

Appendix

Order Denying Petition for Rehearing

United States v. Russey (10th Cir. May 25, 2022)

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

May 25, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JAMES KEITH RUSSEY,

Defendant - Appellant.

No. 20-6036
(D.C. No. 5:19-CR-00264-PRW-1)
(W.D. Okla.)

ORDER

Before **HARTZ**, **SEYMOUR**, and **MURPHY**, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court



CHRISTOPHER M. WOLPERT, Clerk

Order and Judgment

United States v. Russey (10th Cir. October 27, 2021)

FILED
October 27, 2021

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,
Plaintiff - Appellee,
v.
JAMES KEITH RUSSEY,
Defendant - Appellant.

No. 20-6036
(D.C. No. 5:19-CR-00264-PRW-1)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **HARTZ**, **SEYMOUR**, and **MURPHY**, Circuit Judges.

I. Introduction

Defendant, James Keith Russey, appeals the sentence he received after pleading guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). He raises two challenges in this appeal. First, he argues the district court plainly erred when it calculated his base offense level by counting a prior state drug conviction as a controlled substance offense. *See* USSG § 2K2.1(a). Second, he alleges the district court erroneously declined to make

*This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

necessary factual findings before adding four levels to his base offense level pursuant to USSG § 2K2.1(b)(6)(B).

Exercising jurisdiction under 28 U.S.C. § 1291, we **affirm** Russey's sentence.

II. Background

On July 17, 2019, Russey was involved in a domestic disturbance with Rachel Alvey. The incident report prepared by the Oklahoma City Police Department is based on interviews with Alvey and states that the altercation began when Alvey asked Russey to remove his belongings from her residence. According to Alvey, Russey's possessions, including a box containing a black pistol, were on the bed when he arrived. By Alvey's account, Russey removed the firearm from the box and the two struggled over it. A shot was discharged from the firearm during the struggle and the bullet entered the bedframe and wall. Alvey told police Russey attempted to gain control of the pistol by biting her on the left forearm and striking her on the left side of her head. Alvey relinquished the firearm to Russey, and he left the residence with it.

Officers pursued Russey who attempted to evade them, first in his vehicle and then on foot. He was eventually apprehended and officers located the handgun in the front seat of his vehicle when they searched it. Based on the incidents of July 17, Russey was charged in a one-count federal indictment with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). He

was also charged in Oklahoma state court with (1) domestic assault with a dangerous weapon, (2) aggravated attempting to elude a peace officer, (3) felon in possession of a firearm, (4) possession of an offensive weapon while committing a felony, and (5) domestic abuse (assault and battery).

In the federal prosecution, Russey pleaded guilty to the felon-in-possession charge. The United States Probation Office prepared a presentence investigation report (PSR), recommending application of a base offense level of twenty-six on the grounds (1) the offense involved a semiautomatic firearm “capable of accepting a large capacity magazine” and (2) Russey committed the offense “subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense.” USSG § 2K2.1(a)(1). The PSR recommended a two-level enhancement under § 2K2.1(b)(4)(A) because the firearm was stolen and a four-level enhancement under § 2K2.1(b)(6)(B) because the offense of conviction was committed during the commission of another felony offense, i.e., assault and battery with a dangerous weapon. After reducing Russey’s offense level by three levels pursuant to §§ 3E1.1(a) & (b) for acceptance of responsibility, the PSR arrived at a total offense level of twenty-nine.

Russey objected to portions of the PSR. Relevant to the issue raised in this appeal, he challenged the application of the four-level enhancement pursuant to § 2K2.1(b)(6)(B), asserting he did not possess the firearm in connection with

another felony offense. According to Russey, Alvey was the aggressor in the altercation and shot him when he attempted to take the firearm from her. He further alleged he never pointed the firearm at Alvey or threatened her in any way. In its response, the government advocated for application of the four-level enhancement, arguing as follows:

Moreover, the application of § 2K2.1(b)(6)(B) does not hinge on whether the defendant is the one who shot the gun. It applies if the firearm facilitated or had the potential to facilitate another felony offense. This includes Domestic Assault with a Dangerous Weapon, Aggravated Attempting to Elude a Police Officer, Possession of an Offensive Weapon While Committing a Felony, and Domestic Abuse (Assault and Battery) After a Felony Conviction. Clearly, the evidence in this case supports the application of the four level enhancement in § 2K2.1(b)(6)(B) because the United States has proven by a preponderance of the evidence that the defendant's possession of a firearm facilitated, or at the very least had the potential of facilitating, any number of other felony offenses.

The government took the position any sentence less than the ten-year statutory maximum would be insufficient to meet the sentencing goals embodied in 18 U.S.C. § 3553(a).

At sentencing, the district court overruled Russey's objection to the four-level enhancement, concluding his possession of the firearm met the requirements of § 2K2.1(b)(6)(B) because it "facilitated, or had the potential of facilitating, another felony offense or another offense." *U.S. Sent'g Guidelines Manual* § 2K2.1(b)(6)(B) cmt. n.14(A). The district court stated its decision was primarily based on an information filed in Oklahoma state court charging Russey

with domestic assault with a dangerous weapon as a result of the altercation with Alvey. Russey disputed the account in the information, arguing his defense in the Oklahoma state proceeding “would be that the victim in this case is actually the person that had the gun. And [he] . . . had no idea where the gun was when he went into the residence.” Before overruling Russey’s objection, the district court stated:

I do think that we have a perfectly adequate factual basis for the application of this particular four-level increase. Everything I’ve seen in this case, regardless of exactly the timing of the possession of the firearm and regardless of who may or may not have been the initial aggressor in this altercation, we do have a factual basis that establishes that your client, I think, satisfies the elements of domestic assault with a dangerous weapon under state law and certainly even as we’ve characterized it in the presentence investigation report, you know, there was, it appears, an assault and battery here and a gun was involved.

After considering the parties’ other arguments and the extensive information in the PSR, the district court arrived at an offense level of twenty-nine and a criminal history category of III. The court sentenced Russey to 108 months’ incarceration, the low end of the advisory guidelines range of 108 to 135 months.¹

In this appeal, Russey challenges application of the four-level enhancement and argues, for the first time, that the district court erred by using a prior state

¹Because the statutory maximum penalty for the offense of conviction is ten years, the applicable range was actually 108 to 120 months. *See 18 U.S.C. § 924(a)(2).*

felony conviction to calculate his base offense level.

III. Discussion

A. Base Offense Level Calculation

Russey challenges the calculation of his base offense level, arguing the district court erroneously counted an Oklahoma drug conviction as a controlled substance offense. *See USSG § 2K2.1(a)*. He acknowledges he failed to raise this argument below and, thus, it is reviewed for plain error. *See United States v. Faulkner*, 950 F.3d 670, 672 (10th Cir. 2019). To prevail under the plain error standard, Russey must establish “(1) an error occurred; (2) the error was plain; (3) the error affected his substantial rights; and (4) the error seriously affected the fairness, integrity, or public reputation of a judicial proceeding.” *Id.* (quotation and alteration omitted).

Russey’s base offense level was calculated pursuant to USSG § 2K2.1(a)(1), which sets out a base offense level of twenty-six for a defendant who possesses a gun with a large capacity magazine if he has at least two prior felony convictions for either crimes of violence or controlled substance offenses. At sentencing, Russey did not dispute the information in the PSR showing he was convicted of a prior crime of violence and, relevant to this appeal, an Oklahoma state controlled substance offense. Specifically, on January 31, 2018, Russey was convicted of possessing a controlled dangerous substance with intent to distribute

it, in violation of Okla. Stat. Ann. tit. 63, § 2-401(A)(1). Although Russey does not dispute the fact of this conviction, he argues it does not qualify as a controlled substance offense under § 2K2.1(a)(1).

According to Russey the definition of a “controlled substance offense” in § 4B1.2(b)² requires the substance possessed to be federally controlled under the Controlled Substances Act (“CSA”). He further argues that at the time of his drug conviction, Oklahoma law criminalized the possession of at least three substances that are not controlled by the CSA. Thus, he asserts, Okla. Stat. Ann. tit. 63, § 2-401 is overbroad and, because it is also indivisible under the categorical approach, this court must assume his prior Oklahoma drug conviction was for a substance not federally controlled. It is for this reason, he argues, the conviction fails to qualify as a “controlled substance offense” for purposes of § 2K2.1(a)(1).

Russey’s claim for relief fails at the first part of the plain error test. This court has recently rejected the argument that a prior state drug offense only qualifies as a controlled substance offense under § 4B1.2(b) if the state

² The term “controlled substance offense” in § 2K2.1 “has the meaning given that term in § 4B1.2(b).” *U.S. Sent’g Guidelines Manual* § 2K2.1 cmt. n.1. A “controlled substance offense” is defined by the relevant Guideline as: “an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.” USSG § 4B1.2(b).

criminalizes the same controlled substances identified in the CSA. *United States v. Jones*, No. 20-6112, 2021 WL 4851812 (10th Cir. 2021). Accordingly, the district court did not err when it calculated Russey’s base offense level by treating his prior Oklahoma drug conviction as a predicate offense under § 2K2.1(a)(3).³

B. Four-Level Enhancement

Russey also argues the district court erred by applying the four-level enhancement set out in § 2K2.1(b)(B). The parties disagree over the nature of the alleged error. According to Russey, the district court erred by declining to make required factual findings before concluding the enhancement applied. It is unclear whether he advocates for *de novo* or clear error review of the issue. The government characterizes Russey’s challenge as procedural in nature. It argues the issue is reviewed only for plain error because Russey never raised a separate objection to the district court’s alleged failure to resolve the disputed facts. Russey counters that the plain-error cases on which the government relies are inapposite because the district court did not wholly fail to rule but, instead, reached the erroneous conclusion that the factual dispute was inconsequential and, thus, need not be resolved. *See* Fed. R. Crim. P. 32(i)(3)(B) (stating a sentencing court “must” rule on “any disputed portion of the presentence report

³An error is plain if it is “clear or obvious at the time of the appeal.” *United States v. Salas*, 889 F.3d 681, 686-87 (10th Cir. 2018) (quotation omitted).

or other controverted matter . . . or determine that a ruling is unnecessary . . . because the matter will not affect sentencing"). It is unnecessary to resolve this disagreement over the standard of review because there was no error in the application of the four-level enhancement even under the *de novo* standard.

At the sentencing hearing, the parties discussed one of the pending charges against Russey in Oklahoma state court: domestic assault with a dangerous weapon. Russey told the district court his defense in that matter would be that Alvey was the person who first possessed the firearm. Russey also told the court he did not know the gun was underneath a pile of clothes in the bedroom when he arrived at the residence. Russey summed up his argument as follows: "[I]t's all in how the gun first appeared in the residence, which is the crux of the four-point enhancement that the Court has before it today." The district court disagreed with that synopsis, concluding the four-level enhancement applied "regardless of exactly the timing of the possession of the firearm and regardless of who may or may not have been the initial aggressor."

On appeal, Russey asserts the district court was required to determine who first possessed the firearm and who was the initial aggressor because both issues are crucial to the question of whether his subsequent possession of the firearm facilitated the commission of the felony offense of domestic assault with a dangerous weapon. His appellate argument is similar to the one he made to the

district court:

[C]ritical to any determination of whether Mr. Russey committed the Oklahoma crime of domestic assault with a deadly weapon is the question of when Mr. Russey came to possess the firearm. If he took the firearm out of its box and started to point it at Ms. Alvey, as she claimed, then he was guilty of domestic assault with a dangerous weapon. But if she took the gun out of its box, and he merely took it from her and then from the house without ever threatening her with it or pointing it at her, as he claimed, then he was not guilty.

Russey's appellate argument unwittingly highlights the actual "crux of the four-point enhancement." And, as the district court concluded, it is not whether Russey or Alvey first possessed the firearm or whether Russey knew the firearm was on the bed when he entered the residence. It is whether Russey, while in possession of the firearm, assaulted Alvey. *See* Okla. Stat. Ann. tit. 21, § 644(D)(1) ("Any person who, with intent to do bodily harm and without justifiable or excusable cause, commits any assault, battery, or assault and battery upon an intimate partner or a family or household member as defined by Section 60.1 of Title 22 of the Oklahoma Statutes with any sharp or dangerous weapon, upon conviction, is guilty of domestic assault or domestic assault and battery with a dangerous weapon which shall be a felony"); *id.* § 641 ("An assault is any willful and unlawful attempt or offer with force or violence to do a corporal hurt to another."). True, Russey denied engaging in behavior that satisfies the elements of domestic assault with a dangerous weapon, but the district court expressly stated it relied on the entire record to support its finding. That record

included police reports of interviews with Alvey, Russey, and a witness to the altercation; the description of the incident set out in the PSR; and the undisputed fact Russey was charged in Oklahoma state court with the crime of domestic assault with a dangerous weapon.

Russey does not fully explain why the timing of the possession is critical to the determination of whether the government proved by a preponderance of the evidence that he used the firearm in connection with the crime of domestic assault with a deadly weapon. Presumably, Russey could have wrested the firearm from Alvey and then threatened to use it to harm her.⁴ Under that scenario, it is immaterial that Alvey possessed the weapon first. It would appear, therefore, that Russey's real complaint is that the district court did not find his version of the altercation credible, not that the court declined to resolve an isolated factual dispute. And, having reviewed the appellate record, we can discern no clear error in the district court's finding that the government met its burden of proving the four-level enhancement was appropriate.⁵

⁴In a related appellate argument directed at the separate Oklahoma crime of domestic assault and battery, Okla. Stat. tit. 21, § 644(C), Russey states that his version of the facts, if accepted, would be a complete defense to that crime. Russey does not, however, direct this court to any part of the record showing this argument was made to the district court as to the crime of domestic assault with a dangerous weapon.

⁵Even assuming the district court erred in declining to resolve the factual dispute identified by Russey, any error in applying the four-level enhancement (continued...)

IV. Conclusion

The judgment of the district court is **affirmed**.

ENTERED FOR THE COURT

Michael R. Murphy
Circuit Judge

⁵(...continued)

was harmless. We take judicial notice of the public record in Case No. CF-2019-3397, District Court of Oklahoma County, Oklahoma, which shows that Russey pleaded guilty to the charge of domestic assault with a dangerous weapon on June 21, 2021. *See*

<https://www.oscn.net/dockets/GetCaseInformation.aspx?db=oklahoma&number=CF-2019-3397&cmid=3798519> (last visited Oct. 20, 2021). We further note Russey never disputed the facts set out in the PSR indicating he left Alvey's residence with the firearm and refused to pull his vehicle over when pursued by police. Officers later found the firearm in the vehicle. Based on those facts, he was charged with aggravated attempting to elude a peace officer, an additional Oklahoma felony to which he pleaded guilty on June 21, 2021. *See id.*

Court Records

State v. Russey, Oklahoma County, Oklahoma Case No. CF-2016-3999



* 1033204696 *

Case#:

CF16103982

IN THE DISTRICT COURT, IN AND FOR OKLAHOMA COUNTY, STATE OF OKLAHOMA

State of Oklahoma

VS.

JAMES KEITH RUSSEY

ANTHONY DURHAM

AKA: ANTHONY DEWAYNE DURHAM,
ANTHONY DURHAM,

CF- 2016 - 3999

MAY 13 2016

**TIM RHODES
COURT CLERK**

12

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OKLAHOMA, COMES NOW
DAVID W. PRATER THE DULY ELECTED, QUALIFIED AND ACTING DISTRICT ATTORNEY IN
AND FOR OKLAHOMA COUNTY, DISTRICT NO. 7, STATE OF OKLAHOMA, AND ON HIS OFFICIAL OATH INFORMS THE
DISTRICT COURT THAT

COUNT 1 : ON OR ABOUT THE 4TH DAY OF MAY 2016, A.D., THE CRIME OF POSSESSION OF A CONTROLLED DANGEROUS SUBSTANCE WITH INTENT TO DISTRIBUTE WAS FELONIOUSLY COMMITTED IN OKLAHOMA COUNTY, OKLAHOMA, BY JAMES KEITH RUSSEY AND ANTHONY DURHAM, WHO ACTING JOINTLY, WILLFULLY AND KNOWINGLY HAD WITHIN THEIR POSSESSION A QUANTITY OF MARIJUANA, CLASSIFIED AS A CONTROLLED DANGEROUS SUBSTANCE IN SCHEDULE I OF THE CONTROLLED DANGEROUS SUBSTANCE ACT OF THIS STATE, WITH THE INTENT TO DISTRIBUTE IT, CONTRARY TO THE PROVISIONS OF SECTION 2-401 OF TITLE 63 OF THE OKLAHOMA STATUTES, AND AGAINST THE PEACE AND DIGNITY OF THE STATE OF OKLAHOMA

DAVID W. PRATER
DISTRICT ATTORNEY, DISTRICT NO. 7
OKLAHOMA COUNTY, OKLAHOMA

pw

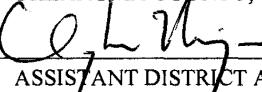
INFORMATION

I HAVE EXAMINED THE FACTS IN THIS CASE AND RECOMMEND THAT A WARRANT DO ISSUE, (22 O.S.: 231).

DAVID W. PRATER

DISTRICT ATTORNEY, DISTRICT NO. 7
OKLAHOMA COUNTY, OKLAHOMA

BY


ASSISTANT DISTRICT ATTORNEY

NAME OF WITNESSES

OCPD CHEMIST
OKLAHOMA CITY POLICE DEPT
701 N. COLCORD DRIVE
OKLAHOMA CITY OK, 73102

STORER
OKLAHOMA CITY POLICE DEPT
701 N. COLCORD DRIVE
OKLAHOMA CITY OK, 73102



* 1 0 3 9 2 4 7 1 4 6 *

FILED IN DISTRICT COURT
OKLAHOMA COUNTY

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
THE STATE OF OKLAHOMA

JAN 31 2018

STATE OF OKLAHOMA,

)

Plaintiff,

)

vs.

)

JAMES KEITH RUSSEY,

)

Defendant.

)

YOB: 1992 POB: Oklahoma City, OK

SS#: 5313 DOC#: N/A

DL#: N/A State: N/A

RICK WARREN
COURT CLERK

10

JUDGMENT AND SENTENCE

Now, on this 31st day of January, 2018, this matter comes on before the undersigned Judge, for sentencing and the Defendant, James Keith Russey, appears personally and by Attorney Bonnie Blumert, the State of Oklahoma represented by Susan C. Stallings, and the Defendant, having previously:

Entered a plea of no contest to the crime(s) of:

Statutory Reference

Count 1: Possession of a Controlled Dangerous Substance with Intent to Distribute (Marijuana)

63 O.S. 2-401

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED BY THE COURT that the Defendant, James Keith Russey, is guilty of the above described offenses and is sentenced as follows:

TERMS OF IMPRISONMENT WITH EXECUTION OF SENTENCE SUSPENDED

SENTENCED TO A TERM OF:

Count 1: Five (5) Years

Under the custody and control of the Oklahoma Department of Corrections.

THESE TERMS TO BE SERVED AS FOLLOWS:

The sentence(s) are to run concurrently with Oklahoma County case CF-2017-6779.

The Defendant shall receive credit for time served while in the Oklahoma County Jail awaiting these charges.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED BY THE COURT that in addition to the preceding terms, the Defendant is also sentenced to:

FINES, COSTS, VCA, RESTITUTION, & FEES

\$45.00 Victim Compensation Fee

\$200.00 Court Appointed Attorney Fee

\$50.00 DA Fee

The Defendant shall pay costs, fees and restitution in accordance with the schedule attached as Exhibit "A" and Addendum "E".

RULES AND CONDITIONS OF PROBATION

The rules and conditions of probation as ordered by the Court and signed by the Defendant, acknowledging his/her understanding of the rules and conditions, are incorporated as Exhibit "B".

HEARING ON ABILITY TO PAY AFTER INCARCERATION

(X) The Defendant shall report to the District Court of Oklahoma County within five (5) days of release for a hearing on the Defendant's ability to pay fines and costs pursuant to Section VIII of the Rules of the Court of Criminal Appeals, 22 O.S., Ch. 18, App.

IT IS FURTHER ORDERED that judgment is hereby entered against the Defendant as to the fines, costs and assessments set forth above.

The Court further advised the Defendant of his/her rights and procedure to appeal to the Court of Criminal Appeals of the State of Oklahoma, and that if he/she desired to appeal and was unable to afford counsel and a transcript of the proceedings, that the same would be furnished by the State subject to reimbursement of the cost of representation in accordance with Sec. 1355.14 of Title 22. The Court further advised the Defendant that, in the event the above sentence is for a crime involving domestic violence where the Defendant is or was a spouse, intimate partner, parent, or guardian of the victim or is or was involved in another similar relationship with the victim it may be unlawful for him or her to possess, purchase, receive, transport or ship a firearm including a rifle, pistol or revolver or ammunition pursuant to federal law under 18 U.S.C. Section 922(g)(8) or (9), or state law, or both.

In the event the above sentence is for incarceration in the Department of Corrections, the Sheriff of Oklahoma County, Oklahoma, is ordered and directed to deliver the Defendant to the Lexington Assessment and Reception Center at Lexington, Oklahoma, and leave therewith a copy of this Judgment and Sentence to serve as warrant and authority for the imprisonment of the Defendant as provided herein. A second copy of this Judgment and Sentence to be warrant and authority of the Sheriff for the transportation and imprisonment of the Defendant as herein before provided. The Sheriff to make due return to the Clerk of this Court, with his proceedings endorsed thereon.

COURT CLERK'S DUTY

[TRIAL JUDGE TO COMPLETE THIS SECTION]

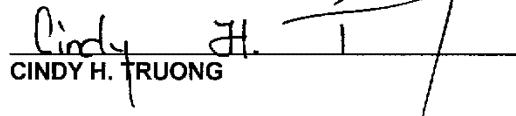
IT IS FURTHER ORDERED that the Clerk of this Court shall register or report the following circumstances in accordance with the applicable statutory authority:

- (X) As to Count(s) 1, the Defendant is ineligible to register to vote pursuant to Section 4-101 of Title 26.
- () Pursuant to Section 985.1 of Title 22, the Court departed from the mandatory minimum sentence of imprisonment as to Count(s) _____.
- () As to Count(s) _____, the Defendant is subject to the Methamphetamine Offender Registry requirements as set forth in Section 2-701 of Title 63.
- () Defendant is a lawyer and certified copies of this document shall be transmitted to the Chief Justice of the Supreme Court and the General Counsel of the Bar Association within five (5) days as set forth in Rule 7.2 of the Oklahoma Rules of Professional Conduct, 5 O.S.Supp.2014, ch. 1, app. 1-A.

Witness my hand the day and year first above mentioned.

(SEAL)

JUDGE OF THE DISTRICT COURT



CINDY H. TRUONG

ATTEST:

RICK WARREN, Court Clerk,

Deputy Court Clerk

CLERK'S CERTIFICATION OF COPIES

I, the Clerk of the District Court of Oklahoma County, State of Oklahoma, do hereby certify the foregoing to be true, correct, full and complete copy of the original Judgment and Sentence in the case of the State of Oklahoma vs. _____ as the same appears of record in my office.

WITNESS my hand and official seal this _____ day of _____, 20 ____.

(SEAL)

By: RICK WARREN, Court Clerk,

Deputy Court Clerk

SHERIFF'S RETURN

I received this Judgment and Sentence the _____ day of _____, 20_____,
and executed it by delivering the Defendant to the Warden of the Lexington Assessment and Reception
Center at Lexington, Oklahoma, on the _____ day of _____, 20_____.
I also certify the above prisoner has served _____ days in the County Jail on the present charge or
charges.

Sheriff

Deputy Sheriff

Order Denying Petition for Rehearing

United States v. Ritchie (10th Cir. May 10, 2021)

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

May 10, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JERRY JAMES KENDALL RITCHIE,

Defendant - Appellant.

No. 20-6069
(D.C. No. 5:18-CR-00283-SLP-1)
(W.D. Okla.)

ORDER

Before **McHUGH**, **BALDOCK**, and **BRISCOE**, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court



CHRISTOPHER M. WOLPERT, Clerk

Order and Judgment

United States v. Ritchie (10th Cir. October 20, 2021)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FILED
October 20, 2021
Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JERRY JAMES KENDALL RITCHIE,

Defendant - Appellant.

No. 20-6069

(D.C. No. 5:18-CR-00283-SLP-1)
(W.D. Okla.).

ORDER AND JUDGMENT*

Before **McHUGH**, **BALDOCK**, and **BRISCOE**, Circuit Judges.

A federal jury in Oklahoma convicted Defendant Ritchie on three counts of criminal misconduct: (1) possession with intent to distribute methamphetamine in violation of 21 U.S.C. § 841(a)(1), (2) possession of a firearm after a felony conviction in violation of 18 U.S.C. § 922(g)(1), and (3) possession of a firearm in furtherance of a drug-trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A). Based on Defendant's § 924(c) conviction and the district court's determination that Defendant qualified as a career offender under U.S.S.G. § 4B1.1(a) as a result of two prior felony convictions for controlled substance offenses in the State of Oklahoma,

* This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Defendant's recommended guideline range was 360 months to life. *See* U.S.S.G. § 4B1.1(c)(3). Defendant did not object to the calculation of this guideline range at sentencing. The district court varied downward from that range and sentenced Defendant to 240-months' imprisonment. On appeal, Defendant now claims the district court committed plain error when it concluded he was a career offender within the meaning of U.S.S.G. § 4B1.1(a).¹ Our jurisdiction arises under 18 U.S.C. § 3742(a)(2). We summarily affirm.

Subsection (a) of U.S.S.G. § 4B1.1 defines a career offender to include those defendants who, among other requisites, have at least two prior felony convictions for a "controlled substance offense." Subsection (b) of U.S.S.G. § 4B1.2 in turn defines "controlled substance offense" as "an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the . . . distribution . . . of a controlled substance." Defendant does not deny that he has two prior felony convictions punishable by a term of imprisonment exceeding one year under an Oklahoma statute that prohibits the distribution of a controlled substance. Rather, Defendant argues that his prior state offenses do not qualify as "controlled substance offense[s]" under U.S.S.G. § 4B1.1(a) because the applicable Oklahoma criminal statute, which Defendant says is indivisible, defines "controlled

¹ In his opening brief, Defendant raised one other claim of error. This claim related to the district court's admission at trial of Rule 404(b) evidence. *See* Fed. R. Evid. 404(b). Defendant withdrew his Rule 404(b) claim prior to oral argument.

substance” more broadly than the federal Controlled Substances Act (CSA). *See* 21 U.S.C. 802(6). And, according to Defendant, the definition of a “controlled substance offense” in U.S.S.G. §4B1.2(b) restricts the meaning of this phrase as used in U.S.S.G. § 4B1.1(a) only to substances identified in the CSA.

Unfortunately for Defendant, our recent decision in *United States v. Jones*, No. 20-6112, slip op. at 2 (10th Cir. Oct. 19, 2021), forecloses his argument. In *Jones*, we held on *de novo* review that § 4B1.2(b) does not limit the meaning of a “controlled substance” to substances identified in the CSA. In other words, *Jones* tells us the district court here properly determined that Defendant’s prior felony drug offenses under Oklahoma law come within the meaning of U.S.S.G. § 4B1.1(a) because they satisfy each of § 4B1.2(b)’s criterion. In addition to being offenses under a state law that prohibits the distribution of (or possession with an intent to distribute) a controlled substance, Defendant’s prior offenses are punishable by at least one year’s imprisonment. See *Jones*, slip op. at 6–7. Accordingly, the judgment of the district court is—

AFFIRMED.

Entered for the Court,

Bobby R. Baldock
United States Circuit Judge

Order by Justice Gorsuch Extending Time to Petition for Writ of Certiorari

Ritchie v. United States (U.S. July 29, 2022)

31a
Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

July 29, 2022

Mr. Howard A. Pincus
Fed Pub. Def. for Dist. CO & WY
633 17th Street
Suite 1000
Denver, CO 80202

Re: Jerry James Kendall Ritchie
v. United States
Application No. 22A79

Dear Mr. Pincus:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Gorsuch, who on July 29, 2022, extended the time to and including August 25, 2022.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by

Emily Walker
Case Analyst