# APPENDIX

**APPENDIX**

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814 Fed.Appx. 553 (Mem)
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007.
See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Duwayne JONES, a.k.a. Black, Defendant-Appellant.

No. 19-11655
|
Non-Argument Calendar
|
(July 6, 2020)

**Attorneys and Law Firms**

Carol Herman, Emily M. Smachetti, U.S. Attorney Service - Southern District of Florida, U.S. Attorney Service - SFL, Miami, FL, Phillip Drew DiRosa, U.S. Attorney's Office, Fort Lauderdale, FL, Brandy Brentari Galler, U.S. Attorney's Office, West Palm Beach, FL, for Plaintiff-Appellee

Peter Vincent Birch, Michael Caruso, Federal Public Defender, Federal Public Defender's Office, West Palm Beach, FL, for Defendant-Appellant

Duwayne Jones, Pro Se

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 9:19-cr-80004-KAM-1

Before JORDAN, NEWSOM, and ANDERSON, Circuit Judges.

**Opinion**

PER CURIAM:

***554** Duwayne Jones appeals his 144-month sentence for distribution of a substance containing a detectable amount of heroin and cocaine. He argues that the district court erred in classifying him as a career offender based on his prior Florida convictions for possession of cocaine with intent to sell or deliver. He asserts that because Florida law does not contain a *mens rea* element regarding the illicit nature of the controlled substance, his convictions should be not used as career offender predicates.

This Court reviews *de novo* the district court's decision to classify a defendant as a career offender. *United States v. Gibson*, 434 F.3d 1234, 1244 (11th Cir. 2006).

Section 4B1.1 of the Sentencing Guidelines provides that a defendant is a career offender if "(2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense." U.S.S.G. § 4B1.1(a). Controlled substance offense is defined as

> an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

U.S.S.G. § 4B1.2(b).

Section 893.13 of the Florida Statutes criminalizes the sale, manufacture, and delivery of a controlled substance, as well as possession of a controlled substance with intent to sell, manufacture, or deliver. Fla. Stat. § 893.12(1)(a)(1). In May 2002, the Florida Legislature enacted Fla. Stat. § 893.101, which eliminated knowledge of the illicit nature of the drugs as an element of controlled substance offenses and created an affirmative defense for the lack of such knowledge. *Shelton v. Sec'y, Dep't of Corr.*, 691 F.3d 1348, 1350 (11th Cir. 2012).

In *United States v. Smith*, this Court held that a conviction under Fla. Stat. § 893.13 for the sale or delivery of cocaine and the possession of cocaine with intent to distribute it qualifies as a "serious drug offense" under the Armed Career Criminal Act ("ACCA") and a "controlled substance offense" under U.S.S.G. § 4B1.2(b). *United States v.*

*Smith*, 775 F.3d 1262, 1266-68 (11th Cir. 2014); *see also* *United States v. Phillips*, 834 F.3d 1176, 1184 (11th Cir. 2016) (following *Smith* as binding precedent to a defendant's conviction for possession cocaine with the intent to sell). This Court concluded that because no *mens rea* element with respect to the illicit nature of the controlled substance is expressed or implied in the definition under 18 U.S.C. § 924(e)(2)(A)(ii), convictions under Fla. Stat. § 893.13(1)(a) categorically qualify as serious drug offenses under the ACCA and controlled substance offenses under § 4B1.2(b). *Smith*, 775 F.3d at 1267-68.

***555** The Supreme Court recently affirmed a decision from this Court relying on *Smith* and held that convictions under Fla. Stat. § 893.13(1)(a) qualify as serious drug offenses under the ACCA even though knowledge of the illicit nature of the controlled substance is not an element of the crime. *Shular v. United States*, — U.S. ——, 140 S. Ct. 779, 784-85, 206 L.Ed.2d 81 (2020). The Supreme Court reasoned that the ACCA's definition of "serious drug offense" requires only that the state offense involve the conduct specified in the federal statute, and not that the state offense match the elements of a generic drug offense. *Id.* at 785-787.

Here, the district court did not err in applying the career offender enhancement based on Jones's prior convictions under Fla Stat. § 893.13. As Jones acknowledges, his argument that his convictions are not serious drug offenses is foreclosed by *Smith*. *Smith* is binding precedent, and, in *Shular*, the United States Supreme Court recently affirmed its holding in the ACCA context.

**AFFIRMED.**

**All Citations**

814 Fed.Appx. 553 (Mem)

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# UNITED STATES DISTRICT COURT
## Southern District of Florida
### West Palm Beach Division

**UNITED STATES OF AMERICA**
**v.**
**DUWAYNE JONES**

**JUDGMENT IN A CRIMINAL CASE**

Case Number: **19-80004-CR-MARRA**
USM Number: **19466-104**

Counsel For Defendant: **Peter Birch, AFPD**
Counsel For The United States: **Jennifer Nucci, AUSA**
Court Reporter: **Stephen Franklin**

**The defendant pleaded guilty to Count One of the Indictment on February 1, 2019.**

The defendant is adjudicated guilty of these offenses:

| **TITLE & SECTION** | **NATURE OF OFFENSE** | **OFFENSE ENDED** | **COUNT** |
|---|---|---|---|
| 21 U.S.C. § 841(a)(1),(b)(1)(C) | Distribution of a detectable amount of heroin and cocaine | 10/02/2018 | One |

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

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.

Date of Imposition of Sentence: **4/12/2019**

**Kenneth A. Marra**
**United States District Judge**

Date: April 12, 2019

DEFENDANT: **DUWAYNE JONES**
CASE NUMBER: **19-80004-CR-MARRA**

## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **144 months**.

**The court makes the following recommendations to the Bureau of Prisons: The defendant be designated to an institution in South Florida and that he enter the Bureau of Prisons 500 Hour Drug Treatment Program.**

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

## RETURN

I have executed this judgment as follows:

______________________________________________

______________________________________________

______________________________________________

______________________________________________

______________________________________________

______________________________________________

Defendant delivered on ________________________________ to ________________________________

at ________________________________, with a certified copy of this judgment.

______________________________
UNITED STATES MARSHAL

______________________________
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **DUWAYNE JONES**
CASE NUMBER: **19-80004-CR-MARRA**

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **Three (3) years**.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall 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 defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.**

**The defendant shall cooperate in the collection of DNA as directed by the probation officer.**

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

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

## STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant’s criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant’s compliance with such notification requirement.

DEFENDANT: **DUWAYNE JONES**
CASE NUMBER: **19-80004-CR-MARRA**

## SPECIAL CONDITIONS OF SUPERVISION

Mental Health Treatment - The defendant shall participate in an approved inpatient/outpatient mental health treatment program. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

Permissible Search - The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Sex Offender Treatment - The defendant shall be evaluated for the need of sex offender treatment and if needed shall participate in a sex offender treatment program to include psychological testing and polygraph examination. Participation may include inpatient/outpatient treatment, if deemed necessary by the treatment provider. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

Substance Abuse Treatment - The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

DEFENDANT: **DUWAYNE JONES**
CASE NUMBER: **19-80004-CR-MARRA**

**CRIMINAL MONETARY PENALTIES**

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

| | Assessment | Fine | Restitution |
|---|---|---|---|
| TOTALS | $100.00 | $0.00 | $0.00 |

* 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.

**Assessment due immediately unless otherwise ordered by the Court.

DEFENDANT: **DUWAYNE JONES**
CASE NUMBER: **19-80004-CR-MARRA**

## 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 $100.00 due immediately.**

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during 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.

This assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

**U.S. CLERK'S OFFICE**
**ATTN: FINANCIAL SECTION**
**400 NORTH MIAMI AVENUE, ROOM 08N09**
**MIAMI, FLORIDA 33128-7716**

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

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) penalties, and (8) costs, including cost of prosecution and court costs.