United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
December 7, 2021
Lyle W. Cayce
Clerk

No. 20-10759

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ANDREW MICHAEL PENNY,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:18-CR-263-1

Before KING, COSTA, and WILLETT, *Circuit Judges*.

PER CURIAM:*

Andrew Penny appeals his conviction for possessing a firearm as a felon. He argues that the district court erred by refusing to hold a hearing on his suppression motion. He also challenges his sentence, though he recognizes that the sentencing arguments are foreclosed by our precedent.

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

Police officers had a warrant for Penny's arrest and went looking for him. Acting on a tip, they soon spotted him driving on the highway. The officers activated their emergency lights, signaling for Penny to pull over. But he kept driving. This pursuit continued for a few miles, until Penny made it back to his house and parked in the driveway. Penny exited his car, after which officers arrested him without incident. When getting out of the car, however, Penny had left the keys in the ignition and locked the doors. Officers searched Penny incident to his arrest and found that he was wearing an empty gun holster.

What happened next is disputed by the parties. The officers allege that they looked in the car window and saw two firearms on the driver's side floorboard. They knew Penny was a convicted felon who could not legally possess firearms. But they could not seize the guns because Penny had locked the keys in the car and told them he did not have a spare key. So the officers called a tow truck and impounded the car.

Penny disagrees with that version of the story. He alleges that the officers did not see the guns through the car window until *after* the tow truck loaded his car. According to Penny, it was only when the car was placed on the tow truck's tilted platform that the guns were jostled into view.

The parties do agree about what happened next. After Penny's car was impounded, the officers obtained a search warrant and found two semiautomatic firearms in the car.

After being indicted on the federal gun charge, Penny moved to suppress the firearms and requested an evidentiary hearing. He argued that the "plain view" exception to the warrant requirement did not apply because the officers did not see the pistols until after his car was seized without probable cause.

The district court denied Penny's motion to suppress without holding a hearing. Penny then entered a conditional guilty plea, retaining his right to appeal the suppression issue. Penny argues that the district court abused its discretion in not holding a suppression hearing because a factual dispute exists about whether the officers saw the guns in plain view before the car was towed.

But we conclude that the officers did not need to have seen guns inside the car to seize the vehicle for the later, authorized search. These other facts provided more than probable cause to believe firearms were in the car: (1) Penny continued driving for miles instead of pulling over when the officers tried to stop him; (2) Penny locked the car with the keys inside as soon as he got out and claimed to not have another key; and (3) Penny was wearing an empty gun holster. Had Penny's car been unlocked, this probable cause would have allowed officers to search it right then and there without a warrant. *See United States v. Wright*, 588 F.2d 189, 193 (5th Cir. 1979). For Fourth Amendment purposes, once that probable cause exists there is "no difference" between that warrantless vehicle search and what the officers did here—"seizing and holding a car before presenting the probable cause issue to a magistrate." *See Chambers v. Maroney*, 399 U.S. 42, 51–52 (1970).

Penny's only pushback against the existence of probable cause on these facts is to argue that the Crosman holster he was wearing is used for airguns. Assuming this argument is properly before us (it was not raised in the district court), there is no showing that a reasonable officer would be familiar with this particular brand of holster and its common use. The bigger point, though, is that probable cause does not require certainty. And there is no denying that it is possible to carry actual firearms in a Crosman holster. The other highly suspicious behavior Penny engaged in—refusing to stop for miles and then locking the car with the keys in the ignition—made it probable that there was contraband in the car that he did not want officers to find.

As a result, even if the officers never saw guns in the car before it was towed, the seizure and subsequent search of the car was lawful.

Penny also challenges his sentence on two grounds but concedes that precedent forecloses both claims. First, he contends that the Armed Career Criminal Act should not have enhanced his sentence because he does not have three violent felony convictions. He acknowledges, however, that our caselaw currently treats his two Texas burglary convictions and one Texas aggravated assault by threat conviction as violent felonies. *See United States v. Wallace*, 964 F.3d 386, 390 (5th Cir. 2020) (citing *United States v. Herrold*, 941 F.3d 173, 181–82 (5th Cir. 2019) (en banc)) (burglary); 18 U.S.C. § 924(e)(2)(B) (qualifying burglary as a violent felony under the ACCA); *United States v. Torres*, 923 F.3d 420, 423 (5th Cir. 2019) (holding that assault by threat is a separate crime from assault by injury); TEX. PENAL CODE § 22.01(a)(2) (assault by threat can only be committed intentionally or knowingly).[1] He raises this issue only in the hope of further review by a court that is not bound by that caselaw.

Likewise, Penny recognizes that precedent forecloses his argument that any prior convictions used to enhance a sentence must be alleged in the indictment and proven beyond a reasonable doubt. This time that precedent comes from the Supreme Court. *See Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998).

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The judgment is AFFIRMED.

[1] Given these three qualifying convictions, we need not resolve the parties' disagreement about the impact of *Borden v. United States*, 141 S. Ct. 1817 (2021), on whether Penny's aggravated robbery convictions are violent felonies.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	Criminal Action No. **3:18-CR-263-L**
	§	
ANDREW MICHAEL PENNY	§	

MEMORANDUM OPINION AND ORDER

Before the court is the Opposed Motion to Withdraw Guilty Plea ("Motion") (Doc. 30), filed February 6, 2018, by Defendant Andrew Michael Penny ("Penny" or "Defendant"). After considering the Motion, response, record, and applicable law, the court **grants** the Motion to Withdraw Guilty Plea (Doc. 30).

I. Background and the Parties' Contentions

Penny seeks to withdraw his September 18, 2018 guilty plea pursuant to Rule 11(d) of the Federal Rules of Criminal Procedure. Penny seeks to withdraw his guilty plea because the discovery provided to his attorney before he pleaded guilty did not include a prior 1995 aggravated robbery conviction that qualifies him for and subjects him to a sentence of not less than fifteen years of imprisonment under the Armed Career Criminal Act ("ACCA"). Defendant's counsel asserts that this prior conviction was disclosed for the first time on December 21, 2018, in the Presentence Investigation Report ("PSR") prepared by the probation officer. Defendant's counsel clarifies that he is not alleging any wrongdoing by the Government but maintains that, without the information regarding this prior conviction, he was not able to factor in this conviction in advising his client regarding the potential exposure he faced in this case, particularly with respect to the ACCA. Counsel contends that this fact alone constitutes a "fair and just" reason for allowing his client to

withdraw his guilty plea, and he maintains that, while a trial would inconvenience the Government, it does not appear that the Government will be prejudiced.

The Government concedes that it was also unaware of the 1995 conviction until it was disclosed in the PSR, but it, nevertheless, contends that Defendant should not be allowed to withdraw his guilty plea because: (1) he delayed unreasonably after pleading guilty before filing his Motion; (2) he does not claim he is innocent of the charged offense; and (3) he had close assistance of counsel for approximately two and one-half months before pleading guilty. In addition, the Government contends that the Indictment, Defendant's Factual Resume, and the transcript of the hearing in which Defendant pleaded guilty establish that: (1) his plea was made knowingly and voluntarily in that he was aware of the punishment range if the court agreed with the Government that he qualified as an armed career criminal under the ACCA; and (2) he knew he would not be allowed to withdraw his plea if the court imposed a sentence different from what he anticipated. The Government takes no position on whether the withdrawal of Defendant's plea will inconvenience the court, and it states that it will not take the position that it will suffer any prejudice if he is allowed to withdraw his plea.

II. Standard for Withdrawal of Guilty Plea

Prior to sentencing, the court may use its discretion to grant a motion to withdraw a guilty plea if the defendant presents a "fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(B); *United States v. Lampazianie*, 251 F.3d 519, 524 (5th Cir. 2001). There is no absolute right to withdraw a guilty plea, and the defendant bears the burden of establishing a fair and just reason for withdrawal. *United States v. Brewster*, 137 F.3d 853, 857-58 (5th Cir. 1998). When ruling on the motion, the court should consider whether: (1) the defendant asserted his innocence;

(2) withdrawal would prejudice the government; (3) the defendant delayed in filing the withdrawal motion; (4) withdrawal would inconvenience the court; (5) adequate assistance of counsel was available; (6) the plea was knowing and voluntary; and (7) withdrawal would waste judicial resources. *United States v. Mendoza-Mata*, 322 F.3d 829, 834 (5th Cir. 2003) (citing *United States v. Carr*, 740 F.2d 339, 343-44 (5th Cir. 1984)). The court need not make a finding as to each *Carr* factor, as it makes its determination based on the totality of the circumstances. *United States v. Powell*, 354 F.3d 362, 370-71 (5th Cir. 2003); *Brewster*, 137 F.3d at 858. The court refers to these factors collectively as "the *Carr* factors."

III. Analysis

As neither party was aware of the 1995 conviction before issuance of the PSR on December 21, 2018, the court determines that the issue of whether Penny delayed in filing his Motion should be considered with reference to the PSR date, not the date he pleaded guilty as argued by the Government. Despite the slight delay in Penny filing his Motion after issuance of the PSR, which occurred close to the holidays, the court determines that the nondisclosure of the 1995 conviction until after Penny pleaded guilty constitutes a significant change in circumstances that justifies allowing him to withdraw his guilty plea. While Penny has not claimed he is innocent and acknowledged during the September 18, 2018 hearing that he was aware his sentence could vary substantially depending on whether he qualified as an armed career criminal, it is also apparent that the parties disputed whether the ACCA applied in light of his convictions that were known at that time and believed that Penny would only qualify if the Government prevailed on its argument that his burglary of a habitation was a qualifying conviction under the ACCA or succeeded in its pending

appeal in another case regarding the applicability of the ACCA to offenses for burglary of a habitation.

That Penny had close assistance of counsel does not change the court's determination in this regard, as the advice provided by counsel was based only on the convictions disclosed before he pleaded guilty, which is a key issue in this case as far as determining whether he qualifies as an armed career criminal who is subject to the ACCA's enhanced sentencing penalties. The range of sentence that a defendant could face is crucially important, as the amount of time to which a court could sentence a defendant is critical as to whether he or she pleads guilty. As the court understands the situation, Penny and his counsel understood that he had only two qualifying ACCA convictions when he pleaded guilty to the offense charged in this case because of the current state of the law regarding his prior burglary of habitation conviction, whereas three prior qualifying convictions are required for the ACCA sentencing enhancement to apply. Because of the parties' dispute over whether Penny's prior burglary of habitation conviction would subject him to the ACCA's sentencing enhancement, the Government, at the magistrate judge's request, stated during the hearing that he could be sentenced either as an armed career criminal to a term of imprisonment of fifteen years to life, or to a maximum sentence of ten years if the court determined he was not an armed career criminal because he did not have the requisite number of qualifying prior convictions. As a result of the disclosure of his 1995 aggravated robbery conviction in the PSR after he pleaded guilty, however, Penny now has three qualifying convictions, such that there no longer appears to be any debate whether he will be subject to the ACCA's enhanced penalties if found guilty for the offense charged in this case. Given this change in circumstances, the court does not believe Penny understood what sentence he could be facing, even though he was told that his sentence could vary

substantially depending on the court's resolution of the parties' dispute regarding punishment and applicability of the ACCA, which now appears to be moot in light of Probation's disclosure regarding the 1995 conviction.

Further, the Government does not contend that it will be prejudiced, and the court determines that a trial of this case will not inconvenience it given the felon-in-possession offense charged, which as noted by Penny's counsel normally takes only a few days to try. Accordingly, the court determines that the consideration of the foregoing *Carr* factors weighs in favor of allowing Penny to withdraw his guilty plea.

IV. Conclusion

For the reasons explained, the court determines that the totality of circumstances establish a fair and just reason for allowing Penny to withdraw his guilty plea and **grants** his Opposed Motion to Withdraw Guilty Plea ("Motion") (Doc. 30). Accordingly, Penny's guilty plea is hereby **withdrawn** and the court, by separate order, will set this case for trial.

It is so ordered this 5th day of April, 2019.

Sam A. Lindsay
United States District Judge