

APPENDIX

958 F.3d 725

United States Court of Appeals, Eighth Circuit.

UNITED STATES of America, Plaintiff - Appellee

v.

Erik BECERRA, Defendant - Appellant

No. 18-2777

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Submitted: October 18, 2019

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Filed: May 7, 2020

Synopsis

Background: Defendant was convicted in the United States District Court for the District of Minnesota, [Susan Richard Nelson](#), J., of federal firearms offense, following denial of his pretrial motion to suppress evidence, [2017 WL 5311435](#), and he appealed.

Holdings: The Court of Appeals, [Stras](#), Circuit Judge, held that:

[1] police officers had probable cause to believe that defendant, who had lengthy criminal history, was in illegal possession of firearm and thus could effect his warrantless arrest;

[2] police officer's questions to defendant following his arrest did not have to be preceded by *Miranda* warnings;

[3] as matter of first impression, that defendant, a convicted felon, allegedly possessed firearm innocently, solely for the purpose of turning it over to police, was no defense to prosecution under felon-in-possession statutes; and

[4] defendant's within-Guidelines sentence of 80 months was neither procedurally nor substantively unreasonable.

Affirmed.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion; Trial or Guilt Phase Motion or Objection.

West Headnotes (14)

[1] **Criminal Law** 🔑 Review De Novo
Criminal Law 🔑 Evidence wrongfully obtained

On appeal from district court's denial of motion to suppress physical evidence and incriminating statements, the Court of Appeals would review for clear error the district court's factual findings, and would review de novo any conclusions of law.

1 Cases that cite this headnote

[2] **Arrest** 🔑 Grounds for warrantless arrest in general

Warrant is not required for individual's arrest, when officer has probable cause to believe that individual is committing a crime in officer's presence. *U.S. Const. Amend. 4*.

[3] **Arrest** 🔑 Other officers or official information

Arrest 🔑 Possession, disposal, or concealment of article; flight or hiding

Police officers who arrived in response to 911 call from defendant's probation officer, after defendant appeared in her office with a noticeable bulge in his front coat pocket, which the probation officer, who was already concerned that defendant might be back on drugs, suspected to be a firearm, had probable cause to believe that defendant, who had lengthy criminal history, was in illegal possession of firearm and thus could effect his warrantless arrest, given that officers were aware of information in 911 call and of defendant's criminal history, and could see the bulge in defendant's coat themselves. *U.S. Const. Amend. 4*.

[4] **Criminal Law** 🔑 Custodial interrogation in general

Generally speaking, statements made during a custodial interrogation are inadmissible unless a suspect has first been given  *Miranda* warnings.

[5] **Criminal Law** Particular cases or questions

While suspect was in custody, having just been formally arrested by police officers, at the time that officer, in response to suspect's volunteered statement that he had "something" in his car outside, asked the defendant what the "something" was, officer's question was mere request for clarification and did not amount to custodial "interrogation," such as should have been preceded by  *Miranda* warning.

[6] **Criminal Law** Warnings

Even follow-up questions can amount to "interrogation," for  *Miranda* purposes, if their point is to enhance a defendant's guilt.

[7] **Criminal Law** Public safety or rescue

While police officer's question to suspect whom he had just arrested on probable cause to believe that suspect, who was known by officer to have lengthy criminal history, was in unlawful possession of firearm, when officer asked whether the suspect had "anything illegal on his person," was a custodial question reasonably likely to produce an incriminating response, question did not have to be preceded by  *Miranda* warning as coming within the public-safety exception to  *Miranda*.

[8] **Criminal Law** Public safety or rescue

No  *Miranda* warnings are required for police officers to ask questions reasonably prompted by a concern for public safety, even when the potential threat is to the officers themselves.

[9] **Criminal Law** Review De Novo

Whether to recognize an innocent-possessor defense to being a felon in unlawful possession of firearm was question of statutory interpretation, which the Court of Appeals would review de novo on appeal.  18 U.S.C.A. §§ 922(g)(1),  924(a)(2).

[10] **Weapons** Possession

Weapons Defenses in General; Justification or Excuse

That defendant, a convicted felon, allegedly possessed firearm innocently, solely for the purpose of turning it over to police, was no defense to prosecution under felon-in-possession statutes, which prohibited mere possession of firearm by felon, regardless of his motive in possessing it.  18 U.S.C.A. §§ 922(g)(1),  924(a)(2).

[11] **Sentencing and Punishment** Acceptance of responsibility

District court did not clearly err in finding that defendant who persisted in pursuing an "innocent possessor" defense to federal firearms charge had not accepted responsibility for his offense, as required to be entitled to an acceptance-of-responsibility reduction in his base offense level at sentencing.  18 U.S.C.A. §§ 922(g)(1),  924(a)(2);  U.S.S.G. § 3E1.1(a).

[12] **Sentencing and Punishment** Particular offenses

Minnesota crime of first-degree aggravated robbery was a "crime of violence," for purposes of sentencing a federal firearms defendant as career offender.  18 U.S.C.A. §§ 922(g)(1),  924(a)(2); Minn. Stat. Ann. § 609.245(1);  U.S.S.G. §§ 2K2.1,  4B1.2(a).

[13] Sentencing and Punishment **Mental illness or disorder****Weapons** **Possession after conviction of crime**

Within-Guidelines sentence of 80 months imposed on defendant with lengthy criminal history who was convicted of being felon in possession of firearm was not procedurally unreasonable as alleged result of district court's failure to consider, as mitigating, evidence of defendant's mental difficulties; district court did consider defendant's mental problems in imposing a lower Guidelines sentence, and its failure to impose an even lower sentence was not procedural error.  18 U.S.C.A. §§ 922(g)(1),

 924(a)(2);  U.S.S.G. § 1B1.1 et seq.

[14] Sentencing and Punishment **Other Offenses, Charges, Misconduct****Weapons** **Possession after conviction of crime**

Within-Guidelines sentence of 80 months imposed on defendant with lengthy criminal history who was convicted of being felon in possession of firearm was not substantively unreasonable.  18 U.S.C.A. §§ 922(g)(1),

 924(a)(2);  U.S.S.G. § 1B1.1 et seq.

***727** Appeal from United States District Court for the District of Minnesota

Attorneys and Law Firms

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Before **LOKEN**, **SHEPHERD**, and **STRAS**, Circuit Judges.

Opinion

STRAS, Circuit Judge.

Erik Becerra was charged as a felon in possession of a firearm and ammunition. He thinks the district court should have let him testify that he intended to hand the gun over to his probation officer. Whether this so-called innocent-possessor defense is available has long been an open question. We now join a number of other courts in declining to recognize it. Because none of his other challenges have merit either, we affirm.

I.

Becerra's probation officer was worried. A seven-time felon, Becerra had left "rambling" voicemail messages for her that did not "make any sense." He also told a police officer who had arrested him for driving under the influence that he was "dirty." She suspected that he was back on methamphetamine.

***728** Based on her concerns, she requested an "apprehension and detention order," which authorized Becerra's arrest. But before she could deliver it, he showed up at her office wearing a coat with an ominous-looking bulge in the front pocket. While he waited in the lobby, she called 9-1-1. The police officers who responded to the call decided to arrest him.

Becerra was cooperative with the officers and held nothing back. He told them that he had ammunition in his pocket and a gun in a red Dodge Avenger parked outside. He was telling the truth. They soon discovered .45-caliber ammunition in his pocket and a black semiautomatic handgun under the driver's seat of the car.

These discoveries led to two federal felon-in-possession charges, one for the gun and the other for the ammunition. See  18 U.S.C. §§ 922(g)(1),  924(a)(2). After a jury found him guilty of both counts, the district court¹ entered judgment and imposed an 80-month, within-Guidelines-range sentence.

¹ The Honorable Susan Richard Nelson, United States District Judge for the District of Minnesota.

Becerra has held nothing back on appeal either, raising an array of challenges to his convictions and sentence. His main focus is on the district court's evidentiary rulings, starting with what it let in: (1) the handgun and the ammunition, and (2) his incriminating statements. Then there is what it kept out: testimony explaining why he possessed the handgun. The challenges to his sentence run the gamut from procedural to substantive.

II.

[1] We begin with Becerra's challenges to what came in during trial. In reviewing the district court's denial of his motion to suppress the physical evidence and his incriminating statements, the standard is clear error for any factual findings and de novo for conclusions of law.  *United States v. Muhlenbruch*, 634 F.3d 987, 995 (8th Cir. 2011).

A.

The first challenge is to the physical evidence used to convict Becerra: the handgun and the ammunition. His theory is that they were inadmissible as "fruit[s]" of an illegal arrest and detention.  *Segura v. United States*, 468 U.S. 796, 804, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984). Without a warrant, he says, the officers should never have been able to arrest him in the first place.

[2] Even though a warrant is typically required for an arrest, there are exceptions. One is when there is probable cause to believe that an individual is committing a crime in the officer's presence. See  *Atwater v. City of Lago Vista*, 532 U.S. 318, 354, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001);  *United States v. Robinson*, 414 U.S. 218, 235, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973). Here, as long as there was a "substantial chance" that Becerra had a firearm on him, the officers could arrest him.  *District of Columbia v. Wesby*, — U.S. —, 138 S. Ct. 577, 586, 199 L.Ed.2d 453 (2018) (citation omitted) (explaining the probable-cause standard).

[3] There was more than enough evidence for them to conclude that he did. Once they arrived, the first probation officer they saw appeared "extremely nervous." She told them that Becerra "more than likely ha[d] a gun on him." See *United States v. Wright*, 145 F.3d 972, 975 (8th Cir. 1998) (explaining that the statements of a reliable informant can be enough for *729 probable cause). And the officers themselves could see the large bulge in his front coat pocket.

See  *Illinois v. Gates*, 462 U.S. 213, 242, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

Moreover, the officers were not entering the situation blind. The dispatcher shared the facts from the 9-1-1 call with them, including that Becerra had a lengthy criminal history and could have had drugs in his system. From their experience, these facts made it more likely that he had a gun, and the officers could reasonably conclude, based on these circumstances, that probable cause existed. At that point, warrant or not, they could arrest him.²

² The presence of probable cause eliminates the need for us to decide whether the undelivered apprehension-and-detention order would have independently justified the search.

B.

Even if the officers could arrest him, they still failed to give  *Miranda* warnings before he made two incriminating statements. See  *Miranda v. Arizona*, 384 U.S. 436, 478–79, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) (discussing what warnings are required). While the officers handcuffed him, he announced that he had "something" in his car. One of the officers asked, "what's in your car?" to which he replied, "a gun." The same officer then asked whether he "had any weapons or anything illegal" on him, which prompted him to admit that "he had bullets in his pocket." The absence of  *Miranda* warnings, according to Becerra, should have kept both statements out.

[4] Generally speaking, statements made during a "custodial interrogation" are inadmissible unless a suspect has been given  *Miranda* warnings first.  *Id.* at 444, 86 S.Ct. 1602. We have no doubt that Becerra was in custody when he made both statements. After all, the officers had just told him that he was under arrest and were placing him in handcuffs at the

time. See [Orozco v. Texas](#), 394 U.S. 324, 327, 89 S.Ct. 1095, 22 L.Ed.2d 311 (1969).

[5] The dispute is over whether the two questions that prompted these statements amounted to interrogation. The first one, “what’s in your car?” did not. It was a “request for clarification” of Becerra’s spontaneous statement that he had “something” in his car. [Butzin v. Wood](#), 886 F.2d 1016, 1018 (8th Cir. 1989). The “something” could have been anything. So asking Becerra to clarify the ambiguity did not require [Miranda](#) warnings. [Id.](#)

[6] To be sure, even follow-up questions can amount to “interrogation” if their point is to “enhance the defendant’s guilt.” [Id.](#) (quoting Wayne R. LaFave & Jerold H. Israel, 1 *Criminal Procedure* § 6.7, at 514 (1984)); see also [United States v. Chipps](#), 410 F.3d 438, 445 (8th Cir. 2005). But at that moment, the officer had not “expand[ed] the scope” of Becerra’s original statement by asking about something else. 2 Wayne R. LaFave et al., *Criminal Procedure* § 6.7(d), at 882 (4th ed.). Rather, “what’s in your car?” was clearly designed to identify the “something” that Becerra had mentioned was there. *Cf. id.* (explaining that an officer is free to ask, “did what?” in response to a defendant’s statement that “I did it”).

[7] The second question is a different story. By asking about “weapons or anything illegal on his person,” the officer expanded the scope of the exchange beyond the subject of Becerra’s original statement with a question that was likely to “elicit an incriminating response.” [Rhode Island v. Innis](#), 446 U.S. 291, 302, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). At that point, clarification became interrogation. Even so, Becerra’s answer, “a gun,” *730 was admissible for a different reason: the question fell under the public-safety exception. See [New York v. Quarles](#), 467 U.S. 649, 655, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984).

[8] No [Miranda](#) warnings were required because “police officers [may] ask questions reasonably prompted by a concern for ... public safety,” even when the potential threat is to the officers themselves. [Id.](#) at 656, 104 S.Ct. 2626; see [United States v. Liddell](#), 517 F.3d 1007, 1009–10 (8th Cir. 2008). When they saw a bulge in Becerra’s pocket, they were justifiably worried about what was in there. Because it could have been a gun or other weapon that would have

posed a danger to themselves and others, they could ask about it without the formality of [Miranda](#) warnings. See [Liddell](#), 517 F.3d at 1009–10 (explaining that questions like this one reduce the risk that officers will be “injured by the mishandling of unknown firearms or drug paraphernalia”); see also [id.](#) at 1010 (noting that the presence of one weapon raises the concern of “additional weapons”). The answer they then received became admissible.

III.

We next address the evidence that the district court kept out over Becerra’s objection: testimony that he had found the gun earlier in the day and was about to hand it over to his probation officer. The evidence was inadmissible, according to the court, because it would have been irrelevant and confusing.

Becerra views his own testimony more charitably. His theory is that it would have revealed that he had an “innocent” motive. For this theory to work, however, an innocent motive must be a defense to a felon-in-possession charge. The D.C. Circuit has said that it is, but other circuits have come out the other way. Compare [United States v. Mason](#), 233 F.3d 619, 623 (D.C. Cir. 2000), with [United States v. Gilbert](#), 430 F.3d 215, 218 (4th Cir. 2005), [United States v. Johnson](#), 459 F.3d 990, 996 (9th Cir. 2006), [United States v. Baker](#), 508 F.3d 1321, 1325 (10th Cir. 2007), and [United States v. Vereen](#), 920 F.3d 1300, 1306 (11th Cir. 2019).

[9] Whether to recognize an innocent-possessor defense presents a question of statutory interpretation that we review de novo. See [United States v. Williams](#), 136 F.3d 547, 550 (8th Cir. 1998). We have discussed the defense in the past, see, e.g., [United States v. Montgomery](#), 444 F.3d 1023, 1026 (8th Cir. 2006), but we have never said one way or the other whether it exists.³ It is time to end the suspense. There is no innocent-possessor defense because there is no statutory basis for it.

³ We have also declined to decide whether there is a “justification” defense to a felon-in-possession charge. See, e.g., [United States v. Thompson](#), 403 F.3d 533, 536–37 (8th Cir. 2005). Becerra does not raise a justification defense, so nothing in our opinion today resolves this lingering question.

Two statutes are relevant. The first,  18 U.S.C. § 922(g), tells us what is prohibited: for a felon to “possess” a “firearm or ammunition.” The second,  18 U.S.C. § 924(a)(2), supplies the mens rea of “knowingly.” So Becerra, a felon, must have knowingly possessed the gun and ammunition.

[10] That is it. Neither statute requires Becerra to have possessed either for a nefarious purpose. Knowing possession, regardless of motive, is all that matters. See  *Bryan v. United States*, 524 U.S. 184, 193, 118 S.Ct. 1939, 141 L.Ed.2d 197 (1998) (explaining that “knowingly” requires only “proof of knowledge of the *731 facts that constitute the offense”). Even if Becerra intended to turn over the gun (or the ammunition) to his probation officer, it is still a crime to knowingly possess it in the first place. See, e.g., *Vereen*, 920 F.3d at 1306–11;  *Gilbert*, 430 F.3d at 218–20.

Becerra does not identify a textual “hook” for the defense. Oral Arg. at 3:00–5:30. Rather, he says that it is an important safety valve to prevent unfair and absurd results, like penalizing a felon who just happens to find a gun in a backpack and is on the way to turn it over to the authorities. See  *Mason*, 233 F.3d at 623 (presenting a similar hypothetical). The statute, however, already contains a safety valve: it penalizes only *knowing* possession. So a felon who innocently picks up a backpack with no knowledge that a gun is inside is not a felon in possession. If Congress had wanted to create another safety valve, it certainly knew how.  *Johnson*, 459 F.3d at 997; see, e.g., 18 U.S.C. § 931(b) (creating an affirmative defense for employer-certified use of body armor). It simply chose not to do so.

IV.

Having dealt with Becerra’s challenges to his conviction, we move on to his 80-month prison sentence. He argues that his sentence is too long because he deserved an acceptance-of-responsibility reduction, is not a career offender, and had strong mitigation evidence. We disagree on every point.

[11] To receive an acceptance-of-responsibility reduction, Becerra had to convince the district court that he “*clearly* demonstrate[d] acceptance of responsibility for his offense.”

 U.S.S.G. § 3E1.1(a) (emphasis added). He fell short in making this showing, in no small part because of his repeated

insistence that he was only an “innocent possessor” of the gun. Whatever merit he believes this argument had, it is not a “clear demonstrat[ion]” of acceptance of responsibility. *Id.* At a minimum, we cannot say that the district court’s decision to deny the reduction was “so clearly erroneous as to be without foundation.” *United States v. Nguyen*, 339 F.3d 688, 690 (8th Cir. 2003).

[12] Becerra’s second challenge is foreclosed by precedent. He claims that he cannot be a career offender because his prior conviction of first-degree aggravated robbery, Minn. Stat. § 609.245 subd. 1, is not a “crime of violence,”  U.S.S.G. §§ 2K2.1,  4B1.2(a). We have rejected this argument before, see *United States v. Robinson*, 925 F.3d 997, 999 (8th Cir. 2019), and do so again here.

[13] Finally, Becerra believes that his sentence is just plain unreasonable. He makes two arguments, one procedural and the other substantive. Procedurally, he believes the district court erred by failing to consider his mental-health difficulties as mitigation evidence. This argument, which we review for plain error in light of his failure to raise it below, does not get past the starting blocks because the court *did* consider the evidence and “even lowered” his sentence in response. *United States v. Kay*, 717 F.3d 659, 663 (8th Cir. 2013). The fact that it refused to go even lower is not a procedural error, much less a plain one.

[14] Becerra’s substantive-reasonableness challenge fares no better. He received a within-Guidelines-range sentence after the district court made “an individualized assessment based on the facts presented, addressing [Becerra’s] proffered information in its consideration of the [ 18 U.S.C.] § 3553(a) factors.”  *United States v. Parker*, 762 F.3d 801, 812 (8th Cir. 2014) (internal quotation marks and citations omitted). He has given us no reason to second-guess this exercise of discretion. See  *732 *United States v. Feemster*, 572 F.3d 455, 461 (8th Cir. 2009) (en banc).

V.

We accordingly affirm the judgment of the district court.

2017 WL 6397718

Only the Westlaw citation is currently available.
United States District Court, D. Minnesota.

UNITED STATES of America, Plaintiff,

v.

Erik BECERRA, Defendant.

File No. 15–CR–187 (SRN/FLN)

|
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MEMORANDUM OPINION & ORDER[SUSAN RICHARD NELSON](#), United States District Judge

*1 This matter is before the Court on the Government's pre-trial Motion in Limine to Preclude Testimony or Arguments that Encourage Jury Nullification ("Gov't's Mot.") [Doc. No. 103]. For the reasons set forth below, and as stated on the record during the second day of Defendant's trial, the Court grants the Government's Motion.

I. BACKGROUND

Defendant Erik Becerra ("Becerra") is charged with one count of being a felon in possession of a firearm and one count of being a felon in possession of ammunition, both in violation of  [18 U.S.C. § 922\(g\)\(1\)](#) and  [§ 924\(e\)](#). (Am. Indictment, Counts 1–2 [Doc. No. 111].) Becerra's trial commenced on December 11, 2017, and as of the date and time of the Court's ruling on this motion, his trial was still underway.

Before trial, the Government filed a motion in limine urging this Court to preclude "any attempts by the defense to encourage jury nullification." (Gov't's Mot. at 2.) Becerra opposed. (*See* Def.'s Opp'n [Doc. No. 106].). At the final pre-trial conference, this Court ordered supplemental briefing,

which the parties duly submitted. (*See* Min. Entry for Nov. 17, 2017 Proceedings [Doc. No. 109], at 2; Def.'s Suppl. Mem. [Doc. No. 112]; Gov't's Suppl. Mem. [Doc. No. 116].)

The Government argues that Becerra should be prohibited from advancing any arguments to try to "justify" his alleged possession of a gun and ammunition—for example, by claiming that he was merely handing over the weapon and ammunition to his probation officer on the day of his arrest. (Gov't's Mot. at 2.) First, the Government contends that a "defendant's justification or state-of-mind behind possessing the firearm is irrelevant" to the three elements needed for a conviction, and thus arguments going to those issues would "serve no purpose other than to encourage jury nullification." (*Id.*; Gov't's Suppl. Mem. at 8.) In the alternative, the Government argues that even if relevant, evidence regarding the circumstances of how Becerra came to possess the gun should nevertheless be excluded under [Federal Rule of Evidence 403](#) because it would mislead and confuse the jury. (Gov't's Suppl. Mem. at 8.) Second, the Government urges this Court to preclude the "innocent possession" defense at trial—an affirmative defense in felon-in-possession cases that thus far has only been recognized under limited circumstances by the District of Columbia Circuit Court of Appeals. (*Id.* at 2–8.) The Government argues that this defense is precluded by the statutory text as several circuits have held. (*Id.* at 7.)

For his part, Becerra argues that granting the Government's motion would contravene the Federal Rules of Evidence and more importantly, effectively deprive him of his constitutional right to a fair trial, to tell his full story, and to present a full defense. (*See* Def.'s Opp'n; Def.'s Suppl. Mem.) First, Becerra argues that he should be permitted to offer "a full account as to how [he] came to possess the offending item(s) at issue, an explanation as to why he came to possess said item(s), how long he possessed said item(s), and so on" as "these matters are directly relevant" to the element of knowing possession. (Def.'s Suppl. Mem. at 3.) In other words, Becerra argues that he must be "permitted to demonstrate that any touching was too fleeting to pass muster under the charged statute," or "that any possession was insufficiently knowing to result in a guilty verdict." (*Id.* at 4.) Second, Becerra also argues that this Court should not preclude an "innocent possession" defense before the full trial evidence is in. (*Id.* at 6.) He stresses that even if several federal circuit courts have rejected the "innocent possession" defense, the availability of the defense is still an open question in the Eighth Circuit. (*Id.*)

*2 On the morning of December 11, 2017, just before the start of Becerra's jury trial, the Court advised the parties that it would defer ruling on the Government's motion until the Government finished its case in chief and Becerra decided whether he would testify on his own behalf.¹ On December 12, 2017, during the second day of trial, Becerra elected to testify, and the Court requested that he proffer some evidence that would support an "innocent possession" defense so that the Court could make the appropriate admissibility determination and rule on the Government's motion. The Court underscored that its ruling would be based on the relevance of the proffered testimony.

¹ The Court did, however, preclude Becerra from raising the "innocent possession" defense in his opening statement since, even under the D.C. Circuit Court authority in  *United States v. Mason*, 233 F.3d 619 (D.C. Cir. 2000), any such instruction should only be given under very limited factual circumstances which must be established at trial.

That same afternoon, the Court entertained a proffer by Becerra's counsel, as well as a statement offered directly by Becerra. In his statement, while asking the Court to permit an "innocent possession" defense, Becerra also strongly contested the constitutionality of the search of the vehicle where the gun was ultimately found the afternoon of May 5, 2015.

The proffer by Becerra's counsel was as follows. As to how he came to drive the red car that was searched on the day of his arrest, Becerra stated that on May 4, 2015, he went to a car dealership looking for a car to purchase. He contends that someone at the car dealership then put him in touch with another individual who subsequently let him keep the car temporarily in order to test drive it. This red car, however, was not test-driven from the dealership.

In the early morning hours of May 5, 2015, at approximately 4:30 to 5 a.m., Becerra drove the red car to the Minneapolis–St. Paul airport and parked it. Very concerned for his safety with respect to a domestic issue and believing that he was being followed, Becerra made contact with the airport police and asked for their help. According to him, however, the airport police were not helpful and did not believe him. Specifically, he believes that they did not take seriously his

requests to follow up regarding a vehicle that was following him.

After his exchange with the airport police, Becerra went back to the red car and for the first time noticed what he thought might be a gun under the driver's seat. When asked by the Court why he did not immediately notify the airport police about the object he thought might be a gun, defense counsel indicated that it was because by then, Becerra had no trust in the airport police officers since they had declined to assist him or follow up on his requests.

From the airport, Becerra drove to his probation office located in Brooklyn Center, Minnesota, wishing to speak to his probation officer, Bobbi Harrington ("Harrington"). When he arrived at the probation office, it had not yet opened for the day. Because the probation office was closed, Becerra went to two establishments very close by. First, he stopped at a Holiday gas station. Afterward, he drove to and went inside of a Walmart, which is also in the same general vicinity.

There is some uncertainty as to what happened when Becerra went into Walmart. In some prior out-of-court testimony, Becerra appears to have told an officer that he actually took the gun when he went inside the Walmart. But apparently in another statement, Becerra stated that he could not recall whether he brought the gun into the Walmart. Defense counsel also explained that Becerra went into the Walmart to purchase some gifts.

*3 Although probation services only has a record of Becerra appearing at the office on two occasions that day, he contends that he went back to the probation office for a second time, but again could not speak with Harrington. Becerra left a note addressed to her, stating that he would be back at 4 p.m. that day. Becerra then drove—with the gun still in the vehicle—to Apple Valley, Minnesota, some distance away, to drop off some gifts.

Later that afternoon, Becerra drove back from Apple Valley to the probation office in Brooklyn Center, and arrived there at approximately 12:35 to 12:45 p.m. He parked the red car, put the ammunition in his pocket, left the gun inside the vehicle, and went into the probation office. Becerra was finally able to make contact with Harrington at that time. But during their initial exchange in the lobby, Becerra did not tell Harrington about the gun and ammunition. Rather, the testimony so far evidences that it was only after he was handcuffed by Officer Burtus and informed that he was under arrest that Becerra

first disclosed that a gun was in the red car and that he had ammunition in his pocket.

The Court notes that Becerra's proffer and Harrington's testimony during the first day of trial both evidence that Becerra's conduct on May 4th and 5th occurred in the context of expressions by Becerra of constant concern and fear about his safety. Harrington testified that Becerra had specifically expressed to her on a number of occasions his fear about his safety, and that she in fact gave him contact information for an FBI agent.

After Becerra's proffer, the Court adjourned for a recess, and then ruled from the bench as follows.

II. DISCUSSION

In  *United States v. Mason*, 233 F.3d 619 (D.C. Cir. 2000)—the relevant D.C. Circuit case—the D.C. Circuit was the first (and so far only) federal court of appeals to recognize and define the “innocent possession” defense to  § 922(g)(1). *Mason* involved a delivery driver who came upon a brown paper bag on the ground while he was out making a delivery.  233 F.3d at 621. The paper bag contained a gun with ammunition in it. *Id.* He picked it up and took it with him to his truck, claiming he did so because there was a school in the area and there were children outside. *Id.* The defendant tucked the weapon into his weight belt and proceeded to the Library of Congress, his next stop, where he intended to turn the gun over to a police officer he knew. *Id.* But before he could do so, another officer observed the gun and arrested him. *Id.*

A jury convicted Mason of one count of unlawful possession of a firearm and ammunition in violation of  § 922(g)(1), but the D.C. Circuit reversed and remanded for a new trial.  *Id.* at 621–22, 625. The D.C. Circuit held that the district court should have instructed the jury on the “innocent possession” defense.  *Id.* at 621. Defining the narrow contours of that defense, the D.C. Circuit held that a defendant may only invoke the defense when two requirements are met: the evidence must show that “(1) the firearm was attained innocently and held with no illicit purpose and (2) possession of the firearm was transitory—i.e., in light of the circumstances presented, there is a good basis to find that the defendant took adequate measures to rid himself of possession of the firearm as promptly as reasonably possible.”

 *Id.* at 624. As to the second prong, the Court further

concluded that “a defendant’s actions must demonstrate both that he had the intent to turn the weapon over to the police and that he was pursuing such an intent with immediacy and through a reasonable course of conduct.” *Id.* (quoting *Logan v. United States*, 402 A.2d 822, 827 (D.C. 1979)).

*4 Since *Mason*, five federal circuits have expressly rejected the “innocent possession” defense defined by that case, primarily on grounds that the defense is precluded by the statutory text. See  *United States v. Baker*, 508 F.3d 1321, 1327 (10th Cir. 2007);  *United States v. Johnson*, 459 F.3d 990, 996 (9th Cir. 2006);  *United States v. Gilbert*, 430 F.3d 215, 216 (4th Cir. 2005);  *United States v. Teemer*, 394 F.3d 59, 63–65 (1st Cir. 2005);   *United States v. Hendricks*, 319 F.3d 993, 1007 (7th Cir. 2003); see also *United States v. Jackson*, 598 F.3d 340, 349 (7th Cir. 2010) (“[W]e have not recognized such a[n] [“innocent possession”] defense and decline to do so in this case.”)

The Eighth Circuit, however, has thus far declined to affirmatively rule on the defense’s availability in this circuit. See, e.g.,  *United States v. Likens*, 464 F.3d 823, 826 (8th Cir. 2006) (“[Defendant] did not commit a technical or accidental violation of the statute, nor, assuming without deciding that such a defense might be available in a proper case, was his possession innocent or transitory.”) Nevertheless, the Eighth Circuit has made clear that in order to invoke such a defense if it were available, a defendant would have to establish the “factual predicate” necessary for the instruction. See, e.g., *United States v. Montgomery*, 444 F.3d 1023, 1026 (8th Cir. 2006). For instance, in *United States v. Montgomery*, the Eighth Circuit affirmed the district court’s denial of the “transitory or innocent possession” jury instruction where the defendant had helped his father purchase guns from a pawn shop and had carried the weapons out to his father’s car. *Id.* at 1025–26. After the defendant was convicted of one count under  § 922(g)(1), he sought reversal, contending that “the evidence only showed transitory possession.” *Id.* at 1026. The Eighth Circuit disagreed, stating that “[s]ince Montgomery neither acquired the firearms innocently nor intended to turn them over to law enforcement, see  *United States v. Mason*, 233 F.3d 619, 624 (D.C. Cir. 2000),” he had not “establish[ed] the factual predicate for an instruction on innocent or transitory possession.” *Id.*

The Eighth Circuit has also opined on the availability of the defense in several more recent decisions. Again, without explicitly adopting the D.C. Circuit's formulation, the Eighth Circuit has stated that it declined to determine whether to adopt the defense because the evidence before it did not meet the two prongs of *Mason*. For instance, in *United States v. Byers*, the Eighth Circuit held that, "[l]eaving open the question whether the duration of possession might ever be relevant to a finding of knowing possession, ... the facts in the instant case did not warrant or require an instruction to that effect."  603 F.3d 503, 507 (8th Cir. 2010). Next, the court held that "[w]ith respect to the question of innocent or transitory possession," Byers "ha[d] not demonstrated that he obtained the firearms innocently without an illicit purpose or that he tried to rid himself of them as promptly as reasonably possible," alluding to the two elements of *Mason*. *Id.* Indeed, the Eighth Circuit reasoned, the defendant's possession had been "transitory" only because he had dropped the weapons while fleeing to avoid capture. *Id.* Thus, the Eighth Circuit declined yet again to decide whether the defense would ever be available. *Id.*; see also *United States v. Wright*, 682 F.3d 1088, 1090–91 (8th Cir. 2012) (stating that the defense of "transitory or innocent possession," although not yet adopted by the Eighth Circuit, did not apply because the defendant had failed to rid himself of the firearm as promptly as reasonably possible after learning of its presence in the car that he occupied).

*5 Here, the Court finds that even if the "innocent possession" defense were permitted by the Eighth Circuit, although the present facts are distinguishable from *Montgomery* and *Byers*, Becerra has nevertheless failed to establish the "factual predicate" necessary to support a jury instruction on the defense. Even assuming, without deciding, that his proffer showed that he obtained the gun and ammunition innocently and with no illicit purpose, it still does not show that "he had the intent to turn [them] over to the police and that he was pursuing such an intent with *immediacy* and through a *reasonable* course of conduct."  *Mason*, 233 F.3d at 624 (emphasis added).

The evidence indicates that Becerra learned about the presence of the gun between 4:30 and 5 a.m. on May 5th. But it was not until he was arrested at around 1 p.m. later that day that he first informed law enforcement of the gun and

ammunition. There were countless occasions during those 7 or so hours between his discovery of the gun and his arrest, when he could have reasonably taken steps to turn over the prohibited items to law enforcement. If he did not trust the airport police, there were any number of police departments between the Minneapolis–St. Paul airport and the probation office, and between the probation office and Apple Valley—a distance Becerra drove twice—where he could have turned over the gun and ammunition.

Instead, during all those hours, Becerra retained possession of these prohibited items. He did not bring the gun into the probation office. He might have brought the gun into Walmart. And throughout this period of time, what he did express to law-enforcement officers was that he feared for his safety—a position that seems inconsistent with his contention that all he was doing was trying to turn over the gun and ammunition. Under these circumstances, the Court finds that Becerra's conduct does not satisfy the second prong of *Mason*, and therefore he may not invoke the "innocent possession" defense.

With respect to Becerra's position that he should nonetheless be able to testify about his intentions before the jury, the Court disagrees because there is no relevance to it. In the absence of an "innocent possession" defense, the reasons why Becerra did things the way he did has no relevance to whether or not he was in possession of the firearm and the ammunition. But it certainly does raise a concern about confusing the jury, making them wonder about the testimony and whether they would be permitted to find him not guilty because he intended to turn the weapon and ammunition over to the police.

Accordingly, for all of the aforementioned reasons, the Government's Motion in Limine is granted.

III. ORDER

Based on the foregoing, and all the files, records, and proceedings herein, **IT IS HEREBY ORDERED THAT** the Government's Motion in Limine [Doc. No. 103] is **GRANTED** as explained herein.

All Citations

Not Reported in Fed. Supp., 2017 WL 6397718