

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

File Name: 19a0392n.06

Case No. 18-3507

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

UNITED STATES OF AMERICA,)
)
 Plaintiff-Appellee,)
)
 v.)
)
 DAMAR D. RUFFIN,)
)
 Defendant-Appellant.)

FILED
Jul 31, 2019
DEBORAH S. HUNT, Clerk

BEFORE: GILMAN, SUTTON, and WHITE, Circuit Judges.

SUTTON, Circuit Judge. A jury convicted Damar Ruffin of conspiring to possess with intent to distribute over two kilograms of methamphetamine. This marked his fifth felony drug conviction. It could mark his last, as the offense came with a life sentence. Ruffin objects to his conviction and sentence. Because none of his arguments carries the day, we affirm.

I.

In October 2015, a Postal Inspection Service drug dog alerted on a suspicious package. Warrant in hand, investigators cracked it open and discovered four pounds of methamphetamine. The officers weren't the only ones interested in the package. Someone had tracked its shipping status three times on the day of its expected delivery, each time with the same phone number. And someone, perhaps the same someone, used that phone number to call the destination residence of the package just minutes after running a status check. Investigators learned that the phone number

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belonged to Damar Ruffin, a four-time convicted drug felon. The officers seized the package but did not arrest anyone then.

In November 2015, authorities intercepted two more packages on their way to two different addresses in the same area, collectively containing eight more pounds of methamphetamine. Investigators noticed that both packages were assigned to the same mail carrier. Suspicious, they set a trap. They replaced the drugs in one package with a placebo. They replaced the drugs in the other package with a representative sample and a GPS tracking device. And they released both packages for drop-off. Then the undercover officers followed the mail carrier.

The mail carrier received the packages but never delivered them. She instead scanned them as delivered, confiscated them, and completed her route. When her shift ended, she transferred the packages' contents to her personal car and, after a short detour, drove them to a known drug house nicknamed "the Mansion." Fearing the packages' contents might disappear if taken inside, the officers arrested the mail carrier as soon as she pulled into the driveway.

From inside the Mansion, Ruffin and others saw the arrest. The occupants scattered. Ruffin made a hasty escape out the backdoor and down a side street. He didn't get far. Police spotted him—he is 6'8" and 350 pounds—and stopped him within a block of the residence. An officer familiar with the October 2015 methamphetamine investigation recognized Ruffin and arrested him. Investigators searched him. They found \$1,400 in cash, a bag of marijuana, and two cellphones.

When the police searched the two cellphones, Ruffin's prospects went from bad to worse.

Police found a photo—taken the morning the November packages were shipped—that displayed a piece of mail postmarked to the destination address of the package. They learned that Ruffin had extensive communication with **Random Person** (who later admitted to helping Ruffin pack

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and ship the methamphetamine) and Wesley Tucker (who provided the mail carrier with delivery instructions for the packages). And they found that Ruffin participated in a Facebook group message on the packages' expected delivery date featuring messages such as "Touchdown, answer phone." R. 99 at 120. Authorities also used location data from the cellphones—in conjunction with other evidence—to create a map of Ruffin's movements before the November methamphetamine deliveries. The map corroborated the account that Harris provided to authorities.

A grand jury charged Ruffin with conspiracy to possess with intent to distribute over two kilograms of methamphetamine. He moved to suppress the evidence collected from his cellphones. The court rejected his motion. Ruffin proceeded to trial, and a jury convicted him. The court imposed a mandatory life sentence due to his extensive criminal history.

II.

Conviction. Ruffin offers a range of arguments about why his conviction should be set aside. None of them moves the ball down the field.

1. Ruffin argues that the court erred in admitting evidence from his cellphones because the officers lacked probable cause to arrest him in the first place. In gauging this claim, we consider all of the circumstances that led to his arrest, *see Maryland v. Pringle*, 540 U.S. 366, 371 (2003), and ask whether they establish a fair probability that the suspect violated the law, *see Northrop v. Trippett*, 265 F.3d 372, 379 (6th Cir. 2001). “[H]eadlong flight” from police is the “consummate act of evasion,” especially when it occurs in a “high crime area.” *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). Coupled with preexisting suspicion, that fact alone can amount to probable cause. *See Sibron v. New York*, 392 U.S. 40, 66 (1968).

Today's evidence easily adds up to probable cause. Ruffin took off running when he saw the police; there's your headlong flight. He ran out of a known drug house; there's your high-crime area. On top of that, Ruffin's flight was a direct response to a live drug bust. And the officers who arrested him knew that he tracked the October methamphetamine delivery and had good reason to connect that shipment with the November shipments.

Ruffin offers a parade of what-ifs in response: What if the mail carrier was delivering the packages to someone else in the house? What if she was paying a social visit and planned to take them elsewhere? What if she was idling in the driveway and never intended to get out of her car? Fair questions all. But regrettably for Ruffin, they are questions that would make a difference only in a guilt-beyond-a-reasonable-doubt inquiry, not a probable-cause inquiry. Probable cause just requires circumstances that create a fair probability of criminality. The officers had plenty of that.

2. Ruffin claims that the government violated his rights by accessing his cellphones' location information without a warrant. No violation occurred, because the exclusionary rule does not apply. Courts, it's true, often suppress evidence obtained in violation of the Fourth Amendment. *See Mapp v. Ohio*, 367 U.S. 643, 655 (1961). But an exception exists for evidence gathered by officers acting under a reasonable "good-faith belief" that they did all the law required. *United States v. Leon*, 468 U.S. 897, 909 (1984). The exception covers good-faith reliance on Congressional statutes, so long as they aren't "clearly unconstitutional." *Illinois v. Krull*, 480 U.S. 340, 349 (1987).

By all accounts, the officers' subpoenas for location information, initiated before the *Carpenter* decision, comported with the requirements of the Stored Communications Act, 18 U.S.C. § 2703(d). That statute is far from "clearly unconstitutional." At the time, it contained ample procedural safeguards to assuage the Fourth Amendment concerns of reasonable line-level

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officers. *United States v. Carpenter*, 926 F.3d 313, 318 (6th Cir. 2019). These same safeguards had already assuaged the Fourth Amendment concerns of two circuits by the time the authorities filed subpoenas in this case. *See In re Application for Historical Cell Site Data*, 724 F.3d 600, 615 (5th Cir. 2013); *United States v. Davis*, 785 F.3d 498, 518 (11th Cir. 2015).

That explains why we've held that evidence collected pre-*Carpenter* in reasonable reliance on the Act's prescribed procedure need not be excluded. *See Carpenter*, 926 F.3d at 318. Every other circuit to address the issue agrees. *See United States v. Chambers*, 751 F. App'x 44, 46 (2d Cir. 2018); *United States v. Goldstein*, 914 F.3d 200, 203 (3d Cir. 2019); *United States v. Chavez*, 894 F.3d 593, 608 (4th Cir. 2018); *United States v. Curtis*, 901 F.3d 846, 848 (7th Cir. 2018); *United States v. Korte*, 918 F.3d 750, 759 (9th Cir. 2019); *United States v. Joyner*, 899 F.3d 1199, 1204 (11th Cir. 2018) (per curiam).

3. Ruffin also challenges the sufficiency of the evidence to support his conviction. That is not an easy claim in general, as we will grant relief only if no "rational trier of fact" could find the crime's essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). And that is not an easy claim here in view of the evidence arrayed against him.

The government had to prove three things: there was an agreement to violate the drug laws, Ruffin intended to join the agreement, and he participated in the agreement. *See United States v. Welch*, 97 F.3d 142, 148 (6th Cir. 1996). Ample evidence showed all of that. Ruffin repeatedly tracked the October methamphetamine shipment, and he contacted the destination residence minutes later. Ruffin had a photo taken the morning the November packages were shipped displaying the destination address. He had a pattern of suspicious communications with Harris and Tucker—both confessed members of the drug-distribution conspiracy. He was at the Mansion at the time the delivery occurred. And he took off running when the police arrived.

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Harris's testimony makes things easier. He explained under oath, and in detail, how Ruffin helped to package the methamphetamine and to coordinate its shipment. If the *uncorroborated* testimony of a single co-conspirator can sustain a conviction if it establishes all the necessary inferences, *see United States v. Graham*, 622 F.3d 445, 450 (6th Cir. 2010), surely this evidence can do the same. Harris's testimony goes to all three elements of conspiracy. And location data from Ruffin's own cellphones corroborated the story.

But, Ruffin counters, Harris admitted on the stand that he was willing to lie if it meant protecting his own skin. And in exchange for his testimony, he stood to receive a substantially reduced sentence. How do we know, he asks, that the jury believed him? Truth be told, we don't. But for purposes of sufficiency review, we don't need to know for sure. All that matters is that a reasonable jury *could* have believed Harris's testimony. *See United States v. Marshall*, 248 F.3d 525, 536 (6th Cir. 2001). This jury could have done just that.

Sentence. Ruffin also challenges his mandatory life sentence.

1. Ruffin begins by arguing that 21 U.S.C. § 841(b), which imposes a mandatory life sentence on third-time (and beyond) drug felons, unconstitutionally precludes judges from considering factors unique to each individual's case. *See* 18 U.S.C. § 3553. On his view, this violates (in combination) the Fifth, Eighth, and Fourteenth Amendments. Not so. The range of criminal penalties at the judiciary's disposal is "subject to congressional control." *Mistretta v. United States*, 488 U.S. 361, 364 (1989). Congress may "eliminate all discretion" from federal courts by fixing mandatory sentences if it wishes to do so. *United States v. Dumas*, 934 F.2d 1387, 1389 (6th Cir. 1990). Case after case says just that. *See Miller v. Alabama*, 567 U.S. 460, 481 (2012); *United States v. Richardson*, 793 F.3d 612, 632 (6th Cir. 2015), *judgment vacated on other*

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grounds, 136 S. Ct. 1157 (2016); *United States v. Odeneal*, 517 F.3d 406, 414 (6th Cir. 2008). In § 841(b), Congress made that choice. We have no warrant to second-guess that judgment.

Nor does it make a difference that capital defendants by contrast have a constitutional right to individualized sentencing. *See Abdul-Kabir v. Quarterman*, 550 U.S. 233, 248 (2007). Individualized sentencing is one of many ways that “death is different” in the Court’s estimation. *Miller*, 567 U.S. at 481. That difference has left the Court disinclined to extend a similar entitlement to non-capital defendants. *See Harmelin v. Michigan*, 501 U.S. 957, 995 (1991) (plurality opinion). It has left us similarly disinclined. *See, e.g., Graham*, 622 F.3d at 453; *Odeneal*, 517 F.3d at 415; *United States v. Dumas*, 934 F.2d 1387, 1389 (6th Cir. 1990). We have no authority to change course now and here.

2. Ruffin adds in the alternative that a life sentence is too harsh for a crime of this severity, and runs afoul of the Eighth Amendment on that basis alone. When it comes to challenges of this sort, we follow a “narrow proportionality principle,” which strikes down only those sentences “grossly disproportionate” to the crime. *United States v. Hill*, 30 F.3d 48, 50 (6th Cir. 1994). As a benchmark, we look to the Supreme Court’s plurality opinion in *Harmelin*, which upheld the life sentence of a first-time felon convicted of cocaine possession. 501 U.S. at 994–95. Since then, this court has repeatedly affirmed life sentences for conspiracy to commit drug-related offenses. *See, e.g., Graham*, 622 F.3d at 452; *Odeneal*, 517 F.3d at 413–15; *Hill*, 30 F.3d at 48.

Acknowledging the precedent arrayed against him, Ruffin tries to distinguish those cases on the ground that he, unlike the defendants in those cases, did not “actively attempt[] to possess or distribute methamphetamine.” Appellant’s Br. 11. But if Ruffin means to say that his conduct was less culpable than theirs, we can’t agree. The government’s case-in-chief establishes that Ruffin traveled out of Ohio to assist Harris in packaging methamphetamine. And it shows that he

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quarterbacked that methamphetamine's delivery into Ohio. There was nothing "inactive" about this conduct. Notably, the support for Ruffin's sentence is stronger than in other life-sentence cases, because ~~Ruffin moved over two kilograms of narcotics, cf. Harmelin~~, 501 U.S. at 961 (672 grams); *Hill*, 30 F.3d at 50 (177.8 grams), and this is his fifth felony drug conviction, ~~cf. Harmelin~~, 501 U.S. at 994 (no prior felony convictions); *Hill*, 30 F.3d at 50 (two prior felony convictions).

3. Last of all, Ruffin requests resentencing under the First Step Act, Pub. L. No. 115-391, § 401(a)(2), 132 Stat. 5194, 5220 (2018) (amending 21 U.S.C. § 841(b)(1)(A)(viii)). ~~The first problem with this argument is that Ruffin waited until his reply brief here to raise it. That is too late. See *United States v. Campbell*, 279 F.3d 392, 401 (6th Cir. 2002). The second problem is that this portion of the Act doesn't apply retroactively. See *United States v. Potter*, 927 F.3d 446, 455 (6th Cir. 2019).~~

We affirm.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,) CRIMINAL ACTION
)
 Plaintiff,) CASE NUMBER 5:16 CR 362
)
 vs.)
) JUDGMENT
 DAMAR D. RUFFIN,)
)
 Defendant.)

The above-captioned case came before this Court for a trial by jury. At the conclusion of the trial, the Jury returned a unanimous Verdict of guilty on the Superseding Indictment against the Defendant Damar D. Ruffin.

Defendant Damar D. Ruffin was charged with one count of conspiracy to possess with intent to distribute approximately 2,210.7 grams of a mixture or substance containing a detectible amount of methamphetamine, a Schedule II controlled substance, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A).

The trial commenced on February 1, 2018. A Jury of twelve was selected with four alternates. Opening statements of counsel were made. The United States called the following witness(es): (1) Postal Inspector Michael Adams; (2) Detective Chris Carney; (3) Special Agent Timothy Edquist; (4) Detective Paul Hill; and (5) Jailla Stoudemire. Court was adjourned until February 2, 2018 at 8:15 a.m.

The trial continued on February 2, 2018. The United States called the following witness(es): (6) Randolph Harris; and (7) Inspector Marc Kudley. The United States rests. Defendant rests. Court gives preliminary instructions of law to Jury. Closing arguments of

Appendix B

counsel were made. The Court gives final instructions to Jury. The Alternate Jurors were excused and the Jury thereafter retired to deliberate. The Jury, in open court, returned a unanimous Verdict of Guilty on the Superseding Indictment. The Verdict was as follows:

VERDICT FORM
COUNT 1

We the Jury, being duly impaneled and sworn, find the Defendant DAMAR D. RUFFIN, GUILTY (insert in ink guilty or not guilty) of conspiracy to possess with intent to distribute Methamphetamine, a Schedule II controlled substance, in violation of Title 21, United States Code Section 841(a)(1) and (b)(1)(A) as charged in the Superseding Indictment.

The Court read the Verdict in open court, and thereafter, the Court polled the Jury as to its Verdict pursuant to Rule 31(d) of the Federal Rules of Criminal Procedure. Each Juror affirmatively responded to the correctness of the Verdict. The Court accepted the Jury's Verdict. The Jury was discharged. The Defendant was referred to the Probation Department for a pre-sentence report. Sentencing was set for May 15, 2018 at 10:00 a.m. Court was adjourned.

IT IS SO ORDERED.

DATE: February 5, 2018

Donald C. Nugent
DONALD C. NUGENT
UNITED STATES DISTRICT JUDGE

No. 18-3507

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct 08, 2019
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAMAR D. RUFFIN,

Defendant-Appellant.

O R D E R

BEFORE: GILMAN, SUTTON, and WHITE, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

Appendix C

14.07B UNANIMITY REQUIRED: DETERMINING AMOUNT OF CONTROLLED SUBSTANCE (§ 846)

(1) The defendant is charged in Count _____ of the indictment with conspiracy to [insert object(s) of conspiracy]. If you find the defendant guilty of this charge, you will then be asked to determine the quantity of the controlled substance involved in the conspiracy that was attributable to him as the result of his own conduct and the conduct of other co conspirators that was reasonably foreseeable to him. You will be provided with a special verdict form for this purpose.

(2) If you find by unanimous agreement that the government has proved beyond a reasonable doubt that a quantity of at least _____ of a mixture or substance containing a detectable amount of [name controlled substance] was attributable to defendant as the result of his own conduct and the conduct of other co conspirators that was reasonably foreseeable to him, then please indicate this finding on the special verdict form.

[(3) If you do not so find, you will then be asked to determine whether the government has proved a lesser quantity. If you unanimously find that the government has proved beyond a reasonable doubt that quantity of at least _____ of a mixture or substance containing a detectable amount of [name controlled substance] was attributable to defendant as the result of his own conduct and the conduct of other co conspirators that was reasonably foreseeable to him, then please indicate that finding on the special verdict form.]

(4) In determining the quantity of the controlled substance, you need not find that the defendant knew that his offense involved this quantity of drugs.

Use Note

This instruction explains the requirements of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Alleyne v. United States*, 133 S.Ct. 2151 (2013) in a controlled substances conspiracy case. In these cases, the committee recommends that the court give this instruction and use a special verdict form. Special verdict forms are provided below following the commentary.

Depending upon the nature and quantity of the controlled substance alleged in the indictment and the special verdict form used, bracketed paragraph (3) may not be necessary to determine the quantity for sentencing purposes.

Committee Commentary 14.07B (current through July 1, 2018)

As described in the Commentary to Instruction 14.07A, under *Apprendi* and *Alleyne*, the jury must unanimously agree on any fact (other than a prior conviction) that increases the statutory maximum penalty or triggers a mandatory minimum penalty. In § 846 conspiracy prosecutions, the quantity of a controlled substance can increase the statutory maximum penalty and/or trigger a statutory mandatory minimum penalty and therefore requires the jury to agree unanimously on a minimum quantity involved in the conspiracy. Instruction 14.07B Unanimity Required—Determining Amount of Controlled Substance (§ 846) and the accompanying special

Provided below are two special verdict forms designed for § 846 prosecutions, Forms 14.07B-1 and 14.07B-2. The Committee decided to provide two versions of a special verdict form so district judges may choose the form they prefer. Form B-1 asks the jury to identify the amount of drugs proved by asking one question on the amount and giving the jury several choices for the answer, from which it must choose just one. Form B-2 asks the jury to identify the amount of drugs by asking two sequential questions, first whether the greater amount was proved, and if not, whether the lesser amount was proved.

Special Verdict Form § 846

Form 14.07B-1

We, the jury, unanimously find the following:

COUNT _____

Question 1. With respect to the charge in count _____ of the indictment for conspiracy to [insert object(s) of conspiracy], we find the defendant [insert name]:

Guilty _____ Not Guilty _____

If you answered guilty in response to Question 1, proceed to Question 1(a).

If you answered not guilty in response to Question 1, skip Question 1(a) and proceed to [next count or signature line].

Question 1(a). With respect to Count _____, the amount of the mixture or substance containing a detectable amount of [name controlled substance] that was attributable to defendant as the result of his own conduct and the conduct of other co conspirators reasonably foreseeable to him was (indicate answer by checking one line below):

_____ [identify amount from § 841(b)(1)(A)] or more.

_____ less than [identify amount from § 841(b)(1)(A)] but more than [identify amount from § 841(b)(1)(B)].

_____ less than [identify amount from § 841(b)(1)(B)].

Proceed to [next count or signature line].

Special Verdict Form § 846

Form 14.07B-2

We, the jury, unanimously find the following:

COUNT _____

Question 1. With respect to the charge in count _____ of the indictment for conspiracy to [insert object(s) of conspiracy], we find the defendant [insert name]:

Guilty _____ Not Guilty _____

If you answered guilty in response to Question 1, proceed to Question 1(a).

If you answered not guilty in response to Question 1, skip Question 1(a) and 1(b) and proceed to [next count or signature line].

Question 1(a). With respect to Count _____, the amount of the mixture or substance containing a detectable amount of [name controlled substance] that was attributable to defendant as the result of his own conduct and the conduct of other co conspirators reasonably foreseeable to him was (indicate answer by checking one line below):

_____ [identify amount from § 841(b)(1)(A)] or more.

_____ less than [identify amount from § 841(b)(1)(A)].

If you chose the first option of [identify amount from § 841(b)(1)(A)] or more, skip Question 1(b) and proceed to [next count or signature line].

If you chose the second option of less than [identify amount from § 841(b)(1)(A)], proceed to Question 1(b).

Question 1(b). With respect to Count _____, the amount of the mixture or substance containing a detectable amount of [name controlled substance] that was attributable to defendant as the result of his own conduct and the conduct of other co conspirators reasonably foreseeable to him was (indicate answer by checking one line below):

_____ [identify amount from § 841(b)(1)(B)] or more.

_____ less than [identify amount from § 841(b)(1)(B)].