

18-91680 ORIGINAL
STATEMENT OF THE CASE

NATURE OF THE CASE

This is a criminal conviction. Defendant Melissa Owens pled guilty to the charge of conspiring together and with others to knowingly and intentionally distribute a quantity of pills containing oxycodone, a Schedule II controlled substances, in violation of 21 U.S.C. § 841(a)(1), all in violation of 21 U.S.C. § 846, pursuant to a Plea Agreement [R. 543, Pg. ID 1635-1639] for which she was sentenced on March 14, 2017 [R. 773, TR Pg. ID 3808-3858]. That a Judgment of Conviction [R. 747 TR Pg. ID 3622-3628] was entered on March 17, 2017.

Supreme Court, U.S.

FILED

APR 24 2019

OFFICE OF THE CLERK

COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

Defendant-Appellant Melissa Owens was charged with conspiring together and with others to knowingly and intentionally distribute a quantity of pills containing oxycodone, a Schedule II controlled substances, in violation of 21 U.S.C. § 841(a)(1), all in violation of 21 U.S.C. § 846.

As indicated Defendant-Appellant Melissa Owens pled guilty to Count 2 of the Second Superseding Indictment as set forth in The Plea Agreement [R. 543, TR Pg. ID 1635-1639] on July 27, 2016. The Presentence Investigation Report [R. 755, TR Pg. ID 3649-3676] which was filed on March 23, 2017, computed criminal history with a total criminal history score of 11 establishing criminal history category of V, and based upon a total Offense Level of 25, determined that

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>U.S. vs. Felix</i> , 561 F.3d 1036 (9 th Cir. 2009)	9, 10
<i>U.S. vs. Shor</i> , 549 F.3d 1075 (Sixth Cir. 2000)	10
<i>U.S. vs. Stubblefield</i> , 265 F.3d 345 (Sixth Cir., 2001)	10
<i>U.S. vs. Walter</i> , 256 F.3d 891, 894 (9 th Cir. 2001)	9

Rules, Statutes and Other Authorities

21 U.S.C. § 841(a)(1)	1, 3
21 U.S.C. § 846	1, 3
U.S.S.G. § 3B 1.2	2
U.S.S.G. § 4A1.2(j)	9, 11
U.S.S.G. § 4A1.2(a)(2)	13
U.S.S.G. § 4A1.1(f)	14
U.S.S.G. § 4A1.2(2)	15, 16

ARGUMENT AND LAW

I. THE TRIAL COURT ERRED IN DETERMINING THE CRIMINAL HISTORY OF DEFENDANT-APPELLANT MELISSA OWENS IN FAILING TO EXCLUDE CONVICTIONS WHICH WHERE EXPUNGED.

On February 6, 2017 [R. 755 TR Pg. ID 3697 and February 9, 2017 [R. 755 TR Pg. ID 3698] additional objections were filed to the Presentence Investigation Report stating that certain convictions have been expunged from Defendant-Appellant's criminal record and that a total of two (2) criminal history points should be removed.

Subsequent objections were filed on behalf of Defendant-Appellant (Fourth objection to the Presentence Investigation Report). The Presentence Investigation Report did not indicate that criminal convictions had been expunged from Defendant's record, and Defendant objected indicating that one point should be removed with regard to each of these expungements. [R. 755 TR Pg. ID 3702].

The following are those convictions objected to:

48. 02/08/2007	Assault, 4 th Degree, (Age 27)	Domestic Violence Russell County Dist. Court, Jamestown, KY Docket No. 07-F-00029	04/09/2007: Guilty: 90 days jail, sentence Suspended and the defendant was placed on two years unsupervised probation, \$239 costs
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According to the citation, law enforcement received a report of domestic violence. The victim, identified as R.L., reported to law enforcement upon their arrival that

the defendant had run over him with a vehicle. The officer noticed visible injuries to the victim's face, leg, and feet. R.L. reported he went into the house to obtain a telephone for his daughter and he was leaving the property, the defendant got into her vehicle and started down the driveway. R.L. advised he was walking down the driveway when the defendant struck him with her vehicle and ran over his right foot. The victim stated he grabbed the door mirror and was dragged down the driveway by the defendant. [R. 755 TR Pg. ID 3660]

49.	12/08/2007 (Age 28)	1. Possession of Marijuana 2. Use and/or Possession of drug paraphernalia Russell County Dist. Court, Jamestown, KY Docket No. 07-M-00863	2/25/2008: 1. Guilty 90 days jail, 90 days suspended and the defendant was placed on two years unsupervised probation, \$293 fine and costs 2. Guilty: 90 day jail, 90 days suspended and the defendant was placed on two years un- supervised probation, concurrent with Count 1.
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According to the citation, the owner of the Cumberland Lodge reported to law enforcement that several people were coming in and out of Room 118 and specifically indicated seeing baggies containing an unknown substance. The responding officer met with a female, not the defendant, who rented the room and advised her of the complaint received. Two other females, one of which was the defendant, were also present in the room. All three women consented to search of the room. Officers discovered several white particles and burnt "Brillo" pads. The defendant had a bottle of Ibuprofen and marijuana in her purse and she acknowledged it belonged to her. Officers also located rolling papers on the night stand. [R. 755 TR Pg. ID 3660]

51. 3/15/2009 1. Public Intoxication,
(Age 29) Controlled Substances,
Excludes alcohol 2.
Possession of a
Controlled Substance
3rd Degree, 1st Offense
Drug unspecified
Russell County Dist.
Court, Jamestown, KY
Docket No. 09-M-00153

4/13/2009; 1 Guilty:
60 days jail, 30
days jail suspended
and the defendant was
placed on 2 years of
unsupervised probation
fine and costs of \$354
2. Guilty: 60 days
jail, 30 days jail
suspended and the
Defendant was placed
on 2 years of un-
supervised probation

Counts 1 and 2 were
Run concurrently

The defendant was originally charged with an additional count of Possession of a Controlled Substance, 3rd Degree, 1st Offense, rug Unspecified, but this charge was later dismissed.

According to the citation, on March 15, 2009, the defendant was a passenger in a vehicle whose driver was arrested for Driving Under the Influence. The officer noticed the defendant's slurred speech, that she was unsteady on her feet, and that she appeared to be disoriented. The officer noted the defendant also appeared to have difficulty following simple directions. A blue pill was found in the front pocket of her purse, identified by Poison Control to be generic Xanax. The defendant was also in possession of two other pills that were not able to be identified by Poison Control. [R. 755 TR Pg. ID 3662]

Defense counsel submitted to the court a copy a Courtnet list of defendant's criminal record from the Russell County Circuit Court clerk's office. [R. 75 TR Pg. ID 3703-3711]. Examination of Defendant-Appellant's criminal records in Russell County reveals the absence of those convictions set forth in numbers 48, 49 and 51

of the Presentence Investigation Report, which indicates that they were expunged.

The District Court's interpretation and application of the Sentencing Guidelines are reviewed de novo. This is *United States vs. August*, 86 F.3d 151, 153 (9th Cir. 1996). The District Court's factual findings are reviewed for clear error. *U.S. vs. Walter*, 256 F3d 891, 894 (9th Cir. 2001).

The Probation Department filed an Addendum to the Presentence Report indicating that in the absence of documentation from Defendant-Appellant Melissa Owens clarifying Russell County District Court's ruling or basis for ruling, the Probation Office could not determine whether the cases were expunged or set aside, pursuant to U.S.S.G. § 4A1.2(j).

The Probation Department further stated that due to Russell County District Court's failure at this time to provide records regarding the cases in question, the Probation Office cannot determine the final ruling of the court and the Defendant bears the burden of proving the necessary facts citing *U.S. vs. Felix*, 561 F.3d 1036 (9th Cir. 2009).

The trial court concluded that in the absence of evidence from which it could determine that the expungement related to innocence, errors and law, or constitutional defect verses just an operation of Kentucky state policy, and because Kentucky's KRS 431.078 does not require showing the innocence, error and law or constitutional

defect, the convictions in question would not be considered to be expunged. (R. 773 TR. Pg. ID 3829-3830]

Defense counsel argued that he had no evidence that would qualify Defendant for any of the reasons articulated by the Court as a basis for expungement, further specifying that there were no records available to determine the basis for the expungements. The case cited by the Probation Department relied upon the court, *U.S. vs. Felix*, 561 F.3d 1036 (9th Cir. 2009) is inopposite since the sentencing court require that Defendant showed diversion which he failed to do so. In the instant case, the Defendant-Appellant Melissa Owens filed the necessary papers for expungement, which were recognized by the District Court and the convictions were expunged.

The Court cites the cases of *U.S. vs. Stubblefield*, 265 F.3d 345 (Sixth Cir., 2001) and the case of *U.S. vs. Shor*, 549 F.3d 1075. (Sixth Cir. 2000). In the *Stubblefield* case the Appellate Court held that even under Ohio law, possession of less than 100 grams of marijuana was a minor misdemeanor which "did not constitute a criminal record. . . ." That would be calculated to determine criminal history, and further, in the *Shor* case the Appellate Court held that any sentence under the Michigan Home Youthful Training Act under Michigan law, would be considered a conviction for the purpose of assessing criminal history and precluding eligibility for a two level "safety valve" reduction. Neither of these cases address the issue of who has the burden of proof.

It is Defendant-Appellant's position that the sentencing Judge incorrectly determined that the Defendant had the burden of proving the basis for the expungement so as to comply with the Sentencing Guidelines as the Government has the burden of determining whether or not there in fact was an expungement in accordance with U.S.S.G. §4A1.2(j), since the Government has the burden of determining criminal history.

II. THE TRIAL COURT ERRED IN DETERMINING THE CRIMINAL HISTORY FOR WHICH SENTENCE WAS IMPOSED ON DEFENDANT-APPELLANT MELISSA OWENS AND DETERMINING THAT PRIOR SENTENCES WERE COUNTED SEPARATELY RATHER THAN A SINGLE SENTENCE.

Defendant-Appellant Melissa Owens filed a pro se objection to #49 of the Presentence Investigation Report [R. 755 TR Pg. ID 3683] stating as follows: "This possession of marijuana is the same possession of marijuana on the following page and should not have been an extra point." Number 49 reads as follows:

49.	12/08/2007 (Age 28)	1, Possession of Marijuana 2. Use and/or Possession of drug paraphernalia Russell County Dist. Court, Jamestown, KY Docket No. 07-M-00863	2/25/2008: 1. Guilty 90 days jail, 90 days suspended and the defendant was placed on two years unsupervised probation, \$293 fine and costs 2. Guilty: 90 day jail, 90 days suspended and the defendant was placed on two years unsupervised probation, concurrent with Count 1.
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According to the citation, the owner of the Cumberland Lodge reported to law enforcement that several people were coming in and out of Room 118 and specifically indicated seeing baggies containing an unknown substance. The responding officer met with a female, not the defendant, who rented the room and advised her of the complaint received. Two other females, one of which was the defendant, were also present in the room. All three women consented to search of the room. Officers discovered several white particles and burnt "Brillo" pads. The defendant had a bottle of Ibuprofen and marijuana in her purse and she acknowledged it belonged to her. Officers also

located rolling papers on the night stand. [R. 755 TR Pg. ID 3660]

In the Presentence Investigation Report, #50, it reads as follow:

50. 12/08/2007 (Age 28)	1. Possession of Controlled Substance, 1 st Degree, 1 st Offense, Cocaine 2. Use and/or Possession of Drug Paraphernalia, 1 st Offense 3. Possession of a Controlled Substance 3 rd Degree, Drug Unspecified 4. Possession of Marijuana	8/14/2012: 1. Guilty three years prison, \$245 cost Count 2-4, Guilty: 12 months jail each, all counts run concurrently for a total of three years prison.
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Russell County Circuit
Court, Jamestown, KY
Doc. No. 08-CR-000312-003

The indictment alleged that, on or about December 8, 2007, the defendant and others knowingly possessed cocaine and marijuana.

A warrant for failure to appear was issued on July 14, 2009, and the warrant was returned served on a later date while the defendant was in federal custody.

The defendant entered a guilty plea on August 4, 2012, and was subsequently sentenced on the same date. The sentence was ordered to run concurrent with the federal sentence the defendant was currently serving (Western District of Kentucky, Docket Number, 1:09-CR-26-R-14). [R. 755 TR Pg. ID 3661]

Defendant-Appellant Melissa Owens was addressed by the sentencing court which cited Sentencing Guidelines §4A1.2(a)(2), which reads as follows:

If the defendant has multiple prior sentences, determine whether those sentences are counted separately or as a single sentence. Prior

sentences always are counted separately if the sentences were imposed for offenses that were separately by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense). If there is no intervening arrest, prior sentences are counted separately unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day. Count any prior sentence covered by (A) or (B) as a single sentence. See also § 4A1.1(f).

The Court further concluded that one "conviction" includes possession of marijuana alone, and one includes possession of cocaine, as well as possession of drug paraphernalia and possession of marijuana. The Court further reasoned these were separate charging documents, one with marijuana she had in her purse and the Defendant was charged with knowingly and possessing cocaine and marijuana. The Court indicated they were sentenced on separate dates, but did not reference the fact that the dates of the offense were the same in both instances.

The Trial Court erroneously made a comparison to #50 in the Presentence Investigation Report, which involves Jamestown, Kentucky, and Russell Circuit Court [R. 773 TR Pg. ID 3818] and then compared #50 to #52 of the Presentence Investigation Report, which involves a conspiracy to possess and distribute occurring in Adair County, Kentucky. Base on this erroneous reference, the Court concludes that these are two different counties involving separate courts and separate sovereignties whereas in fact the objection was

made with reference to Presentence Investigation Report #49 and #50 [R. 755 TR Pg ID 3660-3661] where both the charges involve the same county, Russell County, and both were state offenses occurring on the same date, 12/8/2007.

In accordance with Sentencing Guidelines §4A1.2(2), the sentences with respect to both Presentence Investigation Report #49 and #50 [R. 755 TR Pg ID 3660-3661], resulted from offense contained in the same charging instrument, "Possession of Marijuana."

III. THE TRIAL COURT ERRED IN IMPOSING SENTENCE ON DEFENDANT-APPELLANT MELISSA OWENS IN DETERMINING THAT THERE WAS NO REDUCTION FOR MITIGATING ROLE.

Defendant-Appellant Melissa Owens raised objection #15 regarding her role in a conspiracy insofar as mitigation would apply pursuant to Sentencing Guidelines §4A1.2(2).

The Government argued [R. 773 TR. Pg. ID 3823] that Defendant-Appellant Melissa Owens pursuant to the Plea Agreement acknowledged by way of factual basis of plea that she participated in a large drug conspiracy where thousands of doses of units of Oxycotin were sold. [R. 543 TR Pg. ID 1636]

Further that Defendant-Appellant Melissa Owens collected cash proceeds from the sale of those substances and that was pretty much your average participant in the drug conspiracy. [R. 773 TR Pg. ID 3823]

The Government made further references to wire intercepts indicating that nature and extent of the conspiracy and the presence and knowledge of Defendant-Appellant Melissa Owens. These wire intercepts were never introduced for the purpose of determining a mitigating role.

The defense argued that there was a multi-layer conspiracy here [R. 773 TR Pg. ID 3825] and the conspiracy involved all types of drugs of which:

And about a month before that, I made the worst decision in my life, and I suffered through the most traumatic even of having an abortion, which damaged me in the worst way. I was in the deepest depression of my life, and I'm still struggling to this day, and I would give anything to take that back.

And all of this occurred after the fact that I had abortion, and I was unmedicated on all my mental problems.

After that, along with my pre-existing mental and emotional conditions, I was in a very dark place, and I was not thinking clearly. I did make some bad decisions concerning my drug use, and I relapsed, and the interaction that I had with a couple of people on this case the few years before that I had been doing fairly well and had been staying sober, keeping my doctor's appointments for all mental health problems.

I just hope that you will take these things into consideration.

Also, Your Honor, I'm a mother of three young beautiful children; Kayla, Riley, and Christian, ages 16, 11 and 8, all whom I love and miss very much. And they are struggling, and they need me back in their lives as soon as possible.

I'm a very good and loving mother when I'm able to do so. It's very hard to do that from a jail, but I do my best.

My children have also suffered a great tragedy in their lives. Besides me being locked up, their granny, Phyllis Law, has passed away a few months ago. Their granny was their second mother figure in their lives, and has always been there when I cannot be. She has been there to help me since they were newborns, and there was very few days that went by that she didn't see them at all.

Letter to
the Judge at
Sentencing
that is read
(possibly from
the transcript)

And at the time of her passing, my children were living with her alone, with their dad, and their papa, and a week after that my dad passed away. And all of this has been nothing short of traumatic for them. They need me home with them to take care of them and be the mother they need and deserve.

My daughter graduates high school next year, in May of 2018, and I really need to be there for that, and really need to be there much sooner.

I wish I could do the rest of my time on a house arrest just to be able to help them and take care of them and make their lives a little easier right now.

And also, Your Honor, compared to the rest of the people on this case, my role was very minor. I wasn't involved in all of the daily transactions that were happening. I - on a few occasions, I did take some pills to a couple people. I never once went to Ohio and the places that were obtaining a big quantities of pills. I never did that, not once did I ever do that.

And considered of everything that was going - and I did not have an absolute full scope of what was going on. I did know some things that was going on, but it was not all broadcast to me. My depression was so severe at the time I stayed home. I didn't even barely go anywhere. And plus where I had absconded on my federal probation, I - I was scared to go anywhere. I did not take huge amounts of pills. Just on a few occasions I did, and I'm very sorry for that, and I take full responsibility for that.

But I do feel compared with most of the people on this case that my role was minimal, and the very least on this case.

And I do hope that you would take into consideration as well, there were two other people on the case indicated only for the oxycodone beside myself, Troy Rice and Carol

Myers, with sentences of 36 and 41 months. I do hope that I can get something along those lines and be able to return home to my children and family as soon as possible.

I assure you that I have learned my lesson, and I hope and pray that you will know that I am extremely remorseful, and I regret all of my decisions that have led me to this point.

And I will not let any of this happen again. I have completely learned my lesson. I am done with this life. I absolutely do not want any part of anymore drugs. Actions, I have made a mistake, and I'm very sorry. My addiction I feel has been the biggest driver of that, and then my mental and emotional, just trying to self-medicate sometimes. I have been through a lot in my life, and I'm sorry that I have went down the wrong road of trying to handle those things.

But I will not let any of this happen again. I'm not a bad person. I just made some bad decisions, and for that I'm very sorry.

I've also struggled with drug addiction since I was 12 to 13 years old, especially after my parents divorced.

And I also wish I could do the rest of my time in a long-term inpatient lock down rehab facility. I think I could make the most of my time in a place like that, and I could work on myself more thoroughly, and work on substance abuse problems, as well as my mental and emotional problems and disorders. And if I were able to do that, I believe I would be able to maintain a healthier relationship with my children and family, rather than being locked up in a prison somewhere far away.

I've read and heard about people getting these types of opportunities with this newer CARRA Act, Comprehensive Addiction and Rehabilitation Recovery Act. I promise I will not let you down if I were given that chance.

CONCLUSION AND RELIEF REQUESTED

Defendant-Appellant Mellissa Owens, by and through her Panel Attorney Thomas W. Jakuc, respectfully requests this Honorable Appellate Court set aside the sentencing of Melissa Owens held on March 14, 2017, and remand for the purpose of re-sentencing. (R. 743 TR Pg. ID 3615]

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