

NOT RECOMMENDED FOR PUBLICATION

Nos. 19-6122/20-5015

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct 28, 2020
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,)
)
 Plaintiff-Appellee,)
)
 v.)
) ON APPEAL FROM THE UNITED
 RONALD MARK HARRISON,) STATES DISTRICT COURT FOR
) THE EASTERN DISTRICT OF
 and) KENTUCKY
)
 LAWRENCE WESTBROOK III,)
)
 Defendants-Appellants.)

O R D E R

Before: GUY, KETHLEDGE, and NALBANDIAN, Circuit Judges.

Ronald Mark Harrison (No. 19-6122) and co-defendant Lawrence Westbrook III (No. 20-5015), proceeding through separate counsel, appeal their judgments of conviction and sentence. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

With the benefit of a written plea agreement, Harrison pleaded guilty to two counts of making false statements in the acquisition of firearms, in violation of 18 U.S.C. § 922(a)(6). He was sentenced to serve a total of 33 months in prison followed by a total of three years of supervised release. Also with the benefit of a written plea agreement, Westbrook pleaded guilty to possessing a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1); possessing with intent to distribute fifty grams or more of methamphetamine, in violation of 21 U.S.C. § 841(a)(1); two counts of possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A); and possessing with intent to distribute methamphetamine, in violation of

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21 U.S.C. § 841(a)(1). He was sentenced to serve a total of 300 months in prison followed by a total of five years of supervised release. According to the factual basis supporting Harrison's guilty plea, Harrison purchased three firearms, falsely stating that he was purchasing them for himself when he was purchasing them for Westbrook, whom he believed to be a prohibited possessor of firearms.

Harrison and Westbrook filed timely appeals, challenging their sentences as procedurally unreasonable. The cases have been consolidated.

We review a district court's sentencing decision for procedural reasonableness under an abuse-of-discretion standard. *United States v. Cunningham*, 669 F.3d 723, 728 (6th Cir. 2012). Procedural reasonableness requires the court to "properly calculate the guidelines range, treat that range as advisory, consider the sentencing factors in 18 U.S.C. § 3553(a), refrain from considering impermissible factors, select the sentence based on facts that are not clearly erroneous, and adequately explain why it chose the sentence." *United States v. Rayyan*, 885 F.3d 436, 440 (6th Cir. 2018) (citing *Gall v. United States*, 552 U.S. 38, 51 (2007)). "In evaluating the district court's calculation of the advisory Guidelines range, we review the district court's factual findings for clear error and its legal conclusion *de novo*." *United States v. Sands*, 948 F.3d 709, 712 (6th Cir. 2020) (quoting *United States v. Lalonde*, 509 F.3d 750, 763 (6th Cir. 2007)).

HARRISON

Harrison argues that his sentence is procedurally unreasonable "because the district court engaged in impermissible double counting" when calculating his Sentencing Guidelines range. Harrison argues that the district court relied on the same factor—his belief that Westbrook was a prohibited possessor of firearms, which is not one of the elements of his offenses of conviction—to both increase his base offense level and further enhance his offense level by four under USSG § 2K2.1(b)(5) for trafficking in firearms.

After grouping his convictions under USSG § 3D1.2(d), Harrison's base offense level was determined to be 14 under the 2018 version of USSG § 2K2.1(a)(6)(C), because his § 922(a)(6) offenses for making false statements when acquiring firearms were committed "with knowledge, intent, or reason to believe that the offense[s] would result in the transfer of a firearm or

ammunition to a prohibited person.” The probation officer increased the offense level by two under USSG § 2K2.1(b)(1)(A), because Harrison’s offenses involved three to seven firearms; by four under § 2K2.1(b)(5), because he trafficked in firearms; and by four under USSG § 2K2.1(b)(6)(B), because he possessed or transferred a firearm “with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense.” The adjusted offense level of 24 was reduced by three under USSG § 3E1.1(a) and (b), for acceptance of responsibility, which produced a total offense level of 21.

Harrison was placed in criminal history category I because he had no criminal history points. With a total offense level of 21 and a criminal history category of I, the Sentencing Guidelines recommended a sentencing range of 37 to 46 months in prison. *See USSG Ch.5, Pt.A.*

Harrison objected to the four-level enhancement under § 2K2.1(b)(5) for trafficking in firearms. That enhancement applies when a defendant transferred at least two firearms to a person who the defendant knew or believed to be prohibited from possessing the firearms. § 2K2.1, cmt. n. 13(A). Harrison argued that application of the enhancement resulted in impermissible double counting because his “knowledge that Westbrook was prohibited from possessing a firearm has been used both to determine his offense level (14 instead of 12) and to trigger the four-level enhancement under § 2K2.1(b)(5).” The district court overruled Harrison’s objection, concluding that the four-level sentence enhancement under § 2K2.1(b)(5) was properly applied and did not constitute impermissible double counting.

“Impermissible ‘double counting’ occurs when precisely the same aspect of a defendant’s conduct factors into his sentence in two separate ways.” *United States v. Duke*, 870 F.3d 397, 404 (6th Cir. 2017) (quoting *United States v. Farrow*, 198 F.3d 179, 193 (6th Cir. 1999)). However, “a court may impose two enhancements arising from the same conduct, provided the enhancements ‘penalize distinct aspects of [a defendant’s] conduct and distinct harms.’” *United States v. Sweet*, 776 F.3d 447, 451 (6th Cir. 2015) (quoting *United States v. Smith*, 516 F.3d 473, 476 (6th Cir. 2008)). Thus, “no double counting occurs if the defendant is punished for distinct aspects of his conduct.” *Id.* (quoting *United States v. Battaglia*, 624 F.3d 348, 351 (6th Cir. 2010)).

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Application of the sentence enhancement under § 2K2.1(b)(5) in Harrison’s case did not result in impermissible double counting. Although both the base offense level and the § 2K2.1(b)(5) sentence enhancement require the defendant to believe that his conduct would result in a firearm transfer to a prohibited person, no double counting occurred because § 2K2.1(b)(5) punishes distinct aspects of the defendant’s conduct, specifically the actual transfer of at least two firearms, that the base offense level does not. *See Sweet*, 776 F.3d at 451; *Battaglia*, 624 F.3d at 351. Because Harrison actually transferred three firearms to Westbrook, whom he believed to be prohibited from possessing firearms, the district court properly applied the § 2K2.1(b)(5) sentence enhancement in his case.

Harrison relies on *Farrow*, in which this court held that the district court engaged in impermissible double counting where the defendant’s use of an automobile as a dangerous weapon provided the basis for both determining his base offense level for aggravated assault and applying a four-level enhancement to his offense level for otherwise using a dangerous weapon. 198 F.3d at 189-95. But *Farrow* is distinguishable because Farrow’s base offense level and sentence enhancement were both determined by a single aspect of Farrow’s conduct. *Id.* at 195 (concluding that “it was Farrow’s *use* of his car, and no other aspect of his conduct, that triggered both the base offense determination and the application of the enhancement”). Here, in contrast to *Farrow*, Harrison’s base offense level and sentence enhancement penalize distinct aspects of his conduct beyond the fact that he believed Westbrook was prohibited from possessing firearms. The base offense level punishes Harrison for making false statements to acquire a firearm with the intent to transfer it to a person prohibited from possessing it regardless of whether the firearm is acquired or transferred to the prohibited person. § 2K2.1(a)(6)(C). The sentence enhancement punishes Harrison for the actual transfer of at least two firearms to a person prohibited from possessing them. § 2K2.1, comment. (n.13(A)). Thus, unlike in *Farrow*, Harrison’s base offense level and sentence enhancement were not determined by a single aspect of his conduct.

Harrison emphasizes that a factor not an element of his offenses—his belief of Westbrook’s prohibited status—was impermissibly factored into his base offense level and sentence enhancement, constituting double counting. But the impermissible-double-counting inquiry looks

to the defendant's conduct, not the elements of the offense, comparing the conduct penalized by the base offense level and the sentence enhancement. *United States v. Hickman*, 766 F. App'x 240, 251 (6th Cir. 2019) (concluding that the relevant inquiry for purposes of impermissible double counting is "not whether the elements of [the defendant's] *offense* include the same conduct as the enhancement, but whether 'the base offense level' for which the defendant is sentenced includes the same conduct as the enhancement"). The district court did not engage in impermissible double counting in Harrison's case.

WESTBROOK

Westbrook argues that his sentence is procedurally unreasonable because the district court erroneously enhanced his offense level under USSG § 2K2.1(b)(1)(C) by six levels for possession of twenty-five to ninety-nine firearms. He also argues that the district court erroneously enhanced his sentence under USSG § 2K2.1(b)(6)(B) by four levels for use or possession of a firearm "in connection with another felony offense."

After grouping of Westbrook's firearm-possession offense under USSG § 3D1.2(c) and the drug offenses under USSG § 3D1.2(d), the higher adjusted offense level of the two groups applied, *see* USSG § 3D1.3. The probation officer determined that Westbrook's base offense level for the firearm-possession conviction was 22 under the 2018 version of USSG § 2K2.1(a)(3)(A)(i) and (B) because the offense involved a "semiautomatic firearm that is capable of accepting a large capacity magazine" and the offense was committed after he was convicted of "a crime of violence or a controlled substance offense." The base offense level increased by six under USSG § 2K2.1(b)(1)(C), because Westbrook's offense involved twenty-five to ninety-nine firearms; by two under USSG § 2K2.1(b)(4)(A), because at least one firearm was stolen; and by four under USSG § 2K2.1(b)(6)(B), because he used or possessed a firearm "in connection with another felony offense." The adjusted offense level for the firearm-possession offense was 34.

The probation officer determined that Westbrook's base offense level for the drug convictions was 24 under USSG § 2D1.1(c)(8), because the offenses involved 373.888 kilograms of marijuana equivalency. Because no adjustments were made, the adjusted offense level for the drug offenses was 24. The probation officer applied the greater of the two adjusted offense

levels—34—and reduced it by three under USSG § 3E1.1(a) and (b), for acceptance of responsibility, which produced a total offense level of 31.

Westbrook was placed in criminal history category IV because he had seven criminal history points. With a total offense level of 31 and a criminal history category of IV, the recommended Sentencing Guidelines range was 151 to 188 months in prison for the firearm-possession and drug offenses. *See* USSG Ch.5, Pt.A. However, because the ten-year statutory maximum sentence that could be imposed for the firearm-possession offense was less than the minimum of the Sentencing Guidelines range, Westbrook’s sentencing guidelines range for that conviction was restricted to 120 months. *See* 18 U.S.C. § 924(a)(2); USSG § 5G1.2(b). The probation officer determined that the advisory Sentencing Guidelines range for the possession-of-firearms-in-furtherance-of-drug-trafficking convictions was five years in prison for each conviction under USSG § 2K2.4(b) and § 924(c)(1)(A)(i), because that is the “minimum term of imprisonment required by statute” for those offenses, and that those sentences must run consecutively to each other and any other sentence imposed.

Relevant here, Westbrook objected to the sentence enhancements under §§ 2K2.1(b)(1)(C) and (b)(6)(B). The district court overruled Westbrook’s objections, concluding that the government established by a preponderance of the evidence that both enhancements applied.

A. Section 2K2.1(b)(1)(C)

Westbrook’s offense level was enhanced by six levels under § 2K2.1(b)(1)(C) for possession of twenty-six firearms as relevant conduct with respect to his firearm-possession conviction. Westbrook pleaded guilty to possessing a Century Arms International Model Micro Draco pistol between May 22, 2017 and September 14, 2017. As part of the factual basis supporting his plea, Westbrook admitted that images dated May 22, June 5, and July 10, 2017 and a video dated September 14, 2017 discovered on his cellular phone depicted the Draco pistol.

At sentencing, Bureau of Alcohol, Tobacco, Firearms, and Explosives Special Agent Jack Morgan identified numerous images and several videos discovered on Westbrook’s phone. Morgan testified that the images depicted Westbrook holding the Draco pistol on May 22, June 5, and July 10, 2017 and that the video recorded on September 14, 2017, showed the Draco pistol

displayed on a floor among twenty-five other firearms. Morgan stated that Westbrook is not shown in the video but his voice is heard narrating it.

“To determine if an ‘offense’ involved multiple firearms, courts assess ‘relevant conduct’: ‘the court looks to whether the activity was “part of the same course of conduct or common scheme or plan as the offense of conviction.”’” *United States v. Fisher*, __ F. App’x __, 2020 WL 4814115, at *10 (6th Cir. Aug. 19, 2020) (quoting *United States v. Bowens*, 938 F.3d 790, 798 (6th Cir. 2019)). The Sentencing Guidelines define relevant conduct as conduct that is “part of the same course of conduct or common scheme or plan as the offense of conviction.” USSG § 1B1.3(a)(2). Offenses are part of a “common scheme or plan” if they are “substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar *modus operandi*.” § 1B1.3, cmt. n. 5(B)(i). Offenses are “part of the same course of conduct if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses.” USSG § 1B1.3, cmt. n. 5(B)(ii). When considering whether offenses are within the same course of conduct, the court should consider “the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses. When one of the above factors is absent, a stronger presence of at least one of the other factors is required.” *Id.*; see *United States v. Henry*, 819 F.3d 856, 864-65 (6th Cir. 2016).

The district court properly applied the § 2K2.1(b)(1)(C) sentence enhancement for possession of twenty-five to ninety-nine firearms as relevant conduct. The September 14, 2017 video depicts the Draco firearm, which Westbrook pleaded guilty to illegally possessing, along with twenty-five additional firearms and Westbrook’s narration. The record supports the district court’s determination that Westbrook’s possession of the firearms shown in the video is part of a common scheme or plan because the firearms are connected by a common purpose—protection of himself, his drugs, and drug proceeds, and intimidation of others. Westbrook admitted that he possessed firearms on June 23, 2018 and August 31, 2018 to protect his drugs and drug proceeds and Morgan testified that drug traffickers often possess firearms to protect themselves, their drugs, and their drug proceeds, and to intimidate other people.

The record also supports the district court’s determination that Westbrook’s possession of the firearms depicted in the September 14, 2017, video is part of the same course of conduct based on similarity, regularity, and timing. First, the possession of firearms in the video is similar to Westbrook’s firearm-possession conviction because the same Draco pistol is displayed and the same purposes are apparent—protection, intimidation, and conceit. “The relevant conduct—illegally possessing firearms as a felon—is identical to the offense of conviction.” *Fisher*, 2020 WL 4814115, at *10 (quoting *United States v. Phillips*, 516 F.3d 479, 485 (6th Cir. 2008)). Second, at sentencing, defense counsel conceded “that there is evidence of regular access to firearms during this relevant conduct period.” Even if not conceded, though, the possession of firearms in the video supports regular conduct—the evidence shows that Westbrook repeatedly and continuously illegally possessed firearms, as documented by images and videos discovered on his phone, and that he acquired firearms through straw purchases made by Harrison. Morgan testified that Harrison purchased three firearms for Westbrook and he described images and videos discovered on Westbrook’s phone as depicting various firearms both with and without Westbrook in the image or video. Additionally, as part of the factual basis supporting his guilty plea, Harrison admitted that he purchased firearms on Westbrook’s behalf with the belief that Westbrook was prohibited from lawfully possessing them. Third, the possession of firearms in the September 14, 2017, video is contemporaneous with the firearm-possession conviction, which occurred between May 22 and September 14, 2017. The contemporaneous “possession of uncharged firearms is . . . relevant conduct in the context of a felon-in-possession prosecution.” *Id.* at *11 (quoting *Phillips*, 516 F.3d at 483).

Westbrook contends that the video does not establish that he possessed the firearms depicted because many of the firearms were owned by his wife, and he did not live with his wife. Westbrook points to Morgan’s testimony that Westbrook “stayed at his mother’s house and an apartment.” Possession may be actual or constructive. *Id.* at *7. “Actual possession requires that a defendant have immediate possession or control of the firearm, whereas constructive possession exists when the defendant ‘does not have possession but instead knowingly has the power and intention at a given time to exercise dominion and control over an object, either directly or through

others.’’ *Id.* (quoting *United States v. Campbell*, 549 F.3d 364, 374 (6th Cir. 2008)); *see also* *United States v. Crumpton*, 824 F.3d 593, 609 (6th Cir. 2016) (noting that constructive possession may be established by “[p]roof that ‘the person has dominion over the premises where the [item] is located’” (quoting *United States v. Kincaide*, 145 F.3d 771, 782 (6th Cir. 1998))).

Westbrook’s wife’s ownership of some of the firearms shown in the video does not preclude Westbrook from possessing them actually, constructively, or jointly given the marital relationship. *See United States v. McFarland*, 766 F. App’x 301, 308 (6th Cir. 2019); *United States v. Hadley*, 431 F.3d 484, 507 (6th Cir. 2005); *United States v. Hough*, 276 F.3d 884, 894 (6th Cir. 2002).

Moreover, Westbrook’s residency was not seriously explored at sentencing. Morgan testified that he had no knowledge regarding Westbrook’s permanent residence. There was no evidence that Westbrook did not stay with his wife and son, that his wife exclusively resided at the residence, or that his wife took any measures to exclude him from the residence.

Unlike in *Bowens*, 938 F.3d at 799-800, on which Westbrook relies, Westbrook’s possession of firearms in the September 14, 2017, video is more than “similar only in the broadest terms” as another “illegal gun possession[.]” Rather, Westbrook’s firearm possessions were not only similar due to their unlawfulness but also for facilitation of drug-trafficking activity and the common purposes of protection, intimidation, and conceit.

B. Section 2K2.1(b)(6)(B)

Westbrook’s offense level was enhanced by four levels under § 2K2.1(b)(6)(B) for possession of a firearm “in connection with another felony offense.” The district court determined that Westbrook possessed a firearm in connection with another felony, specifically, drug trafficking.

For the § 2K2.1(b)(6)(B) enhancement to apply, the government must establish a nexus between the firearm and an independent felony, *United States v. Taylor*, 648 F.3d 417, 431 (6th Cir. 2011), such that the firearm “facilitated, or had the potential of facilitating, another felony offense,” USSG § 2K2.1, cmt. n. 14(A). When the other felony is drug trafficking, the enhancement may apply if the “firearm is found in close proximity to drugs, drug-manufacturing

materials, or drug paraphernalia.” USSG § 2K2.1, cmt. n. 14(B); *see Sweet*, 776 F.3d at 450. But “[t]he enhancement is not warranted if possession of the firearm ‘is merely coincidental to the underlying felony offense.’” *United States v. Seymour*, 739 F.3d 923, 929 (6th Cir. 2014) (quoting *United States v. Angel*, 576 F.3d 318, 321 (6th Cir. 2009)).

The district court properly applied the § 2K2.1(b)(6)(B) sentence enhancement for possession of a firearm in connection with another felony because the evidence established a nexus between Westbrook’s possession of a firearm and drug trafficking activities. Morgan testified that some images discovered on Westbrook’s phone depicted firearms along with suspected drugs, drug paraphernalia, and cash, and that a video depicted a firearm and cash. Morgan testified that firearms are commonly used by drug traffickers for protection and intimidation. In addition, Harrison admitted, when pleading guilty to his crimes, that he traded firearms to Westbrook for drugs. This evidence indicates that Westbrook was involved in drug trafficking activities and that he possessed a firearm in connection with those activities. *See United States v. McCoy*, 905 F.3d 409, 419 (6th Cir. 2018) (noting that possession of electronic scales is indicative of drug-trafficking); *Sweet*, 776 F.3d at 450 (“Trading firearms for drugs constitutes ‘use [of a firearm] . . . in connection with another felony offense.’”).

Westbrook contends that his possession of firearms was mere puffery in an attempt to glorify firearm and drug possession and that there was no evidence that he was involved in drug trafficking activity at the time of the images and videos discovered on his phone. But whether labelled puffery or not, the images and videos depicting firearms, suspected drugs, drug paraphernalia, and cash, support the sentence enhancement in Westbrook’s case. *See McCoy*, 905 F.3d at 419; *Sweet*, 776 F.3d at 450. Westbrook’s arguments also ignore Morgan’s testimony describing typical drug-trafficking tools and behavior, Morgan’s opinion that some of the photos depicted suspected narcotics, and Harrison’s admissions in connection with his guilty plea that he traded firearms to Westbrook for drugs. Moreover, the district court rejected Westbrook’s argument that he was not involved in drug-trafficking activities when the images and videos were taken. The district court credited Harrison’s testimony, supported by his plea agreement and guilty plea, that he traded firearms to Westbrook for drugs in September 2017 and January 2018 and

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acknowledged Westbrook's guilty plea to drug trafficking and firearm possession in June and August 2018. Between those time periods, the district court noted that Westbrook lacked employment, yet he possessed "large sums of cash coming in from somewhere, according to the photographs." The district court concluded that it was illogical that Westbrook would stop his drug-trafficking activities, and the images and videos documented on his phone support that conclusion.

Accordingly, we **AFFIRM** the district court's judgments in both Harrison's case (No. 19-6122) and Westbrook's case (No. 20-5015).

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk