

IN THE
Supreme Court of the United States

DAMONTAZE MONTRELL TILLERY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

APPENDIX

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APPENDIX:

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|---|----|
| Opinion of the United States Court of Appeals for the Fourth Circuit in USA v. Tillery, filed August 17, 2020..... | A1 |
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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-4056

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

DAMONTAZE MONTRELL TILLERY, a/k/a Country,

Defendant – Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at
Newport News. Rebecca Beach Smith, Senior District Judge.
(4:19-cr-00031-RBS-LRL-1)

Submitted: June 30, 2020

Decided: August 17, 2020

Before AGEE and DIAZ, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Nicholas R. Hobbs, HOBBS & HARRISON, PLLC, Hampton, Virginia, for Appellant. G.
Zachary Terwilliger, United States Attorney, Alexandria, Virginia, Howard J. Zlotnick,
Assistant United States Attorney, Lisa R. McKeel, Assistant United States Attorney,
OFFICE OF THE UNITED STATES ATTORNEY, Newport News, Virginia, for
Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Damontaze Montrell Tillery was sentenced to life plus 240 months' imprisonment after a jury found him guilty on four counts: use of a firearm during a drug-trafficking crime resulting in death, in violation of 18 U.S.C. §§ 924(j) and 1111(a); conspiracy to possess with intent to distribute ecstasy, in violation of 21 U.S.C. § 846; attempted possession with intent to distribute ecstasy, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C), and 846; and possession of a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g).

On appeal, Tillery argues that there was insufficient evidence to support his firearms convictions and that the district court erred in cross-referencing the first-degree murder Sentencing Guideline when it sentenced him. For the reasons that follow, we affirm.

I.

A.

This case stems from a meeting gone bad between Tillery and Javon Stephenson. Text messages admitted at trial show that Tillery agreed to trade Stephenson a firearm in exchange for drugs on July 26, 2018. That night, Tillery arranged with Stephenson, via text and phone calls, to meet on a residential street for the exchange. Security video footage from a nearby home, later obtained by police, shows two individuals approach Stephenson's parked car. The individual on the driver's side, later identified as Tillery, interacted with Stephenson. The other individual, later identified as Tillery's cousin, approached, but never reached, the passenger's side of Stephenson's car. Approximately

thirty seconds after Tillery reached the driver's-side window, Stephenson drove away. Tillery then began running, but quickly transitioned to walking, in the opposite direction. Tillery's cousin ran in the same direction as Tillery. Another angle of the video footage shows Stephenson's car hopping a curb and hitting a building a few seconds later.

Emergency services later arrived and found Stephenson dead in the driver's seat with gunshot wounds to his left chest and side. There was a bullet hole in the driver's-side door, with the bullet coming from outside the driver's side of the car. Three cartridge casings, which forensic evidence showed came from the same firearm, were found in the middle of the street near where Tillery and Stephenson had met. Officers found a bag containing 6.18 grams, or roughly \$600 worth, of ecstasy in the gap between the driver's-side door and driver's seat. A digital scale and cell phone were also recovered from the vehicle.

Almost a month later, Tillery went to the police in an effort to clear his name. In his interview, Tillery told the police that he and Stephenson had changed the terms of their exchange so that Stephenson would front Tillery the drugs and Tillery would get him a firearm at a later date; that two other men had fired at him and Stephenson from the front of Stephenson's car; and that he had been alone when he met with Stephenson. After being confronted with the security footage, Tillery admitted that his cousin had accompanied him to the meeting.

B.

Tillery was charged with four counts: (1) use of a firearm during a drug-trafficking crime resulting in death, in violation of 18 U.S.C. §§ 924(j) and 1111(a); (2) conspiracy to

possess with intent to distribute ecstasy, in violation of 21 U.S.C. § 846; (3) attempted possession with intent to distribute ecstasy, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C), and 846; and (4) possession of a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g).

Tillery proceeded to trial. At the close of the government's evidence, Tillery moved for judgment of acquittal, and the district court denied the motion. The jury subsequently found Tillery guilty on all four counts. Tillery moved to set aside the jury's verdict, which the court also denied.

Tillery's presentence report calculated his advisory sentencing range under U.S.S.G. § 2A1.1, the first-degree murder guideline, and recommended life imprisonment.* Tillery objected to the application of § 2A1.1, arguing that U.S.S.G. § 2A1.2, the second-degree murder guideline, should apply instead because Stephenson's murder wasn't premeditated.

At sentencing, the district court found by a preponderance of the evidence that the murder was premeditated, supporting the application of § 2A1.1. As evidence of premeditation, the court noted that Tillery had set the meeting location, carried a firearm to the crime scene knowing that Stephenson would be unarmed (because he needed to purchase a firearm), fired four shots at a close range and then calmly walked away from

* Section 2K2.1(c)(1)(B) of the advisory Sentencing Guidelines instructs that if the defendant used a firearm in connection with the commission of another offense and death resulted, the court should apply "the most analogous offense guideline" from the Guidelines chapter governing homicide offenses.

the scene, changed his telephone number, and made false statements to the police. The district court thus sentenced Tillery to life imprisonment for Count 1, plus 240 months' imprisonment for Counts 2, 3, and 4.

This appeal followed.

II.

Tillery makes two arguments on appeal: (1) that the evidence is insufficient to support his convictions for the firearms charges, and (2) that the district court clearly erred in finding that Stephenson's murder was premeditated for purposes of calculating Tillery's sentencing range. We reject both arguments.

A.

We first turn to Tillery's sufficiency of the evidence argument. We will uphold a verdict if "it is supported by substantial evidence, which is evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *United States v. Savage*, 885 F.3d 212, 219 (4th Cir. 2018) (cleaned up). We view the evidence in the light most favorable to the government. *United States v. Fall*, 955 F.3d 363, 375 (4th Cir. 2020). "A defendant who brings a sufficiency challenge bears a heavy burden, as appellate reversal on grounds of insufficient evidence is confined to cases where the prosecution's failure is clear." *Savage*, 885 F.3d at 219 (cleaned up).

Tillery contends that the video footage creates a reasonable doubt because it doesn't show that Tillery possessed or fired a firearm during his interaction with Stephenson. We disagree.

First, the home surveillance video footage isn't as exculpatory as Tillery claims. As the government notes,

because of the angle from which it was shot, the . . . video does not reveal one way or another whether the defendant was holding a gun or whether he fired the shots that killed Stephenson. But the video *is* entirely consistent with defendant being present at the driver's-side door when the fatal shots occurred, and the forensic evidence established that the bullets that killed Stephenson were fired from that direction.

Appellee's Br. at 26.

Second, the evidence presented at trial, though circumstantial, was sufficient for the jury to fill in the blanks left by the video footage and find that Tillery killed Stephenson. *See United States v. Osborne*, 514 F.3d 377, 387 (4th Cir. 2008) (holding that circumstantial evidence alone can support a conviction). Here, Tillery's communications with Stephenson before the exchange, his presence at Stephenson's driver's-side window, the forensic evidence that the shots that killed Stephenson were fired from the direction of where Tillery stood, and the bullet casings found near where Tillery stood are, taken together, more than sufficient to support the jury's verdict.

B.

We next turn to Tillery's argument that the district court clearly erred by finding that the murder was premeditated for purposes of § 2A1.1. When determining a Guidelines range, a district court may find facts by a preponderance of the evidence. *United States v.*

Alvarado Perez, 609 F.3d 609, 614 (4th Cir. 2010). We then review those factual findings for clear error. *United States v. Layton*, 564 F.3d 330, 334 (4th Cir. 2009). “Under clear-error review, our task is to determine whether the district court’s account of the evidence is plausible in light of the record viewed in its entirety.” *United States v. Patterson*, 957 F.3d 426, 435 (4th Cir. 2020) (cleaned up).

We find no clear error in the district court’s finding of premeditation, and thus affirm its decision to apply the first-degree murder guideline. “‘Premeditation’ is a fully formed conscious purpose to kill[.]” *United States v. Abdullah*, No. 06–4970, 2007 WL 2046801, at *4 (4th Cir. July 13, 2007) (unpublished) (per curiam) (quoting 40 Am. Jur. 2d *Homicide* § 44 (2007)). Importantly, we have held, as have other circuits, that there is no requisite amount of time for premeditation to form. *See United States v. Brown*, 518 F.2d 821, 826 (7th Cir. 1975); *Faust v. North Carolina*, 307 F.2d 869, 871 (4th Cir. 1962). Indeed, it can form “in a moment” and must exist only “for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act.” *Abdullah*, 2007 WL 2046801, at *4 (quoting 40 Am. Jur. 2d *Homicide* § 44 (2007)).

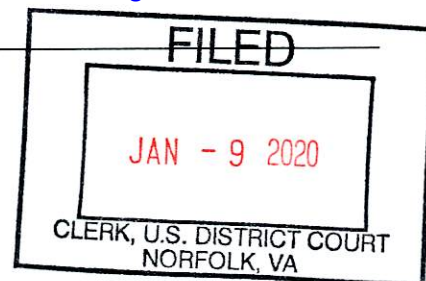
Here, the district court found that Tillery set the meeting location, carried a firearm to the meeting knowing that Stephenson would be unarmed, fired up to four shots at a close range, and then calmly walked away. In light of this evidence, it’s at least plausible that the murder was premeditated. Further, though the meeting between Tillery and Stephenson lasted only about thirty seconds, it was long enough for Tillery to form premeditation. Accordingly, the district court did not err by applying the first-degree murder guideline.

* * *

For the reasons given, we affirm the district court's judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES DISTRICT COURT
Eastern District of Virginia
Newport News Division



UNITED STATES OF AMERICA

v.

DAMONTAZE MONTRELL TILLERY
a/k/a "Country"
Defendant.

Case Number: 4:19CR00031-001

USM Number: 93242-083

Defendant's Attorney: Nicholas Hobbs

JUDGMENT IN A CRIMINAL CASE

The defendant was found guilty by a jury on Counts 1, 2, 3, and 4 of the Superseding Indictment after a plea of not guilty.


Accordingly, the defendant is adjudged guilty of the following counts involving the indicated offenses.

| <u>Title and Section</u> | <u>Nature of Offense</u> | <u>Offense Class</u> | <u>Offense Ended</u> | <u>Count</u> |
|---|---|----------------------|----------------------|--------------|
| T.18, USC, Section 924(c)(1) and (j) | Use of a Firearm Resulting in Death | Felony | July 26, 2018 | 1 |
| T.21, USC, Sections 846, 841(a)(1) and 841(b)(1)(C) | Conspiracy to Possess with Intent to Distribute Ecstasy | Felony | July 26, 2018 | 2 |
| T.21, USC, Sections 841(a)(1) and (b)(1)(C) and 846 | Attempt to Possess with Intent to Distribute Ecstasy | Felony | July 26, 2018 | 3 |
| T.18, USC, Section 922(g)(1) and 924(a)(2) | Felon in Possession of a Firearm | Felony | July 26, 2018 | 4 |

As pronounced on January 8, 2020, 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.

It is ORDERED that the defendant shall 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.

Given this 8th day of January, 2020.

/s/
Rebecca Beach Smith
Senior United States District Judge 

Rebecca Beach Smith
Senior United States District Judge

Case Number: 4:19CR00031-001
Defendant's Name: TILLERY, DAMONTAZE MONTRELL

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of LIFE PLUS TWO HUNDRED FORTY (240) MONTHS. This term of imprisonment consists of a term of LIFE on Count 1, a term of TWO HUNDRED FORTY (240) MONTHS on Count 2, a term of TWO HUNDRED FORTY (240) MONTHS on Count 3, and a term of ONE HUNDRED TWENTY (120) MONTHS on Count 4. Counts 2, 3, and 4 shall be served concurrently to each other, and consecutively to Count 1.

- The Court makes the following recommendations to the Bureau of Prisons:
- 1) The defendant shall obtain his General Equivalency Diploma (GED) first, and then develop a skill.
 - 2) The defendant shall undergo a full mental health evaluation and receive all appropriate mental health treatment and counseling, in particular for anger management.
 - 3) The defendant shall participate in a parenting class.
 - 4) The defendant shall participate in a substance abuse treatment and counseling program, to include the Residential Drug Abuse Treatment Program (RDAP).

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

By _____
DEPUTY UNITED STATES MARSHAL

Case Number: 4:19CR00031-001
Defendant's Name: TILLERY, DAMONTAZE MONTRELL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS. This term consists of a term of FIVE (5) YEARS on Count 1, a term of THREE (3) YEARS on Count 2, a term of THREE (3) YEARS on Count 3, and a term of THREE (3) YEARS on Count 4, all to run concurrently.

The Probation Office shall provide the defendant with a copy of the standard conditions and any special conditions of supervised release.

The defendant shall 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 periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or restitution obligation, it is a condition of supervised release that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

STANDARD CONDITIONS OF SUPERVISION

The defendant shall comply with the standard conditions that have been adopted by this court set forth below:

- 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 five 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 narcotic or other controlled substance or any paraphernalia related to such 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 for a special agent of a law enforcement agency without the permission of the court;
- 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.

Case Number: 4:19CR00031-001
Defendant's Name: TILLERY, DAMONTAZE MONTRELL

SPECIAL CONDITIONS OF SUPERVISION

While on supervised release pursuant to this Judgment, the defendant shall also comply with the following additional special conditions:

- 1) The defendant shall continue to participate in a substance abuse treatment program at the direction and discretion of the probation officer. The defendant shall bear partial costs of this program.
- 2) The defendant shall continue to participate in a mental health treatment and counseling program at the direction and discretion of the probation officer. The defendant shall bear partial costs of this program.
- 3) The defendant shall waive all rights of confidentiality regarding substance abuse/mental health treatment in order to allow the release of information to the United States Probation Office and authorize communication between the probation officer and the treatment provider.
- 4) The defendant shall pay for the support of his minor children in the amount ordered by any social service agency or court of competent jurisdiction and shall register with the Department of Child Support Enforcement in any state in which he resides. In the absence of any such order, payments are to be made on a schedule to be determined by the court at the inception of supervision, based on the defendant's financial circumstances.
- 5) The defendant shall have no contact with any known gang member without first obtaining the permission of the probation officer.
- 6) The court does not deny federal benefits because the denial is not applicable.

Case Number: 4:19CR00031-001
Defendant's Name: TILLERY, DAMONTAZE MONTRELL

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on Sheet 6.

| | <u>Count</u> | <u>Assessment</u> | <u>Fine</u> | <u>Restitution</u> |
|----------------|--------------|-------------------|---------------|--------------------|
| | 1 | \$100.00 | \$0.00 | \$0.00 |
| | 2 | \$100.00 | \$0.00 | \$0.00 |
| | 3 | \$100.00 | \$0.00 | \$0.00 |
| | 4 | \$100.00 | \$0.00 | \$0.00 |
| TOTALS: | | \$400.00 | \$0.00 | \$0.00 |

FINES

No fines have been imposed in this case.

COSTS

The Court waives the cost of prosecution, incarceration, and supervised release, except to the extent the defendant will have to bear costs as outlined in the Special Conditions of Supervision.

Case Number: 4:19CR00031-001
Defendant's Name: TILLERY, DAMONTAZE MONTRELL

SCHEDULE OF PAYMENTS

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

The special assessment shall be due in full 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.

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.

Nothing in the court's order shall prohibit the collection of any judgment, fine, or special assessment by the United States.