ORIGINAL

No: 19-5529

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

KENDRICK DOTSTRY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Kendrick Dotstry, Pro Se Petitioner
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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE DISTRICT COURT CAN ENHANCE A SENTENCE PURSUANT TO UNITED STATES SENTENCING GUIDELINE (U.S.S.G.) PROVISIONS UNDER SECTION 2K2.1(b)(6)(B) WHEN THE CONCOMITANT FELONY OFFENSE CONDUCT WAS DISMISSED?

2. WHETHER THE DISTRICT COURT CAN ENHANCE A SENTENCE PURSUANT TO UNITED STATES SENTENCING GUIDELINE (U.S.S.G.) PROVISIONS UNDER SECTION 2K2.1(b)(6)(B) WHEN THE CONCOMITANT FELONY OFFENSE CONDUCT WAS DIVISIBLE INTO STATUTORY MISDEMEANOR ELEMENTS?

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No._____

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Petitioner Kendrick Dotstry respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, filed on December 20, 2018.

OPINION BELOW

The opinion of the Court of Appeals for the Eighth Circuit that is the subject of this petition is reported in United States v. Dotstry, 2018 U.S. Appx. LEXIS 35819, and is reprinted in the appendix hereto, infra.

The Memorandum Opinion and Order, and final judgment of the United States District Court for the District of Minnesota (Susan R. Nelson) that are the subject of this Petition have not been reported. The documents deemed relevant to this Petition are reprinted in the Appendix.

JURISDICTION

Petitioner Kendrick Dotstry was convicted pursuant to a guilty plea of being a convicted felon in possession of a fire-arm, in violatin of Title 18, United States Code, Section 922(g)(1). He was sentenced to 96-months imprisonment by the Honorable Susan R. Nelson, United States District Judge for the District of Minnesota.

The United States Court of Appeals for the Eighth Circuit affirmed Petitioner's conviciton on December 20, 2018, and denied a petition for an en banc and panel rehearing on March 26, 2019. Petitioner now timely files this petition for a writ of certiorari.

The jurisdiction of this Court to review the judgments of the Eighth Circuit is invoked under Title 28, United States Code, Section 1254(1).

STATEMENT OF THE CASE

A. The Underlying Offenses.

On November 19, 2016, Minneapolis Police Department Officers Andrew Schroeder and Aaron Pearson received a 911-dispatch call concerning a "domestic assault in progress" at an apartment complex located on the 300 block of Emerson Avenue North in Minneapolis. En route, the officers learned that the suspect was a black man and was driving a red pick-up truck. Further, said officers were advised that the suspect was in possession of a gun and was pointing the gun at various individuals at a baby shower which was taking place at the apartment complex.

As officers arrived, they observed a red pick-up truck leaving

the parking lot of the apartment complex. The officers followed and eventually pulled over the suspects vehicle. After locating a Sig Sauer, 9 millimeter handgun in the vehicle, the petitioner was arrested and transported to Hennepin County Adult Detention.

B. Procedural History.

On or about November 22, 2016, the petitioner was charged by criminal complaint in Hennepin COunty (MN) District Court with five separate felony offenses including second degree assault (Two counts), terroristic threats (two counts), and fifth degree possession of a controlled substance. Further, the petitioner was charged in the U.S. District Court for the District of Minnesota with a violation of supervised release as a result of the aforementioned.

On December 21, 2016, the petitioner was charged in a one-count Indictment with being a convicted felon in possession of a firearm, in violation of Title 18, United States Code, Section 922(g)(1) and 924(a)(2). Specifically, the Indictment charged that the petitioner possessed a Sig Sauer, 9 millimeter handgun after having previously been convicted of possession with intent to distribute cocaine in U.S. District COurt for the District of Minnesota in 2000 and conspiracy to distribute cocaine base in U.S. District COurt for the District of Minnesota in 2009

C. The Guilty Plea.

On June 13, 2017, the petitioner pled guilty to the one-count Indictment without the benefit of a plea agreement. Following entry of the petitioner's guilty plea, a PSR and Addendum were submitted to the petitioner and the District Court on Septem-

ber 14, 2017. The PSR recommended that the Defendant's offense level of 24 should be increased by four-levels under U.S.S.G. § 2K2.1(b)(6)(B) for possession of the firearm in connection with another felony offense.

On September 29, 2017, the petitioner filed a pro se motion to withdraw his guilty plea on the grounds that his previous attorney coerced him into entering a guilty plea. On November 3, 2017, an evidentiary hearing was held with the aforementioned motion taken under consideration. The District Court denied the motion to withdraw, determining that the petitioner did not establish a just and fair reason for the withdrawal of his guilty plea.

D. Post-Plea Proceedings.

On December 21, 2017, a sentencing and revocation hearing was held on December 21, 2017, with a concomitant evidentiary hearing held prior to sentencing as the petitioner objected to the 4-level enhancement under U.S.S.G. § 2K2.1(b)(6)(B). Following the evidentiary hearing, the district court determined the 4-level enhancement was appropriate because the petitioner possessed the loaded firearm in connection with other felony offenses.

The District Court imposed a 96-month term of imprisonment for the offense conduct, and imposed a 30-month sentence for the supervised release violation; running it concurrent with the 96-month sentence.

The petitioner appealed the District Court's order to the Eighth Circuit Court of Appeals, only to have the Circuit Court affirm the District Court's judgment on December 20, 2018. The petitioner motioned for an en banc and/or panel rehearing, only

to be denied on March 26, 2019.

REASONS FOR ALLOWANCE OF THE WRIT

This case presents an opportunity for the Court to address an important but unsettled issue of federal crimina law and procedure. The important procedural issue presented is whether this Court's recent holding in Nelson v. Colorado, 137 S.Ct. 1249 (2017) provide a legal foundation for reining in the inclusion of dismissed criminal conduct to enhance a sentence, effectively overruling the decision in United States v. Watts, 519 U.S. 148 (1997).

Alternatively, when the concomitant offense conduct under U.S.S.G. § 2K2.1(b)(6)(B) is divisible into statutory misdemeanor elements, can the District Court apply said U.S.S.G. sentence enhancement, when in fact, another felony offense may not exist.

I. THE DISTRICT COURT CANNOT ENHANCE A SENTENCE PURSUANT TO U.S.S.G. § 2K2.1(b)(6)(B) WHEN THE CONCOMITANT FELONY OFFENSE CONDUCT WAS DISMISSED.....

In accordance with a Supreme Court decision in Nelson v. Coloarado, 137 S. Ct. 1249 (2017), the petitioner is of the belief since the holding precludes the use of acquitted conduct as relevant conduct, the holding and reasoning also reaches that of dismissed conduct. The holding in Nelson, has determined that a defendant is "presumed innocent" of acquitted conduct, again which is also applicable to conduct which is dismissed. The presumption of innocence holds true to dismissed conduct and is only overcome by a conviction of guilt which becomes final. See Nelson.

Further, since Nelson has determined that an individual may

not be penalized for acquitted conduct, but also that a defendant may not be punished for dismissed or even uncharged conduct. Moreover, in accordance with Nelson, a defendant may only be sentenced based on facts/elements of adjudicated offense conduct; effectively over-ruling the decision in United States v. Watts, 519 U.S. 148 (1997)(per curiam), which allowed district court's to use acquitted and dismissed conduct to enhance a defendant's sentence.

The presumption of innocence lies at the foundation of our criminal law judiciary. See Coffin v. United States, 156 U.S. 432, 453, 15 S. Ct. 394, L. Ed. 481 (1895). Accordingly, the district court may not presume the petitioner guilty of any other felony offense conduct under U.S.S.G. 2K2.1(b)(6)(B); unless he was proven guilty of every element of the offense conduct which the government relied upon under U.S.S.G. § 2K2.1(b)(6)(B).

Since the State charges the government relied upon under § 2K2.1(6)(b)(B) were dismissed by the State of Minnesota against the petitioner, his presumption of innocence was restored. See Johnson v. Mississippi, 486 U.S. 578, 585, 108 S. Ct. 1981.

It is undisputed that the presumption of innocence remains with the petitioner through every stage of the judicial proceeding, to include the presentence investigation report and sentencing, and that the presumption is extinguished only upon a determination of guilt beyond a reasonable doubt. See United States v. Crumley, 528 F.3d 1053, 1065 (8th Cir. 2008)(quoting Kellogg v. Skon, 176 F.3d 447, 451 (8th Cir. 1999)).

Accordingly, as the defendant's in Nelson were now innocent simplicited, the District Court in the petitioner's case had no

right to enhance the petitioner's sentence under § 2K2.1(b)(6)(B) as a result of the Supreme Court decision in Nelson. The reasoning of Nelson thus compels the conclusion that Watts has been effectively overruled. Dismissed, just like acquitted conduct cannot be used to penalize (or increase a sentence) because dismissed conduct, by any means, restore the presumption of innocence. And no one may be penalized for being presumed innocent. This in turn, greatly circumscribes the statutory language proscribed under § 2K2.1 (b)(6)(B) and the use of the concomitant "other felony" at sentencing in terms of what constitutionally may be considered by district (sentencing) courts. Thus, facts that may violated due process - as announced in Nelson - may not be incuded for the purposes of imposing an appropriate sentence.

Consequently, for the district court to enhance the petitioner's sentence under § 2K2.1(b)(6)(B) did in fact violate his due process protections, having important constitutional imports.

The Supreme Court should accept this case for review in order to clarify the proper standard for enhancing a sentence for [alleged] criminal conduct which was dismissed and as a result, enjoyed the judicial hallmark of presumption of innocence. The judicially invented standard of enhancing a sentence under § 2K2.1(b)(6)(B) when offense conduct was dismissed ignores the purpose of the presumption of innocence hallmark. It is important for the Supreme Court to accept review of this case to clarify for both district courts and appellate courts on what conduct can be used to increase a defendant's criminal sentence as measured against the presumption of innocence standard.

As the Court has recognized for well over a century, the prin-

ciple that there is a presumptio of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law. See Coffin v. United States, 156 U.S. 432, 453 (1985). Id. Relevant conduct, as a result of Watts, has performed an end run around that most elementary presumption, which has resulted in enhanced sentences that violate due process constituional protections. Now, as a result of Nelson, this constitutional violation era should be over.

II. THE DISTRICT COURT CANNOT ENHANCE A SENTENCE PURSUANT TO U.S.S.G. § 2K2.1(b)(6)(B) WHEN THE CONCOMITANT FELONY OFFENSE CONDUCT IS DIVISIBLE INTO STATUTORY MISDEMEANOR ELEMENTS AND THE RECORD DOES NOT SUPPORT THE ENHANCEMENT...

Alternatively, the district court abused its discretion by holding that the preponderance of the evidence showed that another felony offense was committed, and that use or possession of the firearm "facilitated" that other felony. The petitioner was never convicted of any other felony because the Minnesota charges with respect to Domestic Assault and Terroristic Threats were dismissed. Further, the possession of the controlled substance pills were supressed as a result of the fruits of the poisonous tree doctrine. The petitioner admits that said charges could be used to apply the aforementioned 4-level enhancement, but in the case at bar, the record does not reflect with sufficient evidence that he actually possessed the firearm during the operative events which led up to the dismissed state charges. In fact, when you review, the change of plea hearing transcript. See Tr. pgs. 14-15 and pgs. 18-21 which merely reflect that the petitioner (constructively) was aware of its presence [firearm] in the vehicle

but denied actually possessing or using it during the operative events which led to the federal conviction at hand. Further, the petitioner objected to the 4-level enhancement. Accordingly, and in accordance with eighth circuit [precedential] legal authority, the 4-level enhancement cannot apply as the petitioner never actually in possession of said firearm. cf. United States v. Walker, 900 F.3d 995, (8th Cir. 2018)(holding that since the defendant nevera actually possessed the firearm, even though it was constructively in his possession and he was aware of its presence, his sentence could not be enhanced pursuant to U.S.S.G § 2K2.1(b)(6)(B).

The guidelines call for a four-level sentencing enhancement if the defendant . . . used or possessed any firearm or ammunition in connection with another felony offesne; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to beleive that it would be used or possessed in connection with another felony offense. U.S.S.G. § 2K2.1(b)(6)(B).

Here, since the record does not reflect with sufficiency that said firearm facilitated, or had the potential of facilitating, another felony offense, punishable by imprisonment for a term exceeding one year, the district court committed clear error to find that the firearm facilitated, or had the potential to facilitate domestic assault and terroristic threats; especially when considering the State charges were eventually dismissed, due to lack of sufficient evidence and the fact that said state charges pursuant to MN. Stat. 609.2 and 609.7 were divisible into lesser statutory [misdemeanor] elements which do not carry more than 1-year of imprisonment. Further, there was no direct evidence introduced by any witnesses or otherwise where the petitioner committed any

acts consistent with domestic assault or terroristic threats; especially when considering the record reflects that the witness [initially] contacted 911 to report the operative incident, did not and was unwilling to testify and corroborate her initial 911 call.

Accordingly, the preponderance of the evidence standard is missing in this case at bar. See United States v. Littrell, 557, F.3d 616, 617 (8th Cir. 2009)(quoting U.S.S.G. § 2k2.1 (b)(6)(B). Cmt. n. 14(A)).

Moreover, in order for the aforementioned enhancement to apply, the "pther felony" offense conduct needs to be as a result of a course of conduct which is apart or seperate from the course of conduct, scheme or plan used to charge the possession of the firearm with. The incident or conduct in queestion leading to the State dismissed charges were not seperated by different times, places or locations from the firearm possession offense conduct which the petitioner pled guilty to.

Accordingly, the Supreme Court should accept review of this case in order to further address and clarify the recurring and likely common issue of the meaning of [specifically] when is one in possession (constructively) or actually) of a firearm and what constitutes "another felony" for the district court to rely upon in applying the aforementioned four-level enhancement, especially when offense conduct is dismissed and or divisible into misdemeanor [statutory] elements which do not require more than one-year imprisonment.

Here, the petitioner avers that if the State charges were not dismissed and he would have proceeded to trial, he [likely]

would have been adjudicated innocent of the State charges, or in the alternative, the State would have reduced to misdemeanor level offense conduct in exchange for a guilty plea; carrying [statutorily] less than one-year in prison.

CONCLUSION

Petitioner, Kendrick Ledelle Dotstry repsectfully prays that a writ of certiorari issue.

Dated: June 23, 2019

Respectfully Submitted,

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