

APPENDIX A

United States v. Fannin

United States Court of Appeals for the Fifth Circuit

August 27, 2020, Filed

No. 20-10131 Summary Calendar

Reporter

821 Fed. Appx. 358 *; 2020 U.S. App. LEXIS 27346 **; 2020 WL 5079326

UNITED STATES OF AMERICA, Plaintiff-Appellee, versus
TOMMY DEMOND FANNIN, Defendant-Appellant.

Opinion

[*359] PER CURIAM:*

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: [**1] Appeal from the United States District Court for the Northern District of Texas. USDC No. 4:19-CR-242-1.

Disposition: AFFIRMED.

Counsel: For United States of America, Plaintiff - Appellee: Brian W. McKay, Esq., Assistant U.S. Attorney, Leigha Amy Simonton, Assistant U.S. Attorney, U.S. Attorney's Office, Northern District of Texas, Dallas, TX.

For Tommy Demond Fannin, Defendant - Appellant: Brandon Elliott Beck, Federal Public Defender's Office, Northern District of Texas, Lubbock, TX; George Howard Lancaster Jr., Federal Public Defender's Office, Northern District of Texas, Fort Worth, TX.

Judges: Before SOUTHWICK, DUNCAN, and OLDHAM, Circuit Judges.

Tommy Demond Fannin pleaded guilty to illegal possession of a firearm by a convicted felon. He was sentenced to a 78-month term of imprisonment. Fannin now appeals, challenging his sentence.

The facts recounted in Fannin's Presentence Report (PSR) show that Tianay Grey allowed Fannin to borrow her car. Upon Fannin's return, he became upset with Grey and demanded that she give back some money. Grey exited her apartment to retrieve the money, which was in her car. Fannin followed her outside, and he discharged his illegally possessed firearm straight up in the air. [**2] Grey became fearful. After she gave the money to Fannin, he took Grey inside, strangled her, and punched her in the eye.

In determining Fannin's guidelines range, the probation officer applied the cross-reference under [U.S.S.G. § 2K2.1\(c\)\(1\)\(A\)](#) to [U.S.S.G. § 2X1.1\(a\)](#), which in turn led to the application of [U.S.S.G. § 2A2.2](#), the Guideline addressing aggravated assault. Fannin's objection to the application of [§ 2K2.1\(c\)\(1\)](#) was overruled.

In his sole issue on appeal, Fannin contends that the district court erred in imposing the cross-reference under [§ 2K2.1\(c\)\(1\)](#) because there was no connection between his possession of the firearm and the aggravated assault on Grey. Relying on transcripts of Grey's discussions with police officers, and on police reports, Fannin asserts that he discharged his firearm to keep Grey away from him, left the scene, and then came back, at Grey's request, to return her key. It was only then, he contends, that the aggravated assault occurred, and he argues that the firearm did nothing to

* Pursuant to *5TH CIRCUIT RULE 47.5*, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in *5TH CIRCUIT RULE 47.5.4*.

facilitate the commission of the aggravated assault.

Pursuant to the commentary to [§ 2K2.1, subsection \(c\)\(1\)](#) applies "if the firearm or ammunition facilitated, or had the potential of facilitating," another offense. [§ 2K2.1, comment. \(n.14\(A\)\)](#). We have stated that the "in connection with" language [**3] of [§ 2K2.1\(c\)](#) requires a "functional nexus." [United States v. Mitchell, 166 F.3d 748, 756 \(5th Cir. 1999\)](#). Our review of the district court's application of [§ 2K2.1\(c\)\(1\)](#) is de novo, whereas the factual finding of a connection between the firearm and another offense is reviewed for clear error. See [id. at 754 n.24](#).

Although there are references in the transcripts to Fannin leaving and coming back, the record does not clearly show that, after discharging the firearm, Fannin departed the scene before he strangled Grey. Because the factfinder's choice between two permissible views of the evidence is not clearly erroneous, see [United States v. Harris, 740 F.3d 956, 967 \(5th Cir. 2014\)](#), the district court did not clearly err to the extent it implicitly rejected Fannin's contention that there were two separate encounters.

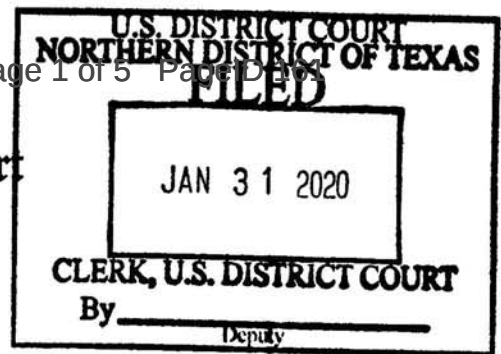
The PSR establishes that the entire incident occurred at Grey's residence, and police reports show that all of the relevant events, starting with the discharge of the firearm, and culminating in the aggravated assault on Grey, occurred within a few [**360] minutes. The record does not indicate that Fannin's possession of the firearm and his commission of the aggravated assault were "geographically, spatially, functionally, [or] logically remote." [Mitchell, 166 F.3d at 756](#). In view of the foregoing, the district court's determination that there was a connection [**4] between Fannin's possession of the firearm and the aggravated assault on Grey "is plausible in light of the record read as a whole," and is therefore not clearly erroneous. [United States v. Villanueva, 408 F.3d 193, 203 \(5th Cir. 2005\)](#).

AFFIRMED.

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APPENDIX B

United States District Court
Northern District of Texas
Fort Worth Division



UNITED STATES OF AMERICA §

v. §

TOMMY DEMOND FANNIN §

Case Number: 4:19-CR-242-A(01)

JUDGMENT IN A CRIMINAL CASE

The government was represented by Assistant United States Attorney Laura Montes. The defendant, TOMMY DEMOND FANNIN, was represented by Federal Public Defender through Assistant Federal Public Defender George Howard Lancaster, Jr.

The defendant pleaded guilty on September 20, 2019 to the one count Indictment filed on August 14, 2019. Accordingly, the court ORDERS that the defendant be, and is hereby, adjudged guilty of such count involving the following offense:

<u>Title & Section / Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count</u>
18 U.S.C. §§ 922(g)(1) Felon in Possession of Firearm	June 7, 2019	1

As pronounced and imposed on January 31, 2020, the defendant is sentenced as provided in this judgment.

The court ORDERS that the defendant immediately pay to the United States, through the Clerk of this Court, a special assessment of \$100.00.

The court further ORDERS that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence address, or mailing address, as set forth below, until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court, through the clerk of this court, and the Attorney General, through the United States Attorney for this district, of any material change in the defendant's economic circumstances.

IMPRISONMENT

The court further ORDERS that the defendant be, and is hereby, committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 78 months. This sentence shall run concurrently with any future sentences which may be imposed in Case No. 1604904, Criminal District Court No. 4 of Tarrant County; and Case No. 1604900, Tarrant County Criminal Court No. 7. This sentence shall run consecutively to any sentence imposed in Case No. 1605741, Tarrant County Criminal Court No. 7.

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

SUPERVISED RELEASE

The court further ORDERS that, upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years and that while on supervised release, the defendant shall comply with the following conditions of supervised release:

1. The defendant shall not commit another federal, state, or local crime.
2. The defendant shall not unlawfully possess a controlled substance.
3. The defendant shall cooperate in the collection of DNA as directed by the U.S. Probation Officer, as authorized by the Justice for All Act of 2004.
4. The defendant shall refrain from any unlawful use of a controlled substance, submitting to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer pursuant to the mandatory drug testing provision of the 1994 crime bill.
5. The defendant shall participate in mental health treatment services as directed by the probation officer until successfully discharged, which services may include prescribed medications by a licensed physician, with the defendant contributing to the costs of services rendered at a rate of at least \$10 per month.
6. The defendant shall participate in a program approved by the probation officer for treatment of narcotic or drug or alcohol dependency that will include testing for the detection of substance use, abstaining from the use of alcohol and all other intoxicants during and after completion of treatment, contributing to the costs of services rendered at the rate of at least \$10 per month.
7. The defendant shall also comply with the Standard Conditions of Supervision as hereinafter set forth.

Standard Conditions of Supervision

1. The defendant shall report in person to the probation office in the district to which the defendant is released within seventy-two (72) hours of release from the custody of the Bureau of Prisons.
2. The defendant shall not possess a firearm, destructive device, or other dangerous weapon.
3. The defendant shall provide to the U.S. Probation Officer any requested financial information.
4. The defendant shall not leave the judicial district where the defendant is being supervised without the permission of the Court or U.S. Probation Officer.

5. The defendant shall report to the U.S. Probation Officer as directed by the court or U.S. Probation Officer and shall submit a truthful and complete written report within the first five (5) days of each month.
6. The defendant shall answer truthfully all inquiries by the U.S. Probation Officer and follow the instructions of the U.S. Probation Officer.
7. The defendant shall support his dependents and meet other family responsibilities.
8. The defendant shall work regularly at a lawful occupation unless excused by the U.S. Probation Officer for schooling, training, or other acceptable reasons.
9. The defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment.
10. 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.
11. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
12. 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 U.S. Probation Officer.
13. The defendant shall permit a probation officer to visit him at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the U.S. Probation Officer.
14. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer.
15. 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.
16. 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.

The court hereby directs the probation officer to provide defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, as contemplated and required by 18 U.S.C. § 3583(f).

FINE

The court did not order a fine because the defendant does not have the financial resource or future earning capacity to pay a fine.

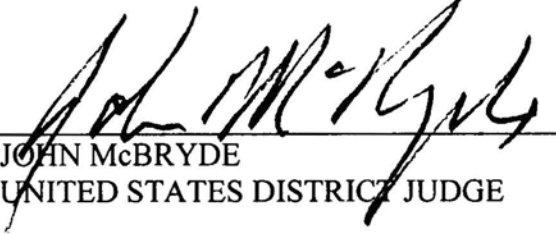
FORFEITURE

Pursuant to 18 U.S.C. § 924(d) and 28 U.S.C. § 2461(c), it is hereby ordered that defendant's interest in the following property is condemned and forfeited to the United States: F.I.E. (Arminius), model Titan Tiger, .38-caliber special revolver, bearing Serial No. 43862, and any ammunition recovered with this weapon.

STATEMENT OF REASONS

The "Statement of Reasons" and personal information about the defendant are set forth on the attachment to this judgment.

Signed this the 31st day of January, 2020.



JOHN McBRYDE
UNITED STATES DISTRICT JUDGE

RETURN

I have executed the imprisonment part of this Judgment as follows:

Defendant delivered on _____, 2020 to _____
at _____, with a certified copy of this Judgment.

United States Marshal for the
Northern District of Texas

By _____
Deputy United States Marshal