No. 19-

IN THE

Supreme Court of the United States

CHRISTOPHER MIKELINICH and JEFFREY KEITH,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Both petitioners pled guilty and were convicted in violation of 18 U.S.C. §922(g) of possessing a weapon having previously been convicted of a felony. Neither petitioner was advised at the Rule 11 colloquy or any other time that the government was required to prove that they were aware at the time they committed the offense that they possessed the requisite knowledge of there their status as a felon. The Court of Appeals determined that in light of *Rehaif v. United States* there was error but petitioners could not demonstrate the existence of plain error. In the view of the Court of Appeals petitioners' challenge failed on the third prong of plain error, i.e., they could not demonstrate that but for the error they would not have pled guilty. This petition raises the following question:

Where a defendant claims his plea was not knowing and intelligent because he was unaware of all the elements of the offense, does it matter whether he would have pled guilty anyway?

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The decision of the United States Court of Appeals for the Second Circuit affirming the judgment of conviction for petitioner Mikelinich is reported as *United States v. Mikelinich,* 798 Fed.Appx. 697 (2d Cir. 2020), a copy of which is annexed hereto as Appendix A.

The unreported order of the United States Court of Appeals for the Second Circuit, dated June 9, 2020, denying petitioner Mikelinich's petition for rehearing with a suggestion for rehearing *en banc* is annexed hereto as Appendix B.

The decision of the United States Court of Appeals for the Second Circuit affirming the judgment of conviction for petitioner Keith is reported as *United States v. Keith,* 797 Fed.Appx. 649 (2d Cir. 2020), a copy of which is annexed hereto as Appendix C.

The unreported order of the United States Court of Appeals for the Second Circuit, dated June 9, 2020, denying petitioner Keith's petition for rehearing with a suggestion for rehearing *en banc* is annexed hereto as Appendix D.

JURISDICTION

The judgments of the United States Court of Appeals sought to be reviewed were entered on March 27, 2020 (Mikelinich) and February 21, 2020 (Keith), and the orders of that court denying petitioners' petitions for rehearing were both entered on June 9, 2020. As a result of the Covid-19 pandemic, by General Order of this Court dated March 19, 2020, petitioners' time to file a petition for certiorari was extended until 150 days after the denial of a petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT

1. Petitioner Mikelinich was convicted and sentenced to a 24-month term of imprisonment to be followed by a term of supervised release based on his possession of a firearm notwithstanding his prior New York State conviction in 1992 of assault, in violation of 18 U.S.C. §§922(g)(1) and 924(a)(2). PSR¶¶ 32, 65; MA69.[1]

[1] "MA__" refers to pagination in the Appendix filed in the Court of Appeals in *United States v. Mikelinich*, "KA" refers to pagination in the Appendix filed in the Court of Appeals in *United States v. Keith*. "PSR" refers to the Pre-Sentence Investigation Report filed under seal in the Court of Appeals in *United States v. Mikelinich.*

Petitioner Mikelinich appealed his plea and conviction arguing that contrary to the requirements of the Fifth and Sixth Amendments, the indictment failed to allege, as required by *Rehaif v. United States*, 139 S. Ct. 2191 (2019), his knowledge of his status as a prohibited person. Moreover, in neither the plea agreement nor during the plea proceedings was Mikelinich ever advised that the government was required to prove such knowledge. A14-A15, A45-47. As such Mikelinich argued on appeal that his plea was not knowing and intelligent, in violation of his due process rights.

The Second Circuit analyzed Mikelinich's challenge under Rule 11 and concluded that he could not demonstrate plain error. According to the Court of Appeals, Mikelinich's challenge failed because he could not establish the third prong of plain error, i.e., an affect on his substantial rights, inasmuch as Mikelinich could not establish "a reasonable probability that, but for the error, he would not have entered the plea." 798 Fed.Appx. at 698.

In analyzing Mikelinich's claim as plain error, the Court of Appeals rejected Mikelinich's argument that his challenge should be analyzed for constitutional sufficiency, i.e., a plea that is not knowing and intelligent

violates due process and warrants relief regardless of whether the defendant would have pled guilty even if properly advised.

2. Petitioner Keith pled guilty to two counts of possession of a weapon as felon in violation of 18 U.S.C. §§922(g)(1) and 924(a)(2). The district court imposed a sentence of 84 months. KA37, KA45. Petitioner Keith timely appealed. KA61-KA62. Petitioner Keith's indictment also failed to allege Keith's knowledge of his status as a prohibited person. KA8-KA-9. Moreover, during the plea proceedings Petitioner Keith was never advised that the government was required to prove such knowledge. KA10-KA27. As such Petitioner Keith argued on appeal that his plea was not knowing and intelligent.

As with Mikelinich, the Court of Appeals analyzed Petitioner Keith's challenge under Rule 11 and concluded that he could not demonstrate plain error. According to the Panel, Petitioner Keith could not meet this burden because he failed to demonstrate "a reasonable probability that, but for the error, he would not have entered the plea." Order at 4-5. 797 Fed. Appx. at 652.

REASONS FOR GRANTING THE WRIT

In rejecting Petitioners' *Rehaif* challenges the Court of Appeals analyzed the argument only as a Rule 11 challenge which it then determined failed to satisfy the plain error standard. But petitioners' claim of error was not simply that the district court violated Rule 11; the district court did violate Rule 11 (a claim the Court of Appeals appeared to agree with), but more importantly it violated petitioners' right to due process inasmuch as it accepted a plea from them that was not knowing and intelligent.

In *United States v. Dominquez-Benitez*, 542 U.S. 74 (2004), this Court in requiring a defendant to demonstrate that but for the claimed Rule 11 violation he would not have pled guilty --- the standard relied on by the Court of Appeals here --- this Court emphasized the distinction between a Rule 11 challenge raised by the defendant in that case and a due process claim similar to those raised by petitioners here. Thus, *Dominquez-Benitez* noted that the reasons for requiring a defendant raising a Rule 11 challenge for the first time on appeal to demonstrate prejudice is "complemented by the fact worth repeating that the violation claimed was of Rule 11, not of due process." 542 U.S. at 83.

Where, by contrast, as here petitioners' claims were one of due process, the rule of *Dominquez-Benitez* relied on by the Court of Appeals and the government has no application. Indeed, in a footnote, *Dominquez-Benitez* further emphasized the distinction between a Rule 11 violation and a claim that defendant's plea was also constitutionally invalid because it was not knowing and voluntary:

> We have held, for example, that when the record of a criminal conviction obtained by a guilty plea contains no evidence that a defendant knew of the rights he was putatively waiving the conviction must be reversed. We do not suggest that such a conviction could be saved even by overwhelming evidence that the defendant would have pleaded guilty regardless.

542 U.S. at 84 n. 10 (emphasis added). In other words, the deficiency identified by the Court of Appeals here, (i.e., petitioners failed to demonstrate that but for the error he would not have entered a plea), was held by *Dominquez Benitez* to be inapplicable in the context of petitioners' challenges.

Indeed, as this Court recognized in *Bousley v. United States*, 523 U.S. 614 (1998), a plea is "constitutionally invalid" where the "record reveals that neither [the defendant], nor his counsel, nor the court correctly understood the essential elements of the crime with which he

was charged." 523 U.S. at 618-19. *See also United States v. Balde,* 943 F.3d 73, 95 (2d Cir. 2019). ("[w]ithout being fully informed of the nature of the offense, and without an established factual basis for finding that one of its elements was satisfied, it is hard to imagine how a defendant's plea could be knowing and voluntary"). Under these circumstances, petitioners' pleas cannot be "saved even by overwhelming evidence that the defendant would have pleaded guilty regardless." *Dominquez-Benitez, supra.*

CONCLUSION

Because the decision of the Second Circuit conflicts with a prior decision of this Court and, in view of the important constitutional rights at stake, petitioners respectfully request that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED

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Christopher Mikelinich
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APPENDIX A

798 Fed.Appx. 697 (Mem)
This case was not selected for
publication in West's Federal Reporter.

United States Court of Appeals, Second Circuit.

UNITED STATES of America, Appellee,

v.

Christopher MIKELINICH,
Defendant-Appellant.

18-3860
|
March 27, 2020

Appeal from a judgment of the United States District Court for the Northern District of New York (Mordue, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Attorneys and Law Firms

For Defendant-Appellant: Steven Y. Yurowitz, New York, NY.

For Appellee: Carina H. Schoenberger, Assistant United States Attorney, for Grant C. Jaquith, United States Attorney, Northern District of New York, Syracuse, NY.

PRESENT: ROBERT A. KATZMANN, Chief Judge, RICHARD C. WESLEY, MICHAEL H. PARK, Circuit Judges.

SUMMARY ORDER

Defendant-appellant Christopher Mikelinich appeals from a judgment of conviction entered by the district court (Mordue, *J.*) on December 13, 2018. Mikelinich pled guilty to one count of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), and he was sentenced to 24 months in prison, followed by three years of supervised release. Mikelinich now argues that his conviction should be vacated under the Supreme Court's decision in *Rehaif v. United States*, —— U.S. ——, 139 S. Ct. 2191, 204 L.Ed.2d 594 (2019), because the government failed to offer proof that Mikelinich knew, at the time that he possessed the firearm in question, that he "ha[d] been convicted in any court of[ ] a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1). We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

We recently held in *United States v. Balde* that a *Rehaif* challenge is reviewed under the plain error standard where, as here, the challenge was not raised before the district court. 943 F.3d 73, 95–96 (2d Cir. 2019); *see also United States v. Keith*, No. 17-4015, 797 Fed.Appx. 649, 651-52, 2020 WL 865027, at *2 (2d Cir. Feb. 21, 2020). Mikelinich argues in his reply brief that plain error review does not apply because the district court violated his right to due process by accepting a guilty plea that was not knowing or intelligent. But the defendant in *Balde* also argued that his guilty plea was not knowing or intelligent, and we nevertheless held that the plain error standard applied to his *Rehaif* ***698** challenge. *See Balde*, 943 F.3d at 88, 95–96. Mikelinich tries to distinguish *Balde* on the ground that it involved a Rule 11 claim rather than a due process claim, but we do not find this distinction relevant given that the substance of Balde's Rule 11 claim and Mikelinich's due process claim is identical.

Reviewing Mikelinich's challenge under the plain error standard, then, we ask whether "(1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant's substantial rights; and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* at 96.[1] In addition, because his conviction arose out of a guilty plea, Mikelinich "must establish that the violation affected substantial rights and that there is a reasonable probability that, but for the error, he would not have entered the plea."

Id. That is, Mikelinich must show a reasonable probability that he would not have pled guilty if the government had been required to prove that he knew, at the time that he possessed the firearm in question, that he "ha[d] been convicted in any court of[ ] a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1).

Mikelinich cannot make this showing. In his plea agreement, Mikelinich admitted that he purchased a shotgun in April 2012 as a gift for his girlfriend and that he occasionally carried, moved, and cleaned the shotgun while living with his girlfriend between November 2014 and February 2017. Mikelinich also admitted that he pled guilty in 2004 to being a felon in possession (based on yet another prior felony) and that he was sentenced to 15 months in prison and three years of supervised release. Given that Mikelinich had in fact been sentenced to more than one year in prison, there is no "reason to believe that he would not have pleaded guilty had he been told that the government would need to prove that he knew he was a felon when he possessed the firearm[ ]." *Keith*, 797 Fed.Appx. at 652, 2020 WL 865027, at *2. To the contrary, the government would have relied on Mikelinich's prior 15-month sentence "as overwhelming proof of his awareness that he had been convicted of a crime punishable by imprisonment for a term exceeding one year." *Id.*[2] For these reasons, Mikelinich's plain error argument fails.

We have considered Mikelinich's remaining arguments and have found in them no basis for reversal. For the reasons stated herein, the judgment of the district court is **AFFIRMED**.

All Citations

798 Fed.Appx. 697 (Mem)

Footnotes

1 Unless otherwise indicated, in quoting cases, all internal quotation marks, alterations, emphases, footnotes, and citations are omitted.

2 Mikelinich suggests that the plain error standard is satisfied because his 2004 felon-in-possession conviction, like his conviction here, was deficient under *Rehaif*. But all that matters for present purposes is that Mikelinich was in fact sentenced to more than one year in prison for his 2004 conviction, and that the government therefore easily could have proven that Mikelinich knew that he was a felon at the time he possessed the shotgun.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 9th day of June, two thousand twenty.

United States of America,

Appellee,

v.

Christopher Mikelinich,

Defendant - Appellant.

ORDER

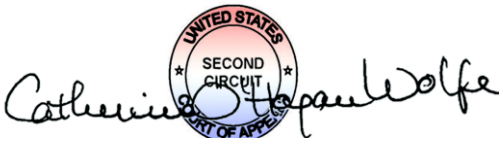
Docket No: 18-3860

Appellant, Christopher Mikelinich, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk



APPENDIX C

797 Fed.Appx. 649
This case was not selected for
publication in West's Federal Reporter.
RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.
United States Court of Appeals, Second Circuit.

UNITED STATES of America, Appellee,

v.

Jeffrey KEITH, aka Bangin J, Defendant - Appellant.

No. 17-4015
|
February 21, 2020

Synopsis

Background: Defendant pleaded guilty in the United States District Court for the Northern District of New York, Kahn, J., to being a felon in possession of firearms and possession with intent to distribute cocaine. Defendant appealed.

Holdings: The Court of Appeals held that:

[1] that defendant's indictment for being a felon in possession of firearms did not include felon status element did not affect the district court's jurisdiction;

[2] there no reasonable probability that defendant would not have entered guilty plea for being a felon in possession of firearms had the district court correctly explained charge; and

[3] sale of both cocaine and a handgun to a confidential informant occurred in the same transaction.

Affirmed.

West Headnotes (3)

[1] Indictments and Charging Instruments Defects in charging instrument

That defendant's indictment for being a felon in possession of firearms that did not include felon status element did not affect the district court's jurisdiction over case, where indictment charging violation of criminal code sufficed to endow the district court with jurisdiction. 18 U.S.C.A. §§ 922(g)(1), 3231.

2 Cases that cite this headnote

[2] Criminal Law Arraignment and plea

There was no reasonable probability that defendant would not have entered guilty plea for being a felon in possession of firearms had the district court correctly explained that it would have needed to prove that defendant knew he was a felon when he possessed the firearms, and thus, court's failure to inform defendant of the nature of each charge before accepting guilty plea was not plain error, where defendant had previously been convicted of criminal sale of cocaine and served over two years in prison, and government would have relied on these fact as overwhelming proof of his awareness that he had been convicted of a crime punishable by imprisonment for a term exceeding one year. 18 U.S.C.A. § 922(g)(1); Fed. R. Crim. P. 11(b)(1)(G).

3 Cases that cite this headnote

[3] Sentencing and Punishment Facilitation of other offense

Sale of both cocaine and a handgun to a confidential informant occurred in the same transaction, and thus district court's application of four-point enhancement of defendant's sentence for being a felon in possession of

firearms and possession with intent to distribute cocaine was not abuse of discretion, where defendant and the informant agreed to both sales in single meeting, and, at a subsequent meeting, defendant transferred the firearm and the cocaine together, in the same bag, at the same time in exchange for a lump sum payment of $900. Comprehensive Drug Abuse Prevention and Control Act of 1970 § 401, 21 U.S.C.A. §§ 841(a)(1), 841(b)(1)(C), 851; U.S.S.G. § 2K2.1(b)(6)(B).

***650** Appeal from a judgment of the United States District Court for the Northern District of New York (Kahn, *J.*).

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment entered on December 15, 2017, is **AFFIRMED**.

Attorneys and Law Firms

FOR DEFENDANT-APPELLANT: Steven Y. Yurowitz, Esq., New York, NY.

FOR APPELLEE: Carina H. Schoenberger, Assistant United States Attorney, for Grant C. Jaquith, United States Attorney for the Northern District of New York, Syracuse, NY.

PRESENT: John M. Walker, Jr., Pierre N. Leval, Susan L. Carney, Circuit Judges.

SUMMARY ORDER

In July 2017, Jeffrey Keith pleaded guilty without a plea agreement to two counts of being a felon in possession of firearms in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2) and one count of possession with intent to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and 851. In December 2017, the District Court entered a judgment convicting him and sentencing him primarily to 84 months' imprisonment.

The following statement of facts is drawn from the Presentence Investigation Report, to which Keith did not object and which the District Court adopted. On July 15, 2015, in Kingston, New York, a confidential informant (CI) met with Keith and asked Keith if he had a gun for sale. Keith responded that he did. The CI then asked if Keith had drugs for sale, and Keith said that he would sell the CI 4.5 grams of cocaine as well. Later the same day, Keith and the CI completed the sale, with Keith giving the CI a paper bag containing the gun and drugs and taking $900 in cash as payment. About one month later, on August 14, 2015, Keith sold two more firearms to the CI in exchange for $3,100 in cash. We assume the parties' familiarity with the other underlying facts, the procedural history, and the arguments on appeal, to which we refer only as necessary to explain our decision to affirm the District Court's judgment.

On appeal, Keith raises three challenges. First, he argues that, because his indictment failed to allege that he knew he was a felon when he possessed the firearms, the Supreme Court's decision in *Rehaif v. United States*, —— U.S. ——, 139 S. Ct. 2191, 204 L.Ed.2d 594 (2019), means that the District Court had no jurisdiction over his prosecution under that indictment. Second, he contends that his convictions on the two counts of illegal firearm possession are invalid because the government did not allege, and he did not admit in his plea allocution, that when he possessed the firearms he knew that he was a felon. Third, he disputes the District Court's addition of four points to his offense level under U.S.S.G. § 2K2.1(b)(6)(B) for possessing a firearm "in connection with" another felony offense. Keith first raised the two initial arguments set forth above in a Rule 28(j) letter filed in this Court on July 25, 2019, soon after the Supreme Court's decision in *Rehaif*. *See* Dkt. No. 100. At the Court's request, the parties subsequently briefed the impact of *Rehaif* on these proceedings.

***651** *1. Jurisdictional Challenge*

[1] Keith argues first that the District Court had no jurisdiction over his prosecution because the operative indictment failed to allege an offense "against the laws of the United States." 18 U.S.C. § 3231. In *Rehaif*, the Supreme Court held that the knowledge requirement of 18 U.S.C. § 924(a)(2) applies not only to the element of possession of a firearm, but also to the provision's status requirement —that is, the status that renders unlawful the individual's possession of a firearm. 139 S. Ct. at 2200. In Keith's case, the unlawful status is that of a felon, as set forth in 18 U.S.C. § 922(g)(1): a person "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year." As relevant here, Keith's indictment charged as follows: "On or about July 15, 2015, in Ulster County in the Northern District of New York, the defendant, JEFFREY KEITH, a/k/a 'Bangin J,' having been convicted in a court

of a crime punishable by a term of imprisonment exceeding one year, knowingly possessed in and affecting commerce, a firearm." App'x 8-9. As the government concedes, the indictment did not separately charge the element required by *Rehaif*—Keith's own knowledge of his felon status.

Our Court's recent decision in *United States v. Balde*, 943 F.3d 73 (2d Cir. Nov. 13, 2019), now forecloses Keith's jurisdictional argument. In *Balde*, the government prosecuted the defendant for illegal possession of a firearm. There, the indictment alleged that the defendant's possession was unlawful under 18 U.S.C. § 922(g)(5) because of his status as an "alien [who was] illegally or unlawfully in the United States." The defendant in *Balde* challenged the court's jurisdiction to adjudicate the case, making the same argument as does Keith: that is, that "in failing to allege that he had actual knowledge of [the status that rendered his possession of a firearm illegal], the indictment failed to allege a federal crime, and that this defect deprived the district court of jurisdiction." *Balde*, 943 F.3d at 88. Relying on case law holding that an indictment that specifies a violation of a federal criminal statute, but does not allege all of the required elements, might be deficient on the merits but does not cause a jurisdictional problem, we decided that "the indictment's failure to allege that [the defendant] knew that ... [his section 922(g) status] was not a jurisdictional defect." *Id.* at 92.

We see no reason to treat Keith's prosecution under section 922(g)(1) any differently. In both cases, the pre-*Rehaif* indictment charging a violation of 18 U.S.C. § 922(g) sufficed to endow the district court with jurisdiction. *See* 18 U.S.C. § 3231. Therefore, that Keith's indictment did not include the element required by *Rehaif* does not affect the District Court's jurisdiction over this case. *Balde* forecloses Keith's argument here.

2. Rule 11 Challenge to Guilty Plea

[2] Second, Keith contends that, for his guilty plea to have been knowing and voluntary and therefore enforceable, the indictment should have alleged and the plea proceedings should have made plain that Keith knew of his status as a felon when he unlawfully possessed the firearms. Keith asserts that the District Court did not "inform [him] of, and determine that [he] understands ... the nature of each charge to which [he] is pleading," as required by Rule 11(b)(1)(G) of the Federal Rules of Criminal Procedure, before accepting his plea. Keith further contends that the absence in his plea allocution of any admission by him to the knowledge-of-status element establishes as a matter of law that his plea rested on an inadequate factual basis, in contravention of ***652** Rule 11(b)(3) ("Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.").

Because Keith did not challenge this aspect of his plea in the District Court, we review the District Court's actions for plain error. *Balde*, 943 F.3d at 95. Plain error has four elements: "(1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant's substantial rights; and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* at 96 (internal quotation marks omitted). Additionally, in "the context of plea proceedings, a defendant must establish that ... there is a reasonable probability that, but for the error, he would not have entered the plea." *Id.* (internal quotation marks omitted). To establish plain error warranting vacatur, Keith must therefore show that, had the District Court explained the additional element and required Keith to state the factual basis for that element, there is a "reasonable probability" that Keith would not have entered a plea of guilty. *Id.*

Keith has not identified any reason to believe that he would not have pleaded guilty had he been told that the government would need to prove that he knew he was a felon when he possessed the firearms. Keith had been convicted in October 2008 of criminal sale of cocaine and served over two years in prison. The government would have relied on these fact as overwhelming proof of his awareness that he had "been convicted ... of a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1); *see also United States v. Burghardt*, 939 F.3d 397, 404 (1st Cir. 2019) (affirming section 922(g)(1) conviction under similar circumstances where there was "no reason to think that the government would have had any difficulty at all in offering overwhelming proof that [the defendant] knew that he had previously been convicted of offenses punishable by more than a year in prison"). These facts distinguish this case from *Balde*, where "the nature of [the defendant's section 922(g)] status [as a possibly unlawfully present alien] was hotly contested." *Balde*, 943 F.3d at 97. In *Balde*, "we [could not] conclude ... that the government's arguments are so strong that Balde would have had no plausible defense at trial and no choice but to plead guilty, even had he known of the element announced in *Rehaif*." *Id.* Here, because the government would have such persuasive proof of Keith's awareness that he was a convicted felon, we see no reasonable probability that Keith would not have entered the plea had the District

Court correctly explained the elements of the offense. Keith's plain error argument thus fails.

3. Sentencing Challenge

[3] Section 2K2.1(b)(6)(B) of the U.S. Sentencing Guidelines mandates a four-point increase to the otherwise applicable base offense level if the defendant "used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense." The comments to this Guidelines section further explain that "[s]ubsection[ ] (b)(6)(B) ... appl[ies] if the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense." U.S.S.G. § 2K2.1 cmt. n.14(A). Keith now challenges the court's application of this four-point enhancement for his July 15, 2015 sale of both cocaine and a handgun to the CI.

***653** We review sentences "for abuse of discretion, a standard that incorporates de novo review of questions of law (including interpretation of the Sentencing Guidelines) and clear-error review of questions of fact." *United States v. Bonilla*, 618 F.3d 102, 108 (2d Cir. 2010) (brackets and internal quotation marks omitted). We review for clear error the District Court's factual determination that the record supported finding a "connection" between the firearm possession and the drug sale sufficient to warrant application of the four-point enhancement under U.S.S.G. § 2K2.1. *United States v. Dodge*, 61 F.3d 142, 146 (2d Cir. 1995).

Keith argues that his sale of the handgun was not made "in connection with," U.S.S.G. § 2K2.1(b)(6)(B), his felony offense of possession of cocaine with intent to distribute under 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C) & 851, to which he pleaded guilty. He urges that the tandem sale of the firearm was "merely coincidental" to the drug offense and that the two acts were unconnected. *United States v. Spurgeon*, 117 F.3d 641, 644 (2d Cir. 1997) ("So long as the government proves by a preponderance of the evidence that the firearm served some purpose with respect to the felonious conduct, ... [the] 'in connection with' requirement is satisfied; conversely, where the firearm's presence is merely coincidental to that conduct, the requirement is not met.").

During the pendency of Keith's appeal, however, we decided *United States v. Ryan*, and held that a sentencing court "may apply § 2K2.1(b)(6)(B)'s enhancement to a defendant who sells a firearm and drugs in the same transaction." 935 F.3d 40, 43 (2d Cir. 2019). In *Ryan*, the defendant sold heroin and a shotgun together to a confidential informant for a single payment of $1,600. *Id.* at 41-42. We explained that, "because selling firearms and drugs in the same transaction will normally facilitate both the drug sale and future drug sales, ... [it] is enough to trigger the enhancement under § 2K2.1(b)(6)(B)." *Id.* at 42.

The record in Keith's case adequately establishes that the sales here are fairly treated as having occurred in "the same transaction" under *Ryan*. Keith and the CI agreed to both sales in a single meeting, and, at a subsequent meeting, Keith transferred the firearm and the cocaine together, in the same bag, at the same time in exchange for a lump sum payment of $900.

Following *Ryan*, we conclude on these facts that the District Court did not abuse its discretion in applying the four-point enhancement.

* * *

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment entered on December 15, 2017, is AFFIRMED.

All Citations

797 Fed.Appx. 649

End of Document

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 9th day of June, two thousand twenty.

United States of America,

Appellee,

v.

Jeffrey Keith, AKA Bangin J,

Defendant - Appellant.

ORDER

Docket No: 17-4015

Appellant, Jeffrey Keith, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk