

EXHIBIT - SUPREME COURT RULE 14(i)(i)

No. 21-2628

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Sep 2, 2022

DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,

)

Plaintiff-Appellee,

)

v.

)

GEMAR MORGAN,

)

Defendant-Appellant.

)

)

)

)

O R D E R

BEFORE: CLAY, ROGERS, and STRANCH, Circuit Judges.

The court received a petition for panel rehearing and petition for rehearing en banc. The original panel has reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the case. The petitions then were circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petitions are denied.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

*Judge Davis recused herself from participation in this ruling.

NOT RECOMMENDED FOR PUBLICATION

No. 21-2628

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Aug 1, 2022

DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,)
)
 Plaintiff-Appellee,)
) ON APPEAL FROM THE UNITED
 v.) STATES DISTRICT COURT FOR
) THE EASTERN DISTRICT OF
 GEMAR MORGAN,) MICHIGAN
)
 Defendant-Appellant.)
)

ORDER

Before: CLAY, ROGERS, and STRANCH, Circuit Judges.

Gemar Morgan, a federal prisoner proceeding pro se, appeals his jury conviction for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Morgan has also moved to reconsider this court's order denying his motion to rescind the extension of time for the government to file its principal brief. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In April 2019, a grand jury indicted Morgan on one count of being a felon in possession of a firearm, i.e., that "having been previously convicted of at least one crime punishable by imprisonment for a term exceeding one year, [he] did knowingly and unlawfully possess a firearm," and the firearm had previously traveled in interstate commerce. In October 2019, the grand jury returned a superseding indictment charging the same offense but adding that Morgan knew that "he had previously been convicted of at least one crime punishable by imprisonment for a term exceeding one year" when he possessed the firearm. Morgan filed a pro se motion to dismiss his case for lack of jurisdiction under Federal Rule of Criminal Procedure 12(b)(2), arguing

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that he was not prohibited from possessing a firearm under Michigan Compiled Laws § 750.224f and that the firearm was not involved in interstate commerce at the time he possessed it. The district court denied the motion. The jury convicted Morgan following a two-day trial in which Morgan represented himself with the aid of standby counsel.

A probation officer prepared a presentence report (“PSR”), which stated that Morgan had at least three state-court convictions—two for armed robbery and one for assault with intent to murder—for violent felonies and classified Morgan as an armed career criminal subject to a sentence enhancement under 18 U.S.C. § 924(e). For each of these convictions, Morgan was convicted as an adult and sentenced as a juvenile. The PSR also indicated that Morgan had another state-court conviction for armed robbery and a conviction in federal court for being a felon in possession of a firearm.

Relying on *Rehaif v. United States*, 139 S. Ct. 2191 (2019), Morgan filed another Rule 12(b)(2) motion, arguing that the district court lacked jurisdiction to try him because he was not a prohibited person under Michigan Compiled Laws § 750.224f, he was not a felon as defined by the “case law-library,” he obtained a commercial driver’s license that allowed him to transport firearms following background checks conducted by the Department of Homeland Security (“DHS”) and the Transportation Safety Administration (“TSA”), and he did not knowingly violate § 922(g) under 18 U.S.C. § 924(a)(2). The district court denied the motion from the bench, explaining that the jury was instructed about the scienter element of the charge, as required by *Rehaif*, and that the record supported the finding of that element as Morgan had a prior conviction for being a felon in possession of a firearm. The district court later issued a written order.

Morgan filed a pro se notice of appeal, raising these previous arguments but adding that he could not be sentenced because the indictment did not charge him with violating § 924(a)(2). Morgan also filed a pro se sentencing memorandum, arguing that his sentence should not be enhanced under the United States Sentencing Guidelines because his prior convictions should be considered a single offense, and only a jury should make the determination about a sentence enhancement. The district court construed the notice of appeal as a motion for judgment of

acquittal and found it to be untimely. The district court also determined that Morgan's arguments lacked merit, explaining that the government only needed to prove that the firearm crossed state lines or affected interstate commerce under § 922(g) and that Morgan's prior convictions could enhance his sentence because they were classified as violent felonies under § 924(e)(2)(B)(i). The district court found four predicate offenses qualifying Morgan as an armed career criminal and imposed a sentence of 180 months and two years of supervised release.

On appeal, Morgan challenges the sufficiency of the indictment, the sufficiency of the evidence, and the procedural reasonableness of his sentence.

Morgan argues that his indictment was invalid because he was not charged under the correct version of § 922(g). The district court denied Morgan's motion to dismiss the indictment. This court reviews the denial of Morgan's motion to dismiss de novo. *United States v. Rankin*, 929 F.3d 399, 404 (6th Cir. 2019).

Following Morgan's initial indictment, the Supreme Court held that in § 922(g) prosecutions, "the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." *Rehaif*, 139 S. Ct. at 2200. Contrary to Morgan's assertion, the superseding indictment accurately reflected the scienter requirement for the charged offense and apprised Morgan of the elements of the charge against him. This claim lacks merit. Under either indictment, the district court had jurisdiction to try Morgan's case. *See United States v. Hobbs*, 953 F.3d 853, 856-57 (6th Cir. 2020).

Relying on 18 U.S.C. § 921(a)(20) and Michigan Compiled Laws § 750.224f, Morgan argues that he should not have been indicted for being a felon in possession of a firearm because he was not serving any sentence at the time of his arrest and he had been cleared as a prohibited person after DHS and TSA permitted him to transport firearms by virtue of his commercial driver's license. Section 922(g)(1) defines an individual who is not permitted to possess a firearm as one "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1). When a state-court conviction "has been expunged, or set aside

or for which a person has been pardoned or has had civil rights restored," however, it "shall not be considered a conviction [under § 921(g)], unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." 18 U.S.C. § 921(a)(20)(B). Under Michigan law, a person convicted of a specified felony shall not possess or carry a firearm in Michigan until five years after he has completed the terms of the imposed sentence and also had the right to possess or carry a firearm restored under Michigan Compiled Laws § 28.424. Mich. Comp. Laws § 750.224f(2). A prohibited person may seek to restore the right to possess a firearm under federal law by statute. 18 U.S.C. § 925(c).

The record demonstrates that Morgan is a felon as defined by § 922(g)(1) under federal and state law. And Morgan has not shown that his right to possess a firearm has been restored. Just prior to the close of the government's case-in-chief, the district court allowed Morgan and standby counsel time to produce documentation that Morgan's right to possess a firearm had been restored. After conducting an inquiry, standby counsel reported that no supporting documentation had been found. The district court denied Morgan's motion to admit a document indicating that he had completed his supervised release. Notwithstanding the lack of documentation, the district court instructed the jury to consider whether Morgan's right to possess a firearm had been restored under federal and state law. The jury convicted Morgan.

"[T]he law of the jurisdiction in which proceedings were held applies not only to what is a conviction, but also to the effect of post-conviction events under the statute." *United States v. Jones*, 253 F. App'x 550, 552 (6th Cir. 2007) (citing *Beecham v. United States*, 511 U.S. 368, 372 (1994)). Section 921(a)(20) cannot support Morgan's claim because he did not provide evidence that his right to possess a firearm had been restored under federal law. *See Beecham*, 511 U.S. at 374 ("[P]etitioners can take advantage of § 921(a)(20) only if they have had their civil rights restored under federal law."). The outcome would be the same even had Morgan shown that his right to possess a firearm had been restored under state law. *See Walker v. United States*, 800 F.3d 720, 722 (6th Cir. 2015) ("Because Walker was convicted in federal court, the restoration of his rights under Tennessee law is not in itself enough."). This claim lacks merit.

Next, Morgan argues that insufficient evidence supported his conviction. When reviewing whether the government presented sufficient evidence to support a conviction, “the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (citing *Johnson v. Louisiana*, 406 U.S. 356, 362 (1972)). Morgan did not file a timely motion for a judgment of acquittal, however. *See* Fed. R. Crim. P. 29(c)(1). In that circumstance, this court reviews this claim for manifest miscarriage of justice, which “occurs only if the record is devoid of evidence pointing to guilt.” *United States v. Childs*, 539 F.3d 552, 558 (6th Cir. 2008) (citing *United States v. Price*, 134 F.3d 340, 350 (6th Cir. 1998)). A conviction for being a felon in possession of a firearm requires the government to “prove beyond a reasonable doubt that: (1) the defendant was a felon; (2) the defendant knew he was a felon (from *Rehaif*); (3) the defendant knowingly possessed a firearm; and (4) that the firearm had traveled through interstate commerce.” *United States v. Ward*, 957 F.3d 691, 696 (6th Cir. 2020) (citing *Rehaif*, 139 S. Ct. at 2200).

At trial, Brian Kross, a member of the Detroit Fugitive Apprehension Team (“DFAT”), testified for the government that on April 9, 2019, he and other DFAT members executed a felony arrest warrant for Morgan. Kross conducted a search incident to arrest and recovered a .25 caliber firearm manufactured by Raven Arms from Morgan’s front, right pants pocket. David Salazar, a special agent for the Bureau of Alcohol, Tobacco, Firearms, and Explosives (“Bureau”), testified that a stamp on the slide of the firearm indicated that Raven Arms manufactured the firearm in California. Kenton Weston, also a special agent with the Bureau, testified that Morgan pleaded guilty to felony armed robbery in state court, was sentenced to 4-15 years in prison in July 1999, and served about four years. Weston testified that Morgan pleaded guilty to being a felon in possession of a firearm in federal court and served more than six years in prison. Weston testified that Morgan had not had his right to possess a firearm restored following the completion of either sentence. Weston testified that the right to possess a firearm could not be restored either by

completing the terms of imprisonment or by satisfying the background check needed to acquire a commercial driver's license authorized by DHS or TSA.

Morgan's challenge to the sufficiency of the evidence lacks merit. The evidence that Morgan had served more than four years on a state offense and more than six years on an earlier felon in possession of a firearm conviction supported an inference that Morgan was a felon and that he knew that he was a felon. *See Hobbs*, 953 F.3d at 858. The testimony demonstrated that Morgan had actual possession of the firearm found in the front pocket of his pants. "Actual possession requires that the defendant have 'immediate possession or control' of the firearm." *United States v. Grubbs*, 506 F.3d 434, 439 (6th Cir. 2007) (quoting *United States v. Craven*, 478 F.3d 1329, 1333 (6th Cir. 1973)). The testimony also demonstrated that a stamp on the firearm slide indicated the state of manufacture, which established the interstate commerce nexus. *See United States v. Robinson*, 205 F. App'x 415, 417 (6th Cir. 2006) ("We similarly hold that a manufacturer's inscription on a firearm can be sufficient evidence to prove that the firearm traveled in interstate commerce."). The record is not devoid of evidence of guilt.

Finally, Morgan argues that his sentence is procedurally unreasonable. As he did below, Morgan challenges his sentence enhancement under USSG § 4A1.2, arguing that his juvenile offenses should not have been considered to enhance his sentence. He also asserts, as he did below, that the PSR did not reflect the use of the categorical approach to determine whether the prior convictions were violent felonies, his multiple sentences should be considered as one sentence, and the jury, rather than the district court, should have determined whether the prior convictions would enhance Morgan's sentence. Significantly, the district court sentenced Morgan under the Armed Career Criminal Act ("ACCA"). We review de novo a district court's legal conclusions under the ACCA. *United States v. Banks*, 679 F.3d 505, 506 (6th Cir. 2012).

The district court was permitted to use Morgan's adult convictions that he committed as a juvenile to enhance his sentence. *See id.* at 508 ("[W]e decline to categorically prohibit the consideration of juvenile-age offenses when determining the applicability of the ACCA's sentencing enhancement."). This court has held that armed robbery under Michigan law, for which

Morgan had three convictions, constitutes a violent felony under the ACCA. *See Reliford v. United States*, 773 F. App'x 248, 253 (6th Cir. 2019).

“[C]rimes that a defendant commits against different victims, in different places, and at different times, will generally be separate offenses.” *United States v. Hockenberry*, 730 F.3d 645, 667 (6th Cir. 2013) (quoting *Logan v. United States*, 552 U.S. 23, 37 (2007)). That occurred here. “[E]ven when convictions ‘were sentenced on the same day, they count separately for purposes of calculating an ACCA enhancement.’” *Id.* at 667 (quoting *United States v. Kearney*, 675 F.3d 571, 575 n.5 (6th Cir. 2012)). Further, a sentencing judge may rely on prior convictions to increase a penalty without jury consideration. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”).

For the foregoing reasons, we **AFFIRM** Morgan’s conviction and sentence. Morgan’s motion to reconsider is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk