NO. 19-

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 2019

JUSTIN MICHAEL OXENDINE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the district court abused its discretion by varying upward when an applicable guideline provision addressed conduct that formed part of the rationale for the variance.

LIST OF PARTIES TO PROCEEDING BELOW

United States of America

Justin Michael Oxendine

LIST OF PROCEEDINGS IN FEDERAL TRIAL AND APPELLATE COURTS

1. United States District Court for the Eastern District of North Carolina, No. 5:18-CR-448, *United States v. Justin Michael Oxendine.* Original criminal judgment entered May 29, 2019.

2. United States Court of Appeals for the Fourth Circuit, No. 19-4380, *United States v. Justin Michael Oxendine*. Judgment affirming district court entered March 23, 2020.

TABLE OF CONTENTS

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

CASES

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Petitioner respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Fourth Circuit rendered in this case on March 23, 2020.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit affirming Petitioner's sentence is found at 798 Fed. Appx. 766 (4th Cir. 2020) (unpublished) and is attached at Pet. App. 1a. The original judgment of the United States District Court for the Eastern District of North Carolina sentencing Petitioner to 46 months in prison is attached hereto as Pet. App. 3a.

JURISDICTIONAL GROUNDS

The opinion of the United States Court of Appeals for the Fourth Circuit affirming Petitioner's sentence issued on March 23, 2020. Pet. App. 1a. The jurisdiction of this Court is

invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S.S.G. § 2A6.1 provides in pertinent part:

§2A6.1. Threatening or Harassing Communications; Hoaxes; False Liens

(a) Base Offense Level:

(1) 12; or

(2) 6, if the defendant is convicted of an offense under 47 U.S.C. § 223(a7(1)(C), (D), or (E) that did not involve a threat to injure a person or property.

(b) Specific Offense Characteristics

* * * * *

(4) If the offense resulted in (A) substantial disruption of public, governmental, or business functions or services; or (B) a substantial expenditure of funds to clean up, decontaminate, or otherwise respond to the offense, increase by 4 levels.

STATEMENT OF THE CASE

According to the government, on the afternoon of June 13, 2018, someone telephoned the 911 Center of the Fayetteville, North Carolina, Police Department and said three bombs, including one inside the county courthouse, would detonate in the downtown area in several hours. (J.A. 28, 64 ¶5). Police evacuated people and swept five buildings, but they did not find any bombs. (J.A. 28, 64 ¶5).

With the assistance of a telephone company, investigators traced the call to a cellular

telephone purchased earlier that day at a variety store. (J.A. 28, 64 ¶6). The trace also showed the bomb threat was called in four blocks away from the courthouse. (J.A. 28-29, 64 ¶6). Video recordings from the store identified Petitioner as the buyer of the phone. (J.A. 29, 64 ¶6).

At the time of the bomb threat, Petitioner was scheduled to appear in the courthouse. (J.A. 29, 64 ¶6). Video footage showed Petitioner in the building. (J.A. 29, 64 ¶6). His case involved crime-victim restitution he had agreed to pay, but Petitioner told the assistant district attorney he did not have enough money to cover the amount. (J.A. 29, 64 ¶6). The prosecutor told the defense attorney the victims wanted Petitioner to go to jail. (J.A. 29, 64-65 ¶7). When the attorney told this to Petitioner, the latter said he was going outside to smoke. (J.A. 29, 65 ¶7). The threatening phone call came in shortly thereafter. (J.A. 29-30, 65 ¶7). Petitioner did not return after the courthouse had been cleared to resume operation. (J.A. 65 ¶7).

On August 29, 2018, police arrested Petitioner. (J.A. 65 ¶8). He admitted purchasing the telephone, but he said he gave it to someone else for use in making the bomb threat. (J.A. 65 ¶8). Later, during a monitored phone conversation from the jail, Petitioner said he made the threat because he did want to go to prison. (J.A. 30, 65 ¶9).

A federal grand jury subsequently indicted Petitioner for violating 18 U.S.C. § 844(e), bomb threat by telephone. (J.A. 8). He pled guilty to the charge in United States District Court on January 15, 2019. (J.A. 9, 27, 51).

Following the plea, a probation officer calculated Petitioner's imprisonment range under the sentencing guidelines as 30 months to 37 months. (J.A. 77 ¶78). The range derived from a total offense level of 13 and a criminal history category of V. (J.A. 72 ¶35, 77 ¶78). The probation officer recommended the court consider an upward departure under U.S.S.G. § 4A1.3,

inadequate criminal history, and section § 2A6.1(c)(4)(B)(iv), multiple victims. (J.A. 78 ¶92). His case came on for sentencing on May 23, 2019. (J.A. 34).

At the hearing, the district court said the bomb threat had cost the police department over $4,000. (J.A. 35). It then asked Petitioner to "think about" a consequence of his offense for which he had received a 4-level enhancement of his offense level: "the disruption to the businesses affected and the court affected, and then what that did to other people." *See* U.S.S.G. § 2A6.1(b)(4). (J.A. 35, 76 ¶68). "That was a really stupid thing you did," the court told Petitioner. (J.A. 35).

After the court found Petitioner's imprisonment range to 30 to 37 months, the government asked the court to vary above that range. (J.A. 36). It said the application note to § 2A6.1 provided that the court "should" consider an upward departure for an offense involving multiple victims. (J.A. 36).

During the government's address, the district court interjected that Petitioner's threat had "completely thrown to the side" the docket at the county courthouse on the day he was supposed to appear there. (J.A. 38). The government reported that in addition to the affected courthouse, the police had gone "door to door" to have business owners in the area check for suspicious packages. (J.A. 38). Officers also brought in dogs to use for sniffing out any bombs in the buildings and in private areas. (J.A. 38). To this, the court said that "[y]ou've got the register of deeds gets evacuated, the clerk's office evacuated." (J.A. 39). The government continued the catalog of disruption, citing private business and government agencies that had been evacuated. (J.A. 39). The court added the county library to the list and summarized that Petitioner had "stopped the business in downtown in a significant way." (J.A. 39).

The government also argued that Petitioner had "planned out" the offense. (J.A. 39). As such, it said, Petitioner was more culpable and more dangerous than someone who impulsively makes a threat. (J.A. 39).

With respect to criminal history, the government said that of Petitioner's 17 convictions, only two were for misdemeanor offenses. (J.A. 39-40). Because of state sentencing practice, "very few" of the convictions figured into the criminal history calculation. (J.A. 40). The government asked the court to depart to criminal history category VI and to a total offense level 15. (J.A. 41).

Defense counsel argued that § 2A6.1 took into account the disruption of private and public functions, as well as the cost of cleanup. (J.A. 41). Therefore, counsel said, "one piece of the puzzle" for which the government sought a variance had been considered already by the guidelines. (J.A. 41).

The prior convictions had scored as they did, counsel continued, because Petitioner had pled guilty in a number of state cases at one time. (J.A. 42). "The guidelines score the way they score," the attorney told the court, and he argued category V was adequate to reflect Petitioner's criminal history. (J.A. 42). Counsel concluded by saying that the sentence his client faced for the federal conviction was longer than many of the previous state sentences he had received. (J.A. 42).

Petitioner himself apologized to the court system. (J.A. 42) He said he had "had a lot on [his] mind" on the day of the crime, including the recent deaths of members of his family. (J.A. 42).

The district court said a sentence within the guideline range would not accomplish the

purposes of sentencing. (J.A. 42). The government's arguments as to number of victims affected were "well taken." A two-level offense-level upward variance "in view of the multitude of people and businesses, individuals that were profoundly affected . . . on that day" would increase to the total offense level to 15 and would place Petitioner within a 37 to 46-month imprisonment range. (J.A. 43). The court said 46 months was a satisfactory imprisonment term. (J.A. 43). For that reason, the court said, it did not need to increase Petitioner's criminal history category, but noted that by moving to category VI and adding one offense level, it would reach the same result. (J.A. 44). The court sentenced Petitioner to imprisonment for a term of 46 months. (J.A. 44, 52).

Petitioner appealed to the United States Court of Appeals for the Fourth Circuit. (J.A. 44, 60). In that forum, Petitioner argued that the district court abused its discretion by in part varying above the guideline imprisonment range because of the disruptive effect of his offense. The applicable guideline accounted for that factor through a 4-level offense-level increase, and the district court did not explain, nor did the record show, that the disruption was so out of the ordinary that the enhancement was insufficient to address that aspect of Petitioner's crime. In an opinion issued on March 23, 2020, the Court of Appeals affirmed Petitioner's sentence.

MANNER IN WHICH THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Petitioner presented to the Fourth Circuit the question whether the district court abused its discretion by varying upward in part because of the disruption caused by his offense. The Court of Appeals affirmed Petitioner's sentence. Thus, the federal claim was properly presented and reviewed below and is appropriate for this Court's consideration. *See generally, Mullaney v.*

Wilbur, 421 U.S. 684 (1975).

REASON FOR GRANTING THE WRIT

BY AFFIRMING PETITIONER'S SENTENCE, THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The district court abused its discretion by basing the increased sentence on the disruption the bomb threat caused to people and businesses in the affected area. The relevant guideline, U.S.S.G. § 2A6.1 had already taken that factor into account and punished Petitioner on that basis through a 4-level offense-level increase. That increase was sufficient to cover the disruption he caused on the day he made the bomb threat.

Section 2A6.1 provides for a 4-level offense-level increase if the offense "resulted in (A) substantial disruption of public, governmental, or business functions or services; or (B) a substantial expenditure of funds to clean up, decontaminate, or otherwise respond to the offense[.]" *See* U.S.S.G. § 2A6.1(b)(4). Petitioner received that enhancement and it factored into the calculation of his offense level and the resulting imprisonment range. (J.A. 76-77 ¶ 68, ¶ 72, ¶76 and ¶ 78). This Fourth Circuit itself has explained that "departures are generally reserved for factors that are not adequately taken into account in the applicable guideline." *United States v. Stokes*, 347 F.3d 103, 106 (4th Cir. 2003). A 4-level enhancement is substantial and was adequate and appropriately addressed the disruption that occurred in this case.

Where, as the court did here, a district court rejects the recommended sentencing range and imposes an above- guidelines sentence, it must explain and justify the upward departure and/or variance. *United States v. Moreland*, 437 F.3d 424, 432-33 (4th Cir. 2006). The greater

the extent of the departure and variance, the more closely this Court scrutinizes the reasons offered in support of them, and the more compelling those reasons must be. *United States v. Tucker*, 473 F.3d 556, 561 (4th Cir. 2007); *United States v. Howard*, 773 F.3d 519, 529 (4th Cir. 2014).

Disruption is inherent in any bomb-threat scenario. Nothing in this record shows the degree of the disruption to have been especially extreme or otherwise unusual. Indeed, the record shows that the area returned to normal that same day. To repeat, ¶ 2A6.1 punished the disruptive consequences of the crime with a significant enhancement reflecting the seriousness of that factor. Given that the guideline considered and accounted for disruption, it was incumbent on the district court to explain why the enhancement fell short in this case. The district court recited an inventory of the places evacuated, but it said nothing to explain why these evacuations made Petitioner's threat more disruptive than the disruption that occurs in the typical bomb threat scenario. The record, in short, shows no basis for an upward variance on this ground, especially given guideline's imposition of an offense-level enhancement.

Petitioner respectfully requests that the writ issue and that his sentence be vacated.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit.

This the 18th day of June, 2020.

Respectfully submitted,

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