

APPENDIX A

United States v. Brown

United States Court of Appeals for the Fifth Circuit

August 6, 2019, Filed

No. 18-11257

Reporter

2019 U.S. App. LEXIS 23451 *; __ Fed. Appx. __; 2019 WL 3713704

UNITED STATES OF AMERICA, Plaintiff - Appellee, v.
LYNDEN BROWN, 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Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.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. USDC No. 4:18-CR-79-1.

Disposition: AFFIRMED.

Case Summary

Overview

HOLDINGS: [1]-Defendant's sentence for being a felon in possession of a firearm was affirmed since it was not clearly erroneous for the district court to find his other firearm-related conduct similar, it was not clearly erroneous for the district court to conclude that his three separate firearms-related offenses represented a regular pattern, and the district court did not clearly err in holding that the temporal proximity of his offenses weighed in favor of finding the conduct relevant.

Outcome

Sentence affirmed.

Counsel: For United States of America, Plaintiff - Appellee: Emily Baker Falconer, Assistant U.S. Attorney, Leigha Amy Simonton, Assistant U.S. Attorney, U.S. Attorney's Office, Northern District of Texas, Dallas, TX.

For Lynden Brown, Defendant - Appellant: Jaidee Serrano, Assistant Federal Public Defender, Brandon Elliott Beck, Federal Public Defender's Office, Northern District of Texas, Lubbock, TX.

Judges: Before CLEMENT, HAYNES, and WILLETT, Circuit Judges.

Opinion

PER CURIAM:*

Lynden Brown pleaded guilty to one count of being a felon in possession of a firearm. On December 18, 2017, police travelled to Brown's grandmother's home to arrest him on "multiple weapons charges." While police were en route, Brown entered Destiny McDaniel's vehicle as a passenger. When an officer turned onto the same street as McDaniel's vehicle, McDaniel sped away. The officer pursued McDaniel and Brown. During the pursuit, Brown threw a stolen pistol out of the passenger-side window. Although he initially escaped, he was arrested on December 27, 2017.

Prior to his arrest, Brown had been involved in two firearm-related [*2] incidents. On July 29, 2017, he conspired with three individuals to burglarize vehicles. Later that day, police stopped a vehicle in which he was riding as a passenger with his co-conspirators. A search uncovered three firearms including a stolen pistol. Police also discovered ammunition and other items stolen from the burglarized vehicles. On August 7, 2017, police responded to a report of an individual brandishing a firearm outside of a vehicle. Brown was a passenger in the vehicle with two other individuals. Police discovered three pistols (one of which was stolen) and .03 ounces of marijuana in the vehicle.

Brown's December 2017 offense resulted in a base offense level of 20. His probation officer considered the prior firearm incidents as "relevant conduct" under the sentencing guidelines and assessed additional points.

Brown objected to the PSR on grounds that the July and August 2017 incidents were not relevant conduct for purposes of sentencing. At the sentencing hearing, the district court overruled his objections because the prior conduct was

*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*.

"similar to the instant offense, and the time integral [sic] between the offenses was not significant." Further, "the other occurrences [*3] have to do with the defendant unlawfully possessing a firearm as a felon."

Brown appeals. He renews his challenge to the treatment of his prior firearm incidents in July and August 2017 as relevant conduct for the purposes of applying the enhancements.¹

"A district court's application of the sentencing guidelines is reviewed *de novo*, and its findings of fact are reviewed for clear error." [*United States v. Brummett*, 355 F.3d 343, 344 \(5th Cir. 2003\)](#) (*per curiam*). However, "[a] district court's determination of relevant conduct is reviewed for clear error." [*Id.* at 345](#). "There is no clear error if the district court's finding is plausible in light of the record as a whole." [*United States v. Serfass*, 684 F.3d 548, 550 \(5th Cir. 2012\)](#) (internal quotation marks omitted).²

A district court may apply guideline enhancements based on a defendant's relevant conduct. [*Brummett*, 355 F.3d at 344](#); [U.S.S.G. § 1B1.3\(a\)](#). Relevant conduct includes "all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction." [U.S.S.G. § 1B1.3\(a\)\(2\)](#). Offenses are "part of the same course of conduct if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses." [U.S.S.G. § 1B1.3, cmt. n.5\(B\)\(ii\)](#). Factors pertinent to making a same-course-of-conduct [*4] determination "include the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses." *Id.*

¹It might be possible to read Brown's brief as raising a separate argument about the propriety of his 4-level enhancement for possession of a firearm during the commission of another felony. But to the extent this represents a different argument from the one he raises about his other enhancements, it is inadequately briefed, and we decline to reach it. See [*Meadowbriar Home for Children, Inc. v. Gunn*, 81 F.3d 521, 532 \(5th Cir. 1996\)](#). Brown also asserts both that [18 U.S.C. § 922\(g\)\(1\)](#) is unconstitutional and that, even if it is not, knowledge of a firearm's interstate travel is a required element. Whatever the merits of the constitutional issue, these arguments—as Brown acknowledges—are foreclosed by binding precedent. [*United States v. Alcantar*, 733 F.3d 143, 146 \(5th Cir. 2013\)](#); [*United States v. Rose*, 587 F.3d 695, 705-06 \(5th Cir. 2009\)](#) (*per curiam*).

²Brown argues that a determination of relevant conduct is an application of the guidelines and thus subject to *de novo* review. However, this court, in [*United States v. Cockerham*](#), rejected that argument and affirmed a clear-error standard because the relevant conduct "analysis [is] primarily factual, raising no substantial issues of law." [919 F.2d 286, 289 \(5th Cir. 1990\)](#).

In evaluating the degree of similarity, this court "inquire[s] whether there are distinctive similarities between the offense of conviction and the remote conduct that signal that they are part of a course of conduct rather than isolated, unrelated events that happen only to be similar in kind." [*United States v. Rhine*, 583 F.3d 878, 888 \(5th Cir. 2009\)](#) (internal quotation marks omitted).

In [*Brummett*](#), the defendant pleaded guilty to possession of one firearm, but his sentence accounted for two additional firearms found in his possession in the nine months following his arrest. [355 F.3d at 344](#). During the offense of conviction, police discovered drug paraphernalia, a pistol, and a shotgun after a search of Brummett's home in connection with a check-forging-scheme investigation. *Id.* Seven months later, police searched his home as part of a methamphetamine ("meth") lab investigation and found a handgun and meth manufacturing equipment. *Id.* Two months later, police discovered a rifle, meth lab, and meth in Brummett's motel room. *Id.* This court affirmed the district court's relevant-conduct finding, holding [*5] that Brummett's "pattern of behavior of possessing firearms was similar." [*Id.* at 345](#).

The parties disagree as to whether similarity in the context of felon-in-possession charges requires more than a showing of mere possession of a firearm. While the court in [*Brummett*](#) did not explicitly find Brummett's other firearm possessions relevant only because drugs as well as guns were present at all the scenes, it did not explicitly hold that a felon's mere possession of a firearm satisfies the similarity factor. However, in supporting its holding, the [*Brummett*](#) court cited three cases from other circuits appearing to hold that firearm possession alone satisfied similarity. *Id.* (citing [*United States v. Santoro*, 159 F.3d 318, 321 \(7th Cir. 1998\)](#); [*United States v. Windle*, 74 F.3d 997, 1000-01 \(10th Cir. 1996\)](#); [*United States v. Powell*, 50 F.3d 94, 104 \(1st Cir. 1995\)](#)). In [*Powell*](#), the First Circuit explicitly stated that "the contemporaneous, or nearly contemporaneous, possession of uncharged firearms is, in this circuit, relevant conduct in the context of a felon-in-possession prosecution." [50 F.3d at 104](#). We agree and hold that it was not clearly erroneous for the district court to find Brown's other firearm-related conduct similar.³

The second factor, regularity, is satisfied when "there is

³We acknowledge that in defining similar conduct in some drug cases this court has required that the allegedly similar conduct involve more than the mere presence of the same drug. See e.g., [*United States v. Rhine*, 583 F.3d 878, 888-89 \(5th Cir. 2009\)](#). But drug cases are analogically distinct from felon-in-possession cases where the elements of the underlying offense are simply being a convicted felon in possession of a firearm.

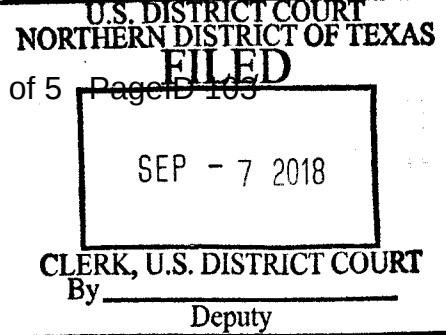
evidence of a regular, i.e., repeated, pattern of similar unlawful conduct directly linking the purported [*6] relevant conduct and the offense of conviction." [*Rhine*, 583 F.3d at 889-90](#). In *Brummett*, the court noted that the defendant possessed firearms on "three separate occasions within a nine month period," and that his "pattern of behavior of possessing firearms was . . . regular." [*355 F.3d at 345*](#). It was not clearly erroneous for the district court to conclude that Brown's three separate firearms-related offenses represented a regular pattern.

Finally, this court typically uses one year "as the benchmark for determining temporal proximity," which is the third factor. [*Rhine*, 583 F.3d at 886-87](#). Here, Brown's firearm possessions all occurred less than a year apart. The district court did not clearly err in holding that the temporal proximity of Brown's offenses weighed in favor of finding the conduct relevant.

AFFIRMED.

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APPENDIX B

United States District CourtNorthern District of Texas
Fort Worth Division

UNITED STATES OF AMERICA §
v. §
LYNDEN BROWN §

Case Number: 4:18-CR-079-A(01)

JUDGMENT IN A CRIMINAL CASE

The government was represented by Assistant United States Attorney J. Michael Worley. The defendant, LYNDEN BROWN, was represented by Federal Public Defender through Assistant Federal Public Defender Jaidee Serrano.

The defendant pleaded guilty on April 20, 2018 to the one count indictment filed on March 27, 2018. Accordingly, the court ORDERS that the defendant be, and is hereby, adjudged guilty of such count involving the following offense:

<u>Title & Section / Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count</u>
18 U.S.C. § 922(g)(1) & 924 (a)(2) Felon in Possession of Firearm	December 18, 2017	1

As pronounced and imposed on September 7, 2018, 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 108 months. The sentence of 108 months shall run concurrently with any future sentences imposed in Case Nos. 1526176, 1508936D, 1515488D, and 1515494D in Criminal District Court No. 1 of Tarrant County, Texas and Case No. 1526000 in Tarrant County Criminal Court No. 4 of Tarrant 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 standard conditions ordered by this court and shall comply with the following additional 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 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.
5. 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.
6. 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 7th day of September, 2018.



JOHN McBRYDE
UNITED STATES DISTRICT JUDGE

RETURN

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

Defendant delivered on _____, 2018 to _____
at _____, with a certified copy of this Judgment.

United States Marshal for the
Northern District of Texas

By _____
Deputy United States Marshal