APPENDIX

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-3020 **September Term, 2019**

FILED ON: June 26, 2020

UNITED STATES OF AMERICA,
APPELLEE

v.

ORLANDO BELL,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:17-cr-00234-7)

Before: HENDERSON, WILKINS and KATSAS, *Circuit Judges*

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs of the parties. *See* FED. R. APP. P. 34(a)(2); D.C. CIR. R. 34(j). The Court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). For the reasons stated below, it is

ORDERED AND ADJUDGED that the judgment of the District Court be **AFFIRMED.**

Following a jury trial, Orlando Bell was convicted of Unlawful Possession with Intent to Distribute Cocaine Base, in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(C), and of Using, Carrying, and Possessing a Firearm During a Drug Trafficking Offense, in violation of 18 U.S.C. § 924(c)(1). **J.A. 529.** The jury acquitted Bell of the charge of Conspiracy to Distribute and Possess with Intent to Distribute Cocaine Base and Heroin, 21 U.S.C. § 846. **J.A. 529.** The District Court sentenced Bell to seventy months of incarceration on the drug charge and to sixty months of incarceration on the firearm charge, to be served consecutively. **J.A. 517-19.** Bell raises four issues on appeal; we find merit in none of them.

Bell first contends that the District Court erred in denying his motion to dismiss the firearm charge and in granting the government's motion to amend the superseding indictment. **Blue Br. 5-13.** Specifically, the original indictment listed the possession charge as Count Thirty-Six and the firearms charge as Count Thirty-Seven. **J.A. 31.** The grand jury issued a superseding indictment, which listed Bell's possession charge as County Thirty-Seven and the firearms charge as Count Thirty-Eight. **J.A. 48.** Count Thirty-

Eight, the firearms charge in the superseding indictment, still referenced the predicate drug offense (the possession charge) as "Count Thirty-Six," even though the drug offense had been renumbered as Count Thirty-Seven. **J.A. 49.** The District Court denied Bell's motion to dismiss Count Thirty-Eight of the superseding indictment, and granted the government's motion to amend the superseding indictment to correct the numeration error. **J.A. 305-09.** The government then filed a "Retyped Indictment," **J.A. 285-302**, which, in Count Thirty-Eight, identified Count Thirty-Seven as the predicate offense**, *id.* 300**. Bell now argues that the amendment violated the Grand Jury Clause of the Fifth Amendment. **Blue Br. 5-13.**

It is a "settled rule in the federal courts that an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form." *Russell v. United States*, 369 U.S. 749, 770 (1962); *see* U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."). "An amendment of form and not of substance occurs when the defendant is not misled in any sense, is not subjected to any added burden and is not otherwise prejudiced." *United States v. Kegler*, 724 F.2d 190, 194 (D.C. Cir. 1984); *see also United States v. Bush*, 659 F.2d 163, 167 (D.C. Cir. 1981) (amendment may permissibly "correct a clerical error plainly insignificant in nature" if the defendant was not "misled by the miscue"). Indeed, upon finding an absence of prejudice to a defendant, we have previously countenanced the judicial amendment of an indictment to correct the typographical omission of the *mens rea* of an offense. *United States v. Sobamowo*, 892 F.2d 90, 97 (D.C. Cir. 1989). Bell neither contended below that he was prejudiced by this obvious typographical error**, J.A. 309,** nor makes any claim of prejudice now. We therefore affirm the District Court's denial of Bell's motion to dismiss Count Thirty-Eight of the indictment and its grant of the government's motion to amend the indictment.

Second, Bell argues that the District Court erred in denying his motion to suppress evidence from the electronic surveillance of Wayne Holroyd's phone, which allowed the government to identify Bell as a person of interest. **Blue Br. 14-20.** Following Chief Judge Beryl A. Howell's signing and issuance of an order authorizing the continuation of the wiretap, **J.A. 123-33,** the Clerk's Office informed the government that it did not have signed versions of the affidavit and application in support thereof – rather, it had unsigned versions, together with the signed order. **J.A. 134-35.** In denying Bell's motion to suppress, the District Court found that the at-issue wiretap order had been properly supported by an affidavit and application sworn to and signed before Chief Judge Howell. **J.A. 253-58.** Bell hypothesizes that "there were no signed copies" of the affidavit and application, Appellant's Opening Br. 19, and contends that the wiretap order was therefore facially insufficient under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.* "In assessing a district court's denial of a wiretap suppression motion, the court reviews the district court's legal conclusions *de novo* and its factual findings for clear error." *United States v. Williams*, 827 F.3d 1134, 1147 (D.C. Cir. 2016).

Title III – which "allows judges to issue wiretap orders authorizing the interception of communications to help prevent, detect, or prosecute serious federal crimes," *Dahda v. United States*, 138 S. Ct. 1491, 1494 (2018) – requires each application for such an order to, *inter alia*, "be made in writing upon oath or affirmation to a judge of competent jurisdiction," 18 U.S.C. § 2518(1). Title III authorizes the suppression of evidence gleaned from a wiretap upon a showing that "the order of authorization or approval under which it was intercepted is insufficient on its face." *Id.* § 2518(10)(a)(ii). In assessing an order for facial insufficiency, "a reviewing court must examine the four corners of the order and establish whether, on its face, it contains all that Title III requires it to contain." *United States v. Scurry*, 821 F.3d 1, 8 (D.C. Cir. 2016). But Bell points to no deficiency within the order's four corners, *see id.*, nor does he establish that the District Court's finding that the order was properly supported by an affidavit and application sworn to and signed before Chief Judge Howell was clearly erroneous. Therefore, we affirm the District Court's denial of Bell's motion to suppress evidence from the wiretap of Holroyd's phone.

Third, Bell asserts that the District Court erred in applying a two-level sentencing enhancement for obstruction of justice. **Blue Br. 20-24.** Relying primarily on the testimony of a cooperating witness that Bell "told" him to "get rid of [the witness's] phone," J.A. 406, the District Court found by a preponderance of the evidence that Bell "did attempt to impede the government's investigation" and applied the two-level sentencing enhancement under Section 3C1.1 of the U.S. Sentencing Guidelines. J.A. 495; *see id.* 495-97. Bell contends that the cooperating witness was not credible, **Blue Br. 23-24,** and also that his testimony, even if believed, establishes only that Bell "suggested" the witness dispose of the phone, which Bell argues "is not sufficient to establish obstruction of justice." Appellant's Opening Br. 22. On appeal of sentencing enhancements, "purely legal questions are reviewed *de novo*; factual findings are to be affirmed unless clearly erroneous; and we are to give due deference to the district court's application of the sentencing guidelines to facts." *United States v. Vega*, 826 F.3d 514, 538 (D.C. Cir. 2016) (per curiam) (brackets and citation omitted). We give "the greatest deference" to "the district court's credibility determinations." *United States v. Hart*, 324 F.3d 740, 747 (D.C. Cir. 2003) (brackets and citation omitted). Where a litigant fails to preserve his claim of error by raising an objection below, our review is only for plain error. *Puckett v. United States*, 556 U.S. 129, 134-35 (2009); FED. R. CRIM. P. 52(b).

The Sentencing Guidelines provide for a two-level sentencing increase for a defendant who has "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation . . . of the instant offense of conviction[.]" U.S.S.G. § 3C1.1; *see also id.* cmt. 4(D) (listing, under "Examples of Covered Conduct," "destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation . . . or attempting to do so"). Attacking the witness's credibility, Bell points to the witness's failure to mention Bell's name earlier in the investigation and to inconsistencies in the witness's testimony as to the number of their interactions, **Blue Br. 22-24,** but Bell fails to clear the high bar of establishing that the District Court's credibility-driven factual finding was clearly erroneous. Nor do we find clear error in the District Court's application of the sentencing enhancement to behavior that Bell, for the first time on appeal, attempts to cast as a mere "suggestion"; given the witness's testimony that Bell "told" him to dispose of the phone, and given too that the Guidelines sanction the application of the enhancement for "attempt," we cannot find that the District Court committed a "clear or obvious" error in applying the enhancement. *Puckett*, 556 U.S. at 135.

Finally, Bell argues that the District Court abused its discretion by sentencing him based on acquitted conduct. Although Bell was acquitted of the conspiracy charge, the District Court found by a preponderance of the evidence that "Bell was accountable for at least 35 grams of crack cocaine," J.A. 491 – i.e., for an amount that included the cocaine involved in the charged conspiracy. ***See* J.A. 530.** As Bell himself acknowledges, however, "the state of the law permits sentencing based on acquitted conduct." Appellant's Opening Br. 25; *see United States v. Watts*, 519 U.S. 148, 157 (1997) (per curiam) ("[T]he sentencing court [may] consider[] conduct underlying [an] acquitted charge, so long as the conduct has been proved by a preponderance of the evidence."); *see also United States v. Settles*, 530 F.3d 920, 924 (D.C. Cir. 2008) ("[U]nder binding precedent, the Constitution does not prohibit a sentencing court from relying on acquitted conduct."). Bell forwards this claim of error "in order to preserve this issue for when that law is changed." Appellant's Opening Br. 25. Because the District Court did not abuse its discretion by applying settled and binding precedent to the facts before it (the only way in which Bell asserts the District Court erred here), we affirm.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing

or petition for rehearing *en banc*. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

District of Columbia

UNITED STATES OF AMERICA
v.
ORLANDO BELL

JUDGMENT IN A CRIMINAL CASE

Case Number: 17-cr-234-7 (TNM)

USM Number: 83130-007

Christopher Michael Davis
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☑ was found guilty on count(s) 37s and 38rs. after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 USC § 841(a)(1) and 841(b)(1)(C)	Unlawful Possession with Intent to Distribute Cocaine Base	3/9/2017	37

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☑ The defendant has been found not guilty on count(s) 1s

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

3/15/2019
Date of Imposition of Judgment

Signature of Judge

Trevor N. McFadden, U.S. District Judge
Name and Title of Judge

Date 3/18/19

DEFENDANT: ORLANDO BELL
CASE NUMBER: 17-cr-234-7 (TNM)

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 USC § 924(c)(1)	Using, Carrying, and Possessing a Firearm During a Drug Trafficking Offense	3/9/2017	38

AO 245B (Rev. 02/18) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: ORLANDO BELL
CASE NUMBER: 17-cr-234-7 (TNM)

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

SEVENTY (70) MONTHS on Count 37 and SIXTY (60) MONTHS on Count 38, to run consecutively to Count 37.

☐ The court makes the following recommendations to the Bureau of Prisons:

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: ORLANDO BELL
CASE NUMBER: 17-cr-234-7 (TNM)

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

No term of Supervised Release imposed.

It is the ORDER of the Court that upon release from imprisonment, you shall comply with the following:

Deportation Compliance - You must immediately report or surrender to U.S. Immigration and Customs Enforcement and follow all their instructions and reporting requirements until any deportation proceedings are completed. If you are ordered deported from the United States, you must remain outside the United States, unless legally authorized to re- enter. If you re-enter the United States, you must report to the nearest probation office within 72 hours after you return.

It is further ORDERED that:

The probation office shall release the presentence investigation report and/or Judgment and Commitment Order to the Bureau of Immigration and Customs Enforcement (ICE) to facilitate any deportation proceedings.

The probation office shall release the presentence investigation report to all appropriate agencies in order to execute the sentence of the Court.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☐ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: ORLANDO BELL
CASE NUMBER: 17-cr-234-7 (TNM)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 200.00	$ 0.00	$ 0.00	$ 0.00

☐ The determination of restitution is deferred until _____ . An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: ORLANDO BELL
CASE NUMBER: 17-cr-234-7 (TNM)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 200.00 due immediately, balance due

☐ not later than _____, or
☑ in accordance with ☐ C, ☐ D, ☐ E, or ☑ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:

The special assessment is immediately payable to the Clerk of the Court for the U.S. District Court, District of Columbia. Within 30 days of any change of address, you shall notify the Clerk of the Court of the change until such time as the financial obligation is paid in full.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.