

IN THE SUPREME COURT OF THE UNITED STATES

ALEX KNIGHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

ROSS B. GOLDMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the district court erred in applying a four-level enhancement under the advisory Sentencing Guidelines by relying on conduct that it found by a preponderance of the evidence but that the jury did not find beyond a reasonable doubt.

IN THE SUPREME COURT OF THE UNITED STATES

No. 19-6265

ALEX KNIGHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is not published in the Federal Reporter but is reprinted at 773 Fed. Appx. 1057.

JURISDICTION

The judgment of the court of appeals was entered on May 16, 2019. On July 22, 2019, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including October 13, 2019. The petition for a writ of certiorari was filed on October 11, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of possession of a firearm and ammunition by a felon, in violation of 18 U.S.C. 922(g)(1), and one count of possession of heroin and fentanyl, in violation of 21 U.S.C. 844(a). Judgment 1. He was sentenced to 72 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-16a.

1. Petitioner was a suspect in a string of burglaries in Miami, Florida. Presentence Investigation Report (PSR) ¶¶ 4-6. When police officers went to petitioner's home to execute a warrant for his arrest, they asked if he would consent to a search of his home. PSR ¶ 7. Petitioner replied: "I have a gun in the closet, if you overlook that I will let you." Ibid. Petitioner then told another officer "OK, I will let you search, but there's also some drugs in here that I use for my personal use." Ibid. Police obtained a search warrant for petitioner's home; the resulting search uncovered 72 baggies containing a heroin-fentanyl mixture, some cash, a .22-caliber semiautomatic firearm, and .22-caliber ammunition. PSR ¶ 8; see Pet. App. 5a.

A federal grand jury in the Southern District of Florida indicted petitioner on one count of possession of a firearm and ammunition by a felon, in violation of 18 U.S.C. 922(g)(1) (Count 1); one count of possession with intent to distribute a controlled

substance, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C) (Count 2); and one count of possession of a firearm in furtherance of a drug trafficking crime (namely, the offense charged in Count 2), in violation of 18 U.S.C. 924(c)(1)(A)(i) (Count 3). Indictment 1-2. The jury found petitioner guilty on Count 1 and on simple possession of heroin and fentanyl, in violation of 21 U.S.C. 844(a), a lesser-included offense under Count 2. See Pet. App. 2a. The jury found petitioner not guilty on Count 3. See ibid.

2. At sentencing, the district court applied a four-level enhancement under Section 2K2.1(b)(6)(B) of the advisory Sentencing Guidelines, which applies if a defendant "possessed a[] firearm or ammunition in connection with another felony offense." Under the Guidelines, "another felony offense" includes an offense punishable by more than one year of imprisonment "regardless of whether a criminal charge was brought, or a conviction obtained." Sentencing Guidelines § 2K2.1 cmt. n.14(C). And when that other offense is a "drug trafficking offense," the enhancement in Section 2K2.1(b)(6)(B) applies if "a firearm is found in close proximity to drugs." Id. § 2K2.1 cmt. n.14(B).

The district court determined that a preponderance of the evidence showed that petitioner had committed a drug-trafficking offense, and that because petitioner's "gun was in the closet," "the proximity is sufficient" to apply the four-level enhancement in Sentencing Guidelines § 2K2.1(b)(6)(B). Pet. App. 19a. After the court calculated an advisory guidelines range of 41 to 51

months of imprisonment, petitioner's counsel stated that the range was "very low considering everything about my client" and that "[m]aybe an upward variance is appropriate based on his record." Id. at 27a. The court sentenced petitioner to an above-guidelines term of 72 months of imprisonment. Judgment 2.

3. The court of appeals affirmed in an unpublished per curiam order. Pet. App. 1a-16a. As relevant here, the court explained that "the 'felony offense' that triggered § 2K2.1(b) (6) (B) was possession of heroin with intent to distribute, a drug-trafficking crime," id. at 10a; that the district court's finding that the large "number of baggies" of heroin in petitioner's home "was consistent with distribution," not "personal use," was not clearly erroneous, id. at 12a; and that the district court's finding that the firearm in the closet was in close proximity to the drugs in the kitchen likewise was not clearly erroneous, id. at 13a-14a. Applying circuit precedent, the court of appeals rejected petitioner's argument that those findings, made by a preponderance of the evidence, violated petitioner's Fifth and Sixth Amendment rights because a jury had not found beyond a reasonable doubt that he intended to distribute the heroin or that he possessed a firearm or ammunition in furtherance of a drug-trafficking crime. See id. at 12a n.4 (citing United States v. Faust, 456 F.3d 1342 (11th Cir.), cert. denied, 549 U.S. 1046 (2006)).

ARGUMENT

Petitioner renews his contention (Pet. 8-27) that the district court violated his Fifth and Sixth Amendment rights by sentencing him based on conduct that the court found by a preponderance of the evidence, but that the jury had not found beyond a reasonable doubt. For the reasons stated in the government's briefs in opposition to the petitions for writs of certiorari in Asaro v. United States, No. 19-107 (filed July 22, 2019), and Martinez v. United States, No. 19-5346 (filed July 20, 2019), which the government is serving on petitioner, that contention lacks merit, and no further review is warranted. See Br. in Opp. at 7-15, Asaro, supra (No. 19-107); Br. in Opp. at 8-15, Martinez, supra (No. 19-5346). As petitioner acknowledges, "[e]very federal court of appeals to consider the issue has * * * uph[e]ld the use of acquitted conduct at sentencing." Pet. 10. And this Court has recently and repeatedly denied petitions for writs of certiorari raising the issue. See Br. in Opp. at 14, Asaro, supra (No. 19-107) (listing cases). The same result is warranted here.

In any event, this would be a poor vehicle in which to review the question presented. Although the lower courts here relied on the "proximity" test that applies when the defendant possesses the firearm or ammunition in connection with a drug-trafficking felony offense, see Pet. App. 13a, 19a, the record here supports the four-level enhancement on the ground that petitioner possessed the

firearm and ammunition "in connection with" the simple possession offense for which he was convicted. Sentencing Guidelines § 2K2.1(b)(6)(B). A firearm is possessed "in connection with" another felony offense, ibid., when it "facilitate[s] or ha[s] the potential of facilitating" that offense, id. § 2K2.1 cmt. n.14(A); cf. Smith v. United States, 508 U.S. 223, 237 (1993) (observing that "[t]he phrase 'in relation to' is expansive"). Courts have explained that when the other offense is simple drug possession, the enhancement is appropriate when "the possession of a firearm * * * embolden[s] the actor to possess the drugs or provide[s] the actor protection for himself and his drugs." United States v. Jenkins, 566 F.3d 160, 163 (4th Cir.), cert. denied, 558 U.S. 924 (2009); see United States v. Angel, 576 F.3d 318, 323 (6th Cir. 2009). "[C]ourts will look to the quantity of the drugs and their street value to determine whether possession of a gun was likely to achieve these purposes." United States v. Gibbs, 753 Fed. Appx. 771, 775 (11th Cir. 2018) (per curiam).

Here, petitioner possessed 72 baggies of a heroin-fentanyl mix, which testimony established had a street value of \$720 and was many times the amount consistent with personal use. See Pet. App. 12a. That is sufficient to establish that the firearm and ammunition likely helped to protect petitioner and the drugs. See, e.g., Angel, 576 F.3d at 319, 323 (enhancement proper where gun was found near 81 grams of marijuana). Indeed, as the court of appeals observed, petitioner admitted to police that "his friend

gave [the weapon] to him for protection.” Pet. App. 4a n.1 (emphasis added). Accordingly, the four-level enhancement would have been appropriate even had the district court not relied on the drug-trafficking conduct that it found by a preponderance of the evidence but which the jury did not find beyond a reasonable doubt.

Moreover, even petitioner’s counsel observed that the advisory guidelines range after applying the four-level enhancement still was “very low considering everything about my client” and that “[m]aybe an upward variance is appropriate based on his record.” Pet. App. 27a. The government had urged a sentence of eight years of imprisonment based on petitioner’s extensive criminal history, id. at 35a-36a; see id. at 21a (observing that petitioner had 40 prior convictions, 12 of which were for felonies, and more than 30 other arrests), and the district court ultimately imposed an above-guidelines sentence of 72 months of imprisonment, id. at 36a-37a. Petitioner does not argue that his sentence is or would be substantively unreasonable without the district court’s finding that he intended to distribute the 72 baggies of heroin and fentanyl. Under those circumstances, it is questionable whether petitioner would be entitled to relief -- or that the result would ultimately be different at any resentencing -- even if he were to prevail on the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

ROSS B. GOLDMAN
Attorney

JANUARY 2020