

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 08-3099

United States of America

Appellee

v.

Demario B. Griffin

Appellant

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:07-cr-00012-DW-1)

ORDER

The motion to recall the mandate filed by Appellant Mr. Demario B. Griffin is denied.

January 13, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

United States of America, Appellee, v. Demario B. Griffin, Appellant.
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
394 Fed. Appx. 349; 2010 U.S. App. LEXIS 20150
Nos. 08-3099

September 3, 2010, Submitted

September 29, 2010, Filed

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Subsequent History

Habeas corpus proceeding at, Decision reached on appeal by Griffin v. United States, 617 Fed. Appx. 618, 2015 U.S. App. LEXIS 11905, 2015 WL 4140181 (8th Cir. Mo., July 10, 2015) Petition denied by United States v. Griffin, 2022 U.S. App. LEXIS 16506 (8th Cir. Mo., June 14, 2022) Petition denied by, En banc, Petition denied by United States v. Griffin, 2022 U.S. App. LEXIS 33875 (8th Cir. Mo., Dec. 8, 2022)

Editorial Information: Prior History

{2010 U.S. App. LEXIS 1}

Appeal from the United States District Court for the Western District of Missouri.

Counsel

For United States of America, Plaintiff - Appellee: Christina Y. Tabor,
Assistant U.S. Attorney, U.S. ATTORNEY'S OFFICE, Kansas City, MO.

Demario B. Griffin, Defendant - Appellant, Pro se, Pollock, LA.

Judges: Before BYE, BOWMAN, and COLLOTON, Circuit Judges.

Opinion

{394 Fed. Appx. 350} PER CURIAM.

Demario Griffin appeals from the judgment of the District Court,¹ entered after a bench trial, finding him guilty of being a felon in possession of ammunition, 18 U.S.C. §§ 922(g)(1), 924(e)(1), and sentencing him to 327 months in prison and five years of supervised release. For reversal, Griffin challenges the voluntariness of his jury-trial waiver, the sufficiency of the evidence, and the application of a sentencing enhancement based upon his status as an armed career criminal. For the reasons that follow, we affirm.

The Sixth Amendment right to a jury trial in a criminal case, though fundamental, Duncan v. Louisiana, 391 U.S. 145, 149, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968), is a right that a defendant can waive, Fed. R. Crim. P. 23(a) (noting that a defendant's jury-trial waiver must **{2010 U.S. App. LEXIS 2}** be in writing, with government consent and court approval); see also United States v. Williams, 559 F.3d 607, 609 (7th Cir. 2009) **{394 Fed. Appx. 351}** ("For the defendant's waiver to be valid, it must be voluntary, knowing, and intelligent."), cert. denied, 130 S. Ct. 1137, 175 L. Ed. 2d 971 (2010); Fitzgerald v. Withrow, 292 F.3d 500, 504 (6th Cir.) (noting that the Constitution does not require that a jury-trial waiver take any particular form), cert. denied, 537 U.S. 1009, 123 S. Ct. 501, 154 L. Ed. 2d 409 (2002). In this case, Griffin requested a waiver through counsel in a written

motion. Testimony at a hearing on his motion demonstrated that Griffin knowingly and voluntarily elected to waive his right to a jury trial in accordance with his counsel's advice, which was based in part on counsel's concern that a jury would be improperly influenced by Griffin's history of domestic assaults. See United States v. Diaz, 540 F.3d 1316, 1322 (11th Cir. 2008) (per curiam) (explaining that the adequacy of a jury-trial waiver is a mixed question of fact and law that is reviewed de novo); Brown v. Burns, 996 F.2d 219, 221 (9th Cir. 1993) (per curiam) (noting that compliance with Rule 23(a)'s writing requirement provides "the best record evidence of a defendant's {2010 U.S. App. LEXIS 3}express consent"). The waiver was also made with the government's consent and the District Court's approval.

At trial, the evidence established that law enforcement officers responded to a 911 call. In the course of looking for a gun that Griffin allegedly brandished while assaulting his girlfriend, the officers found ammunition in a bedroom closet at the home shared by Griffin and his girlfriend. According to a detective who interviewed Griffin after advising him of his rights, Griffin admitted that the ammunition found in the bedroom closet belonged to him and indicated that he was unaware that as a convicted felon, he was not allowed to have ammunition. There were later claims that the ammunition belonged to the girlfriend and that Griffin was not living with her at the time of the assault. But the detective's testimony about Griffin's initial admission, Griffin's stipulation that he had been convicted of a crime punishable by a term of imprisonment exceeding one year, and undisputed evidence that the ammunition had traveled in interstate commerce were sufficient to support the verdict. See 18 U.S.C. § 922(g); United States v. Thompson, 285 F.3d 731, 733 (8th Cir. 2002) (reviewing {2010 U.S. App. LEXIS 4}de novo a district court's denial of a motion for judgment of acquittal, viewing the evidence in the light most favorable to the verdict and according that evidence all reasonable inferences); United States v. Moore, 212 F.3d 441, 445 (8th Cir. 2000) (noting that the court of appeals does not reweigh the evidence or judge the credibility of witnesses and concluding that the evidence was sufficient to support a felon-in-possession conviction where an officer testified that the defendant admitted post-arrest that the gun found in a bedroom belonged to him); United States v. Anderson, 78 F.3d 420, 422 (8th Cir. 1996) (explaining that possession may be either actual or constructive, and "[c]onstructive possession exists when a person has ownership, dominion, or actual control over the contraband").

As for Griffin's sentence, to the extent he preserved his challenges to the armed-career-criminal enhancement, we find no error. See 18 U.S.C. § 924(e) (requiring that a person who violates § 922(g) and has three previous convictions for a violent felony or a serious drug offense be imprisoned not less than fifteen years); U.S.S.G. § 4B1.4; United States v. Jones, 574 F.3d 546, 549 (8th Cir. 2009) {2010 U.S. App. LEXIS 5}(standards of review). Griffin's qualifying convictions include his Missouri convictions for first-degree felony domestic assault, second-degree felony domestic assault, and possession with intent to distribute a controlled {394 Fed. Appx. 352} substance, the last of which occurred when Griffin was age seventeen but had been certified as an adult.

The judgment is affirmed. Griffin's pending motions are denied.

Footnotes

1

The Honorable Dean Whipple, United States District Judge for the Western District of Missouri.