney, the district court concluded that it could "tell from a preponderance of the evidence that he committed a significant part of the **[*2]** activities that he was charged with then."

On appeal, Gipson challenges the sentence imposed by the district court. He argues that because a grand jury found there was no probable cause to indict him for aggravated kidnapping, the district court could not have found by a preponderance of the evidence that he committed "a significant part of the activities that he was charged with."

At issue is the district court's factual finding—namely, its determination that Gipson did indeed commit the aforementioned activities. ***HN1*** We review that finding for clear error. *United States v. Harris*, 702 F.3d 226, 229 (5th Cir. 2012). "There is no clear error if the district court's finding is plausible in light of the record as a whole." *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 764 (5th Cir. 2008) (citation omitted).

We conclude that the district court's finding was plausible. As a general rule, "[i]n determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, *any* information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law." U.S.S.G. § 1B1.4 (emphasis added).

Here, in reaching its decision to impose an above-Guidelines sentence, the district court relied on the presentence report prepared **[*3]** by the government. We have long recognized that ***HN2*** such reports generally bear "sufficient indicia of reliability to be considered as evidence by the sentencing judge in making factual determinations required by the sentencing guidelines." *United States v. Trujillo*, 502 F.3d 353, 357 (5th Cir. 2007) (citation omitted). However, we note that "mere inclusion in the PSR does not convert facts lacking an adequate evidentiary basis with sufficient indicia of reliability into facts a district court may rely upon at sentencing." *United States v. Harris*, 702 F.3d 226, 230 n.2 (5th Cir. 2012).

In this case, the PSR bore sufficient indicia of reliability to support the district court's conclusion. The PSR explained how witness testimony corroborated the victim's assertion that Gipson was present at the scene of the alleged attack. Moreover, Gipson himself possessed "numerous tattoos identified by [the victim] as tattoos observed at the time of his assault." The bare fact that the victim did not positively identify Gipson as his assailant in a photo lineup does not deprive the PSR of the requisite indicia of reliability—after all, the victim apparently did not disagree with the witness testimony cited in the PSR that placed Gipson at the scene of the attack, nor did the victim disagree that the tattoos he identified **[*4]** match the tattoos found on Gipson. *Cf. United States v. Toney*, 440 F.2d 590, 591 (6th Cir. 1971) ("When a man is actually seen in court, his expression, the glance from his eyes, the movement of his facial features may be, to a witness, much more convincing that he has seen that man before than observations of a photograph taken of the accused, or views of him at a 'line-up' or police 'show-up.'").

HN3 Once the initial indicia-of-reliability requirement is satisfied, the defendant "bears the burden of showing that the information in the PSR relied on by the district court is materially untrue." *United States v. Valencia*, 44 F.3d 269, 274 (5th Cir. 1995) (citation omitted). Yet Gipson has put forth no evidence to that effect. The PSR was therefore a sufficient basis for the district court's determination.

To be sure, as the dissenting opinion makes clear, at least one of us would not have reached this result, had we been placed in the role of the sentencing court. But it was not clear error for the district court to do so, given the evidence cited in the PSR and the absence of any actual contradictory evidence.

That leaves the question of the grand jury's no-bill. And Gipson's argument on this point elides an important distinction: ***HN4*** A grand jury's no-bill is a decision not to charge the accused with a *particular* **[*5]** *offense*,

not a judgment that *no unlawful conduct whatsoever* occurred. Indeed, at Texas law, "[a] Grand Jury's no-bill is merely a finding that the specific evidence brought before the particular Grand Jury did not convince them to formally charge the accused with the offense alleged." *Rachal v. State*, 917 S.W.2d 799, 807 (Tex. Crim. App. 1996).

In this case, the district court did not find that Gipson committed the *offense* of aggravated kidnapping. Rather, it simply found by a preponderance of the evidence that Gipson "committed a significant part of the activities that he was charged with then." This determination—which, as noted, rested on the presumptively reliable factual findings contained in the PSR—was in no way irreconcilable with the grand jury's decision not to indict Gipson for a particular offense. Thus, the district court did not clearly err in imposing an above-Guidelines sentence.

AFFIRMED.

Dissent by: STEPHEN A. HIGGINSON

Dissent

STEPHEN A. HIGGINSON, Circuit Judge, dissenting:

Our federal criminal justice system overwhelmingly assigns prison terms after guilty pleas based on facts assessed by judges alone, and only to a preponderance, at sentencing hearings. For that reason, we have cautioned sentencing courts not to rely, without inquiry, on unreliable **[*6]** PSR assertions when making factual findings about uncharged arrests.

I.

The district court staked its above-guidelines sentence on a summary of Gipson's arrest record given in Gipson's PSR. But the PSR simply repeats a police report's unconfirmed statements about Gipson's unrelated, unindicted arrest for the alleged crime of "Aggravated Kidnapping for Ransom/Reward." (In another section the PSR describes the allegation as "Aggravated Kidnapping - Deadly Weapon.") And critical to this case, the PSR affirmatively discloses facts that cast significant doubt on whether Gipson committed the kidnapping. Although the police report recounted that Gipson "possessed numerous tattoos identified by [the victim] as tattoos identified at the time of [the] assault," the alleged kidnapping victim failed to identify Gipson (and another alleged assailant) in a photograph lineup—despite claiming to have been face-to-face with both.[1] Unsurprisingly, then, when Texas sought to indict Gipson, a Texas grand jury "[n]o-billed" the charge.

Yet, without resolving these inconsistencies, the PSR asserted "by a preponderance of the evidence" that Gipson was the kidnapper.

Gipson objected.

Notably, **[*7]** the Government responded that it would *not* rely on the alleged kidnapping as a basis for an above-guidelines sentence.

Also notably, the probation office acknowledged that it had "no further information" about Gipson's uncharged conduct.

Despite the PSR's exculpatory statements, Gipson's objection, the government's disclaimer, and the probation office's candid concession that it lacked other evidence, the sentencing court still relied on the no-billed offense to impose an above-guidelines sentence. Without conducting any independent inquiry—and without mentioning the tattoos on which the majority opinion now depends—the district court imposed a sentence one-and-a-half times higher than the top of Gipson's guidelines range. Even then the district court did not claim to contradict the grand jury; the court observed instead that it "c[ould] tell from a preponderance of the evidence"—i.e., the PSR's description of a police report—that Gipson committed "a significant part of the activities that he was charged with," namely "str[iking]," "stabb[ing]," "assault[ing]," and attempting to "ransom" the alleged kidnapping victim.

I would hold that the district court reversibly erred.

II.

Due process **[*8]** requires the Government to prove sentencing facts by a preponderance of evidence. *E.g.*, *United States v. Windless*, 719 F.3d 415, 420 (5th Cir. 2013). The sentencing court may base its fact-findings on "any information [that] bears sufficient indicia of reliability to support its probable accuracy." *United States v. Harris*, 702 F.3d 226, 230 (5th Cir. 2012) (quoting *United States v. Solis*, 299 F.3d 420, 455 (5th Cir. 2002)).

As the majority opinion correctly observes, PSRs often clear that threshold. But not always. A PSR does not receive unfettered deference. *See id.*

To help district courts determine when to discount or adopt a PSR's assertions, this circuit has fashioned a two-step test—one that I respectfully perceive the district court overlooked.

At step one, "the district court must determine whether [the PSR's] factual recitation has an adequate evidentiary basis with sufficient indicia of reliability." *Id.* at 231 (citing *United States v. Trujillo*, 502 F.3d 353, 357 (5th Cir. 2007)). This is the court's duty, not the defendant's. *Id.* If the PSR lacks sufficient indicia of reliability, "it is error for the district court to consider it at sentencing—*regardless* of whether the defendant objects or offers rebuttal evidence." *Id.* (emphasis added); *accord, e.g.*, *United States v. Johnson*, 648 F.3d 273, 277 (5th Cir. 2011) ("[W]ithout sufficient indicia of reliability, a court may not factor in prior arrests when imposing a sentence."); *United States v. Rodriquez*, 897 F.2d 1324, 1328 (5th Cir. 1990) ("[A]s [the defendant] presented no rebuttal evidence, **[*9]** the district court had discretion to adopt the [PSR]'s facts without more specific inquiry or explanation, *provided that* those facts had an adequate evidentiary basis." (emphasis added)). And a PSR does not redeem flawed facts merely by repeating them. *See Harris*, 702 F.3d at 230 n.2 (collecting cases).

Only *after* the district court verifies the PSR as reliable does the analysis shift to step two. *Id.* at 230. At that point, it becomes the defendant's burden to show that the facts contained within the PSR are "materially untrue, inaccurate or unreliable." *Id.* But, of course, the burden never shifts to the defendant if the PSR lacks sufficient indicia of reliability in the first place. *Id.* The district court skipped over that critical step-one inquiry.

III.

This is a step-one case that should break in Gipson's favor. The PSR's preponderance assertion that Gipson was the kidnapper was not sufficiently reliable. Absent independent inquiry into the statements that acknowledged doubts of Gipson's guilt as to kidnapping, it was "error for the district court to consider" the PSR's allegation about the no-billed arrest "regardless of whether the defendant object[ed] or offer[ed] rebuttal evidence." *Id.* at 231.

A.

Detail, consistency, and corroboration **[*10]** are the hallmarks of a reliable PSR. *See United States v. Nava*, 624 F.3d 226, 231-32 (5th Cir. 2010) (finding corroborated hearsay sufficient to warrant a sentencing enhancement); *United States v. Ortega-Calderon*, 814 F.3d 757, 762 (5th Cir. 2016) (PSR reliably showed a judgment of conviction when it attached unofficial but detailed records that "strongly corroborate[d] one another"). Bald, conclusory statements, on the other hand, "are not sufficiently reliable." *United States v. Zuniga*, 720 F.3d 587, 591 (5th Cir. 2013). A PSR fails this test if it proposes uncorroborated facts inconsistent with the evidence or the PSR's other statements. *See United States v. Davalos-Cobian*, 714 F. App'x 371, 374 (5th Cir. 2017) (PSR unreliable when it attributed *crystal* meth to a dealer-defendant when (1) wiretapped calls between the defendant and his buyer discussed only "*liquid* methamphetamine" and (2) "the PSR state[d]" elsewhere that the buyer "had issues converting the methamphetamine received from [the defendant] to crystalline form" (emphasis added)); *United States v. Simmons*, 964 F.2d 763, 775-76 (8th Cir. 1992) (PSR unreliable when it estimated drug quantity based on "information [that] was developed at trial" through testimony of a person who gave inconsistent accounts and may have had an impaired memory).

These principles vitally apply to a PSR's assertions about past arrests that did not lead to convictions. All courts agree that a "bare arrest record" reflecting "[t]he mere fact of an arrest, **[*11]** by itself," is insufficient. *Harris*,

702 F.3d at 229; *accord* Johnson, 648 F.3d at 277-78. At minimum, a PSR must provide *some* account of what the defendant did. *See* Harris, 702 F.3d at 230-31 & n.1. But "a factual recitation of the defendant's conduct" is no silver bullet; the sentencing court must still "determine whether that factual recitation has an adequate evidentiary basis with sufficient indicia of reliability." *Id.* at 231; *accord* Zuniga, 720 F.3d at 591.

B.

The PSR's counterfactual assertion—that Gipson more likely than not committed kidnapping—suffers from various infirmities. Taken together, these tensions so undermine the convincing force of proof that Gipson was the kidnapper that the district court was obligated to probe further. *See* Harris, 702 F.3d at 231.

For starters, the PSR contained powerful exculpatory statements. The supposed victim, who claimed to have been face-to-face with his assailants, could not identify Gipson and another accused kidnapper in a photo lineup.

Thus it is unsurprising that the probation office acknowledged that it lacked further evidence of Gipson's guilt.

And it is unsurprising that the government, in its discretion, declined to seek a variance based on Gipson's unconfirmed and uncharged conduct.

Nor is it hard to see why a Texas grand jury did not indict, because a "grand **[*12]** jury is to return a true bill when it determines that there is probable cause to believe that the accused committed the offense." *Harris Cty. Dist. Atty's Office v. R.R.R.*, 928 S.W.2d 260, 264 (Tex. App.—Houston [14th Dist.] 1996, no writ). It stands to reason that the grand jury lacked a reasonable basis to suspect that Gipson committed the kidnapping recounted in the PSR.

Finally, this may explain why the district court was careful not to second-guess the lack of a conviction, much less a prosecution. As the majority opinion observes, the district court did not claim to conclude "that Gipson committed the *offense* of aggravated kidnapping." Majority Op. at 4. Instead, it "simply found by a preponderance of the evidence that Gipson committed a significant part of the activities that he was charged with"—i.e., that Gipson struck, stabbed, assaulted, and ransomed the alleged victim. *Id.*

But that is a distinction without a difference. Although the district court did not decree that Gipson committed the crime of "Aggravated Kidnapping," it still found that Gipson committed that crime's constituent elements: intentionally restraining someone with intent to hold him for ransom or by using a deadly weapon. *See* Tex. Penal Code § 20.04(a)-(b); *see also id.* § 20.01(1)-(2). Those are the same thing.

And even crediting that, as a matter of law, a **[*13]** no-bill "is merely a finding that the specific evidence brought before the particular Grand Jury did not convince them to formally charge the accused with the offense alleged," Majority Op. at 4 (quoting *Rachal v. State*, 917 S.W.2d 799, 807 (Tex. Crim. App. 1996)),[2] what is important here is that a no-bill is *not* proof positive of guilt. The majority opinion's reliance on *Rachal v. State* prompts more questions than answers.[3] What evidence did the state present? Who testified? Did they contradict the PSR's factual account? Was there yet a third failed identification? What, precisely, were the "the activities that [Gipson] was charged with"? (On this score, the PSR offers conflicting answers.) Shrouding the PSR's preponderance assertion with more mystery hardly bolsters its credibility.

These infirmities underscore the district court's legal error at step one. In imposing an upward variance, the district court improperly relied on the PSR's preponderance assertion when it should have inquired further into the exculpatory evidence to resolve the determinative facts. *See* Fed. R. Crim. P. 32(i)(3). Even moving to step two, in comparing the district court's preponderance statement with the PSR's exculpatory statements I am still left with a "definite and firm conviction **[*14]** that a mistake has been committed." *Zuniga*, 720 F.3d at 590. Of course, the Government could have remedied both deficiencies, legal and factual, by offering more evidence (say, a witness to the kidnapping or a police officer). *See, e.g.*, *United States v. Hebert*, 813 F.3d 551, 560 (5th Cir. 2015). That the Government instead declined to prop up the kidnapping allegation is telling.

IV.

When increasing a defendant's prison term because of uncharged conduct, a federal court must rely on more than a PSR's inconsistent, even exculpatory, statements about an arrest that failed to pass muster the only time

it faced independent scrutiny in a state's criminal justice system. I would vacate and remand for resentencing.

I respectfully dissent.

Footnotes

[*] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[1] I am unpersuaded by the majority opinion's reliance on dicta in *United States v. Toney*, an out-of-circuit case that answered a different question: whether a witness's failure to "identify an accused from a photograph" requires excluding an in-court identification. 440 F.2d 590, 591 (6th Cir. 1971). As I explain below, however, the Government in this case never asked the victim to identify Gipson at sentencing.

[2] *But cf.* Tex. Code Crim. Proc. art. 20.09 (requiring grand juries to "inquire into all offenses liable to indictment of which any member may have knowledge, or of which they shall be informed by the attorney representing the State, or any other credible person"); *Harris Cty. Dist. Atty's Office*, 928 S.W.2d at 264.

[3] *Rachal* held that "misconduct left unadjudicated because the evidence may possibly be insufficient to formally indict" is admissible "during the sentencing stage of a capital murder trial[] if it is clearly proven, relevant, and more probative than prejudicial." 917 S.W.2d at 807.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-10753

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

JAMES CASTLEMAN GIPSON,

Defendant - Appellant

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING EN BANC

(Opinion 8/20/18, 5 Cir., _____, _____ F.3d _____)

Before CLEMENT, HIGGINSON, and HO, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court

having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE