

No. _____

In the

Supreme Court of the United States

Tommy Demond Fannin,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

- I. Did the district court err when it imposed a cross-reference under U.S. Sentencing Guidelines Manual § 2K2.1(c)(1) without a connection between the possession of a firearm and the commission of an alleged assault?

PARTIES TO THE PROCEEDING

Petitioner is Tommy Demond Fannin, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the United States District Court for the Northern District of Texas and the United States Court of Appeals for the Fifth Circuit:

- *United States v. Fannin*, 821 F. App'x 358 (5th Cir. 2020)
- *United States v. Fannin*, No. 4:19-cr-242-A-1 (N.D. Tex. 2020)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Tommy Demond Fannin seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is *United States v. Fannin*, 821 F. App'x 358 (5th Cir. 2020). It is reprinted in Appendix A to this Petition. The judgment of the district court is reprinted in Appendix B to this Petition.

JURISDICTION

The opinion and judgment of the Fifth Circuit were entered on August 27, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND RULES PROVISIONS

This petition involves U.S. Sentencing Guidelines Manual § 2K2.1(c)(1)(A):

If the defendant used or possessed any firearm or ammunition cited in the offense of conviction in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm or ammunition cited in the offense of conviction with knowledge or intent that it would be used or possessed in connection with another offense, apply—

(A) §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above offense.

STATEMENT OF THE CASE

On June 7, 2019, officers from the Arlington Police Department initiated a traffic stop on a vehicle that Mr. Fannin was driving. At that time, the officers saw Mr. Fannin throw a red bag out of his vehicle. Inside the bag, the officers recovered a firearm, which Mr. Fannin admitted belonged to him. The officers later determined that Mr. Fannin had previously been convicted of a crime punishable by more than one year. The government charged Mr. Fannin with one count of Felon in Possession of a Firearm, in violation of 18 U.S.C. § 922(g)(1). On September 20, 2019, he pleaded guilty to the one-count Indictment.

When the Presentence Investigation Report (PSR) was prepared, however, U.S. Probation did not calculate Mr. Fannin's advisory sentencing range based on U.S. Sentencing Guidelines Manual (USSG) § 2K2.1 but instead applied a cross-reference to § 2A2.2 for an alleged aggravated assault. Probation then applied a series of guidelines enhancements, which raised Mr. Fannin's total offense from 14 to 25. It was then reduced to 22 for acceptance of responsibility.

A total offense level of 22, combined with a criminal history category of IV, yielded an advisory sentencing range of 63-78 months. In response to the PSR, Mr. Fannin objected to the cross-reference, arguing that Mr. Fannin's possession and discharge of firearm into the air was not in connection with the commission of an alleged assault; instead, they were entirely separate events. The government and Probation disagreed.

At the sentencing hearing, the district court overruled Mr. Fannin's objections to the cross-reference and imposed a sentence of 78 months followed by a 3-year term of supervised release. The Fifth Circuit affirmed.

REASONS FOR GRANTING THIS PETITION

I. The district court erred when it imposed a cross-reference under U.S. Sentencing Guidelines Manual § 2K2.1(c)(1) without a connection between the possession of a firearm and the commission of an alleged assault.

The cross-reference in U.S. Sentencing Guidelines Manual § 2K2.1(c)(1) requires a connection between the possession of a firearm and the commission of another felony offense. The Sentencing Commission advises that the connection is present when the firearm facilitates or has the ability to facilitate the other felony. Here, the possession of the firearm was not connected with an alleged aggravated assault and there is no evince that the firearm was even present at the time of the assault. Therefore, the cross-reference was improper.

In certain cases, Guideline § 2K2.1 substitutes another offense Guideline for that generally applicable to firearm possession cases. Specifically, the court may apply the offense Guideline applicable to crimes committed with the charged firearm if:

the defendant used or possessed any firearm or ammunition cited in the offense of conviction in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm or ammunition cited in the offense of conviction with knowledge or intent that it would be used or possessed in connection with another offense...

USSG § 2K2.1(c)(1). Application Note 14 clarifies that “in connection with” requires that the “firearm or ammunition facilitated, or had the potential of facilitating, another felony offense or another offense, respectively.” *See United States v. Johnson*, 559 F.3d 292, 295 (5th Cir. 2009); *see also* USSG § 2K2.1 cmt n.14(A) (2018). The

cross-reference analysis, moreover, is more exacting than a relevant-conduct analysis. *See United States v. Rogers*, 726 F. App'x 989, 991 (5th Cir. 2018) (unpub.) (“Although the two inquiries may sometimes overlap, the cross reference requires more than a finding of relevant conduct would.”).

Here, the PSR applied the cross-reference to § 2X1.1—and, by extension, § 2A2.2—on the conclusion that Mr. Fannin “was in possession of the firearm cited in the count of conviction during the Aggravated Assault of Tianay Grey in which he strangled her.” (ROA.140). What the PSR and district court fail to appreciate is that possession of a firearm during another felony offense does not necessarily trigger the cross-reference. Instead, by its terms, the cross-reference only applies when the defendant possesses the firearm “in connection with the *commission* of another offense.” USSG § 2K2.1(c)(1). This requires a closer connection than what relevant conduct and § 2K2.1(b)(6)(B) require. *See United States v. Condren*, 18 F.3d 1190, 1197 (5th Cir. 1994) (“The requirement that the firearm possession [in subsection (c)(1)] be in connection with the *commission* of another offense appears to mandate a closer relation between the firearm and the other offense than that required for § 2K2.1(b)(5) purposes.”).¹

The question then becomes, for purposes of the cross-reference, whether Mr. Fannin possessed the firearm *in connection with the commission* of the alleged aggravated assault of Ms. Grey. On the facts before the district court, the answer is “no.” While the firearm possession may or may not have *correlated* with the assault,

¹ What is now found in USSG § 2K2.1(b)(6)(B) was in subsection (b)(5) in 1994 when *Condren* was decided.

it certainly did not *facilitate* the assault. Thus, while the enhancement in § 2K2.1(b)(6)(B) may apply on remand, the cross reference certainty should not.

What we know about the relationship between the firearm and the alleged assault comes from the transcripts of the police cameras as well as the written reports by the investigating officers.

First, here is how Arlington Police Department Officer J. Dean described his interview with Ms. Grey, in relevant part:

Ms. Grey stated that [Mr. Fannin] had informed her he was going to a friend's house, but did not return home for approximately 4 hours. Ms. Grey stated that when he returned home he became upset. [Mr. Fannin] told Ms. Grey to return the money he had given her. Ms. Grey stated that it was 40 dollars and it was located in her car. Ms. Grey stated that she went to her car. Before he had went to the car Ms. Grey said [Mr. Fannin] wanted her to get away from him and he discharged a firearm straight up in the air. Ms. Grey said it was a smaller gun unknown color or description. Ms. Grey said that she was frightened by this and went to get the money. When Ms. Grey returned [Mr. Fannin] took her inside in the living room an[d] assaulted her by strangulation.

(ROA.201). The report goes on to describe the assault but Ms. Grey never mentions seeing a firearm during the assault inside her house. (*See* ROA.201).

Second, here is how Arlington Police Department Sgt. R. Olson described his interview with Mr. Fannin, in relevant part:

[Mr. Fannin] stated they argued about his late hours. He was told to leave. He grabbed items. He stood outside the apartment and fired one round from the revolver as he left.

(ROA.204). While this Court may regard Mr. Fannin's account with suspicion, it does align with Ms. Grey's account in that the firearm was discharged outside the house and never places the firearm inside the house, where the alleged aggravated assault occurred.

Third, Arlington Police Department Officer Todd described his experience as a responding officer but did not have any personal knowledge about the assault or firearm discharge other than stating that the 911 caller reported hearing arguing and a gunshot. (ROA.206-07). This same information was relayed in the report of Arlington Police Department Officer Gonzales. (ROA.209).

Fourth, although Officer Gonzales's report offers little in the way of context, Officer Gonzales was wearing a body camera when interviewing Ms. Grey. That interview, which was transcribed at the district court's request (ROA.44-45), depicts the scene as follows:

Ms. Grey: Yeah. He shot his gun (pointing) in (inaudible) in the street in the air because he wanted me to get away from him.

Ofc. Gonzales: Ok. Because he wanted me to get away from him?

Ms. Grey: Yes.

Ofc. Gonzales: Were you following him or anything like that or what was going on?

Ms. Grey: Yes. I was just like talking to him or whatever and then he got mad and he like left and I told him to bring my key back.

Ofc. Gonzales: Uh huh.

Ms. Grey: And when he came back that's when he started doing all this other stuff. And like beating me and (inaudible).

Ofc. Gonzales: Inside here. Ok. And then uh and then what? What stopped him from uh beating you?

Ms. Grey: I gave him his money back.

Ofc. Gonzales: How much was it if you don't mind me asking?

Ms. Grey: It was like \$40.

Ofc. Gonzales: Ok. So you gave him the money back and then what?

Ms. Grey: He basically just left.

Ofc. Gonzales: He left in which vehicle?

Ms. Grey: In his but I don't I'm not good with cars.

(ROA.130-31).

This depiction, which is more unfiltered than the various officers' reports, confirms that the gunshot was outside and into the air while adding an additional element: Mr. Fannin left after the gunshot and only returned when Ms. Grey "told him to bring my key back." And it was then that the assault occurred. Still, there was no mention of a firearm during the alleged assault.

Fifth, the transcript of Officer Dean's bodycam interview adds a bit more detail, describing a punch outside after the alleged choking incident inside Ms. Grey's house:

Officer Dean: Let's run it back. So he came in. Did he hit you first or choke you first?

Ms. Grey: No he choked me.

Officer Dean: OK then what happened? After he's done choking you what happened right after that?

Ms. Grey: He made me go get the money.

Officer Dean: Ok.

Ms. Grey: Then that's when I was getting it he hit me and then he left.

Officer Dean: Ok. He hit you, where did he hit you?

Ms. Grey: In my eye.

Officer Dean: In your eye. Ok. So let me make sure I got it right. Came in. Was upset. Choked you. Made you go get the money. Go the money and then he hit you and left.

Ms. Grey: No we were outside that's when he hit me.

Officer Dean: He hit you outside. How did you get outside?

Ms. Grey: That's where the money was. It was in my car.

Officer Dean: Ok. Got you. So you went and got the money in the car he hit you in the eye. Which eye?

Ms. Grey: (Points to eye).

Officer Dean: That one. Ok. Yeah. I can see it's swollen. Ok. Hit you in the eye. And then what happened? Then he left. Did you follow him afterwards or ?

Ms. Grey: (Shakes head no).

Officer Dean: So why did you leave? Cause I know you left.

Ms. Grey: I left to go move my car.

(ROA.125-26).

Ms. Grey also described the gunshot in relation to the other incidents:

Officer Dean: You said he fired the gun. How did he fire it?

Ms. Grey: In the air.

Officer Dean: Straight up in the air. And then what happened?

Ms. Grey: That's when we came in the house.

Officer Dean: And that's when he choked you?

Ms. Grey: (Shakes head yes).

Officer Dean: Ok. And so he just left after that?

Ms. Grey: After (unintelligible) yeah.

Officer Dean: Ok. Got it.

(ROA.128).

Based on the sources described above, even ignoring Mr. Fannin's interview, a consistent order of events emerges:

1. Mr. Fannin arrives at Ms. Grey's house angry. (ROA.201).
2. They argue outside the house. (ROA.201).
3. Mr. Fannin fires a pistol into the air because he wants Ms. Grey to get away from him. (ROA.128,130-31).
4. Mr. Fannin leaves. (ROA.130-31).
5. Ms. Grey requests that he return because she wants her key back. (Mr. Fannin and Ms. Grey are periodically intimate). (ROA.130-31).
6. Mr. Fannin returns and demands that Ms. Grey return money he gave her. (ROA.201).
7. They go inside and Mr. Fannin chokes Ms. Grey. (ROA.201).
8. They go back outside the house because the money is in Ms. Grey's vehicle. (ROA.125-26).
9. Ms. Grey gives Mr. Fannin the money. (ROA.125-26).
10. Mr. Fannin punches Ms. Grey in the eye and leaves in his vehicle. (ROA.125-26).
11. Ms. Grey then moves her vehicle. (ROA.125-26).

At no point in this timeline did Mr. Fannin assault Mr. Grey with a firearm, display a firearm during the assault, or threaten Ms. Grey with a firearm. He fired a pistol into the air to keep Ms. Grey away from him before leaving and coming back at her request. It was only then that the assault occurred. Based on these facts—which are the facts as Ms. Grey describes them—Mr. Fannin’s firearm was not “in connection with” the alleged assault because it did nothing to facilitate *the commission* of the assault, which is required under the cross-reference provision. USSG § 2K2.1 cmt n.14(A) (2018); *see United States v. Condren*, 18 F.3d 1190, 1197 (5th Cir. 1994); *see United States v. Johnson*, 559 F.3d 292, 295 (5th Cir. 2009); *see United States v. Rogers*, 726 F. App’x 989, 991 (5th Cir. 2018) (unpub.).

CONCLUSION

Petitioner requests that this Court grant his Petition for Writ of Certiorari and allow him to proceed with briefing on the merits and oral argument.

Respectfully submitted,

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