

APPENDIX - A

UNITED STATES DISTRICT COURT JUDGEMENT (6th CIRCUIT)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

-----X
UNITED STATES OF AMERICA, : Case No. 5:21-cr-00370
: Cleveland, Ohio
Plaintiff, :
: v. : Wednesday, May 11, 2022
: 11:03 a.m.
TODDELL ALEXANDER, :
: Defendant. :
-----X

TRANSCRIPT OF SENTENCING PROCEEDINGS

BEFORE THE HONORABLE PATRICIA A. GAUGHAN

UNITED STATES CHIEF DISTRICT JUDGE

Court Reporter: Donnalee Cotone, RMR, CRR, CRC
Realtime Systems Administrator
United States District Court
801 West Superior Avenue
Court Reporters 7-189
Cleveland, Ohio 44113
216-357-7078
donnalee.cotone@ohnd.uscourts.gov

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1 APPEARANCES:

2

3 For the Government: **AARON P. HOWELL**

4 Assistant United States Attorney

5 208 Federal Building

6 2 South Main Street

7 Akron, Ohio 44308

8 330-375-5716

9 aaron.howell@usdoj.gov

10

11 For the Defendant: **MICHAEL J. O'SHEA**

12 Lipson O'Shea Legal Group

13 110 Hoyt Block Building

14 700 West St. Clair Avenue

15 Cleveland, Ohio 44113

16 216-241-0011

17 michael@lipsonoshea.com

18

19 For Probation: **ANNA NEWMAN**

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22

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MORNING SESSION, WEDNESDAY, MAY 11, 2022

(Proceedings commenced at 11:03 a.m.)

— — —

4 THE COURT: Mr. Alexander, you may approach
11:04:30 5 the podium with counsel.

We are here in the matter of the *United States of America v. Toddell Alexander*, Case Number 21-cr-370.

Present in court is Mr. Alexander.

Is that correct, sir?

11:04:52 10 THE DEFENDANT: Yes.

11 THE COURT: Represented by his attorney,
12 Mr. Michael O'Shea.

13 MR. O'SHEA: Good morning.

14 THE COURT: Good morning.

11:04:58 15 On behalf of the Government, Mr. Aaron Howell.

16 MR. HOWELL: Good morning, Your Honor.

17 THE COURT: Good morning.

18 On behalf of probation, Ms. Anna Newman.

19 PRETRIAL SERVICES OFFICER: Good morning.

11:05:08 20 THE COURT: Good morning.

21 We're here, sir, today for purposes of sentencing. On
22 January 19th, you entered a plea of guilty to the
23 single-count indictment. At that time, I referred your
24 matter to the probation department for a presentence
25 investigation report.

1 I have that report before me and I have thoroughly
2 reviewed it.

3 Have you had an opportunity to go over this report
4 with your attorney?

11:05:33 5 THE DEFENDANT: Yes, ma'am.

6 THE COURT: According to your report, sir,
7 your base offense level is 24. There are no specific
8 offense characteristics, no victim-related adjustments, no
9 adjustment for role in the offense, no adjustment for
11:05:53 10 obstruction of justice.

11 Because you are deemed to be an Armed Career Criminal,
12 your offense level becomes a 33. Three levels are deducted
13 for acceptance of responsibility for a total offense level
14 of 30.

11:06:08 15 You have ten criminal history points which corresponds
16 to a criminal history category of V.

17 Now, let me first turn to the Government.

18 It's my understanding that you do not have any
19 objections to the manner in which the guidelines have been
11:06:29 20 applied; is that correct?

21 MR. HOWELL: That is correct, Your Honor.

22 THE COURT: All right. Now, I'm going to turn
23 to the objections by Mr. Alexander.

24 The first objection, although it states paragraph 31.
11:06:44 25 I believe that's because of an earlier edition of the

1 presentence report, so it's really paragraph 34.

2 The defendant objects to four points being added for
3 his convictions for aggravated robbery and felonious
4 assault. Basically, defendant claims that these crimes
5 occurred more than 15 years before the conduct giving rise
6 to this offense.

7 Mr. O'Shea, are you maintaining that objection in
8 light of the probation officer's response?

9 MR. O'SHEA: Can I elaborate and say --

11:07:26 10 THE COURT: Sure.

11 MR. O'SHEA: -- let me explain why, Judge.

12 Item No. 1, my client, as the Court may or may not be aware,
13 filed his own *pro se* objections.

14 THE COURT: No, I understand. But -- but,
11:07:39 15 Mr. Alexander, you're represented by counsel.

16 I'm going to consider your objections, but I'm -- but
17 when it comes to argument, it's really you, Mr. O'Shea --

18 MR. O'SHEA: Very well, Judge.

19 THE COURT: -- that you're the one that needs
11:07:55 20 to respond to the Court's questions because, again --

21 MR. O'SHEA: Understood.

22 THE COURT: -- he's represented by counsel.

23 So technically, I shouldn't even be considering the *pro se*
24 objections, but I'm going to. I am going to address them.

11:08:10 25 MR. O'SHEA: And Judge, when I filed the

1 objections for the record or gave them to the probation
2 officer, I incorporated by reference my client's -- just
3 so --

4 THE COURT: You did.

11:08:17 5 MR. O'SHEA: I did.

6 THE COURT: No, you -- you did. But
7 regardless, I'm going to consider them.

8 MR. O'SHEA: Thank you, Judge. Thank you.

9 THE COURT: But I'm going to call on you to
11:08:26 10 tell me, are you maintaining it, number one, and if so, do
11 you wish to argue further than the arguments that are in
12 your sentencing memorandum and presented in the presentence
13 investigation report under the heading "Objections."

14 MR. O'SHEA: And thank you for that -- I
15 wasn't aware -- you hadn't mentioned yet the sentencing
16 memorandum, Judge, so I -- I -- I, of course, set forth some
17 arguments in that document.

18 Thank you, Judge.

19 THE COURT: Yes. I -- I want you to be
20 assured and your client to be assured, I have it, and I have
21 thoroughly reviewed it.

22 MR. O'SHEA: Thank you, Judge.

23 The -- I think it's paragraph 34 now. It talks about
24 four points, three plus one, under the ACCA. My
11:09:11 25 understanding of the law is that there is no lookback period

1 as it relates to ACCA. It only applies to career offender.
2 But we do argue that the one point that he got, because it
3 was based upon -- and, you know, a contained definition of
4 physical harm, the same argument that we made --

11:09:30 5 THE COURT: I -- I -- I'm going to stop you.

6 The first objection is the fact that -- correct me if
7 I'm wrong -- that the crimes occurred more than 15 years
8 before the conduct in this case, and that's why he believes
9 he should not be given the four points.

11:09:57 10 Am I missing something?

11 MR. O'SHEA: And I -- my fault if I'm
12 confusing the Court, Judge.

13 Three points get for the -- for the -- for the crime,
14 but you get an additional -- additional point. So we're --
11:10:10 15 we believe -- I mean, my understanding of the ACCA is that
16 it has no lookback. So three -- I think academically we
17 lose on that argument, but we do not lose on the additional
18 point that -- that was assessed for those because of the
19 definition of violent felony.

11:10:31 20 MR. HOWELL: I think, just in general, my
21 understanding from speaking to Attorney O'Shea before that,
22 I don't think they're continuing to contest that it is
23 outside of the 15-year time period.

24 He's just going to the fact that there is the three
11:10:45 25 levels for that. I think he's conceding that, but arguing

1 that the fourth point, that there being two offenses of
2 violence, so there's a fourth point added to that. I think
3 that's what he's arguing now. So he's conceding that
4 probation is correct about the 15 years, so there should be
11:11:03 5 three points.

6 The fourth point is saying there are two crimes of
7 violence, one of which was not sentenced; they're on the
8 same date. So they added a fourth level to it. That's what
9 I believe he's arguing in regards to that objection.

11:11:16 10 THE COURT: That's not what I read in the --
11 Sir, okay. Go ahead. You're represented by counsel.

12 THE DEFENDANT: It's four points for --

13 THE COURT: Where is it split up between the
14 three points and the one point?

11:11:32 15 Where is it here that I -- and I'm missing it?

16 MR. HOWELL: The response from the probation
17 officer, Your Honor, at the bottom of the response to
18 Objection Number 1, it talks about the fourth point being
19 added. It's in italics there.

11:11:50 20 THE COURT: Okay. I'm speaking of -- that
21 there's a concession regarding the three points.

22 MR. O'SHEA: Yeah. And it has to do with
23 this, too, Judge. Even though it was a 2005 case, the
24 defendant wasn't actually sentenced, I think, until sometime
11:12:09 25 in 2009, which pushed his incarceration level, even if the

1 15-year lookback period applied, into the realm of the 15
2 years.

3 THE COURT: All right. All right.

4 MR. O'SHEA: I can't, in good faith, argue
11:12:20 5 that issue.

6 THE COURT: All right. So you are conceding
7 it. Mr. Howell is correct.

8 MR. O'SHEA: Only academically because I know
9 my client doesn't want me to. I apologize for that
11:12:33 10 distinction, Your Honor.

11 THE DEFENDANT: I was sentenced in '05.

12 MR. O'SHEA: It counts for when your sentence
13 ends, not when it starts. That's what the law says.

14 THE DEFENDANT: I'm not convinced.

11:12:44 15 THE COURT: Do you wish to speak privately?

16 MR. O'SHEA: I have spoken with my client
17 extensively on this, Your Honor. So he and I agree to
18 disagree on whether that three points applies or not.

19 THE COURT: Mr. Howell.

11:12:58 20 MR. HOWELL: Yes, Your Honor.

21 THE COURT: What's the Government's position
22 regarding the additional point?

23 MR. HOWELL: In regards to the additional
24 point, Your Honor, we believe that probation correctly
11:13:08 25 scored that as specifically in regards to the aggravated

1 robbery, okay. Under the guidelines, we believe that it
2 meets the generic definition of a crime of violence under
3 4B1.2, as it's enumerated there as robbery.

4 So we do believe that they've correctly calculated the
11:13:32 5 criminal history category points because both the aggravated
6 robbery and the felonious assault are crimes of violence
7 under the guidelines.

8 THE COURT: I'll tell you what.

9 I am going to address each and every one of the prior
11:13:50 10 convictions at issue, because all of your objections appear
11 to be regarding whether those are crimes of violence or
12 violent felonies. Okay. So I'm simply going to address --
13 begin there and then work backwards; unless, Ms. Newman, you
14 want to say anything at this point?

11:14:16 15 PRETRIAL SERVICES OFFICER: No, Your Honor.

16 I stand by the information that I included in the
17 report.

18 THE COURT: Okay.

19 MR. O'SHEA: Judge --

11:14:22 20 THE COURT: Sure.

21 MR. O'SHEA: One last thing.

22 I had -- although I had filed the sentencing
23 memorandum, and I believe the Government has seen it, I did
24 not forward a copy of it to the probation department. Maybe
11:14:33 25 my fault. But I gave the probation officer this morning a

1 copy of mine so that they have it.

2 THE COURT: Okay. No problem.

3 All right. So I have to determine if four of

4 Mr. Alexander's convictions are crimes of violence for

11:14:54 5 purposes of guideline determinations, and I have to

6 determine whether they are violent felonies for purposes of

7 determining whether he qualifies for the Armed Career

8 Criminal enhancement.

9 I'm going to begin with aggravated robbery. The

11:15:19 10 Government concedes -- and I know Mr. Howell will correct me

11 if I'm wrong -- that aggravated robbery is not a violent

12 felony for purposes of the Armed Career Criminal Act.

13 Therefore, I am not going to consider aggravated robbery in

14 determining whether he qualifies under the Act. I'm going

11:15:40 15 to make the statement, it does not qualify.

16 However, aggravated robbery is a crime of violence for
17 guideline purposes, because it is an enumerated offense.

18 So, again, aggravated robbery, not a violent felony

19 for purposes of ACCA. It is a crime of violence under the

11:16:15 20 guidelines.

21 Felonious assault. I find that the conviction for
22 felonious assault qualifies as both a violent felony under
23 the Act and a crime of violence under the guidelines.

24 I know the defendant argues that the felonious assault
11:16:44 25 statute relies on Ohio's definition of physical harm, which

1 includes nonphysical harm such as illness, et cetera,
2 regardless of its gravity or duration.

3 And -- and Mr. O'Shea, you have extensively argued it
4 in your sentencing memorandum. Because a conviction under
11:17:05 5 the statute could stem from essentially minor or nonphysical
6 injuries, it is argued, any such conviction cannot qualify
7 as being violent under either the ACCA or for guideline
8 computations. This is what the defendant is arguing.

9 However, this Court rejects that argument.

11:17:30 10 In *United States v. Burris* -- it's B-U-R-R-I-S --
11 912 F.3rd 386 -- it's a 2019 Sixth Circuit case -- the
12 Sixth Circuit rejected this very argument that the defendant
13 now raises.

14 In *Burris*, the Court reviewed the Ohio's felonious
11:17:57 15 assault statute and reviewed the definition of physical
16 harm. The Court first determined very importantly that the
17 statute is divisible. It then determined that convictions
18 under Revised Code 2903.11(A)(1) do not qualify because they
19 incorporate harm that would not qualify as violent.

20 But the Court then separately analyzed 2903.11(A)(2).
21 The Court noted that convictions under this provision
22 require the additional element of use of a deadly weapon or
23 dangerous ordnance by causing or attempting to cause
24 physical harm. Because of this additional element, the
11:18:48 25 Court concluded that a conviction under 2903.11(A)(2)

1 qualifies as a violent felony for purposes of the Armed
2 Career Criminal Act, as well as a crime of violence for
3 guideline purposes.

4 Because this defendant's prior conviction for
11:19:11 5 felonious assault is based upon 2903.11(A)(2), it qualifies
6 for both purposes here.

7 I'm now going to move to the domestic violence
8 convictions. The defendant has two prior convictions for
9 domestic violence under Ohio Revised Code 2919.25(A).

11:19:37 10 Defendant, again, argues that Ohio's definition of
11 physical harm is too broad and that these two convictions
12 cannot be considered for purposes of the Armed Career
13 Criminal Act. The argument is rejected.

14 In *United States v. Gatson* -- it's G-A-T-S-O-N --
11:20:01 15 776 F.3rd 405 -- it's a 2015 Sixth Circuit case -- the Court
16 determined that crimes of violence under 2919.25(A) are
17 categorically violent felonies for purposes of the Armed
18 Career Criminal Act. And less than one month ago, the
19 Sixth Circuit addressed this very issue once again in
11:20:32 20 *United States v. Mickel*, M-I-C-K-E-L, 2022 WL 1100459,
21 Sixth Circuit case, decided on April 13th of this year.

22 That defendant made the same argument Mr. Alexander is
23 making to me. In that case, defendant argued that based on
24 *Burris* and other authority, *Gatson* should be reconsidered.

11:21:14 25 The Sixth Circuit Court, however, noted that it was

1 bound to apply *Gatson* because in the absence of an
2 inconsistent decision from the Supreme Court of the
3 United States that requires modification of a panel
4 decision, only the Court sitting *en banc* can overrule a
11:21:38 5 prior published panel decision.

6 Accordingly, based upon *Gatson* and *Mickel*, I find that
7 the two prior convictions for domestic violence qualify as
8 violent felonies under the Armed Career Criminal Act and
9 they are also considered crimes of violence for guideline
11:21:58 10 purposes. And I do cite *United States v. Solomon*,
11 763 Fed.Appx 442, Sixth Circuit case, decided on
12 February 13th, 2019.

13 So now I go back to the calculations. I'll start with
14 paragraph 19. All four prior convictions count.

11:22:33 15 I move to paragraph 25, aggravated robbery does not
16 count, but aggravated assault and both violent -- domestic
17 violence convictions count. So the offense level of -- or
18 the enhancement to 33 remains.

19 And then turning to paragraph 34, the four points are,
11:23:07 20 in fact, correctly scored.

21 Okay. So now, Mr. O'Shea, having heard all of that,
22 let me now go back to any other objections.

23 MR. O'SHEA: We're -- I believe, Judge -- and
24 if I can cite the case, I'll call it -- I think we referred
11:23:34 25 to it in our sentencing memorandum as the *Derrick Johnson*

1 case. It's out of the Sixth Circuit. We stand by that
2 objection. I think you've already addressed it. I just
3 want to ratify that, my client wants me to ratify it, so I'm
4 doing that in the courtroom for you.

11:23:50 5 Let me double-check, Judge, but I think you've covered
6 it all.

7 And Judge, I think by virtue of what you've just said
8 to us as it relates to what we'll call Section 4 on page 10
9 of our sentencing memorandum, and the rule of lenity.

11:24:09 10 You've addressed that. We believe that there might be some
11 obvious interpretation issues, let's say.

12 I mean, I struggled myself, and I think everybody in
13 this room did, with how to apply some of these definitions
14 that are implicit in the ACCA and in the sentencing
15 guidelines. And so, I believe in good faith, to a certain
16 degree, Judge, that there is some confusion and ambiguity
17 here and because of that, the tie goes to the defendant.
18 I've already argued that in the sentencing memorandum.

19 In addition to that, Judge, we brought up an Eighth
20 Amendment issue relative to the impact of a 15-year
21 mandatory minimum sentence under the ACCA.

22 As the Court may remember from the motion to suppress
23 that we had here, which, I think, took us the better part of
24 two hours. We had Akron police pulling over my client and
11:25:02 25 the mother of his child as well as the child, essentially on

1 their way to a functional grocery store run, in what I would
2 characterize, and I believe the Akron police would agree
3 with me, is a relatively high crime activity neighborhood.
4 My client possessed, it appears, a weapon on the floorboard
11:25:18 5 of the car.

6 As the Court may recall, too, he was extraordinarily
7 polite to the police, extraordinarily cooperative to the
8 police, when they pulled him over; as were the police, to
9 their credit as well.

11:25:36 10 And it appears to me that -- that to send a guy to
11 prison for 15 years under the application of the ACCA, in
12 the context of this defendant, with these facts as it
13 applies to this defendant -- not saying the ACCA in all
14 cases is a violation of the Eighth Amendment. But in the
11:26:00 15 context of this particular case as it applies to this
16 defendant, it appears to me that it is an extraordinarily
17 harsh remedy for the conduct that took place on the day in
18 question.

19 And it appears -- and I know there's case law out
11:26:16 20 there that says, you know, if you even possess a shotgun
21 shell accidentally in your mom's attic, they can apply the
22 ACCA. That seems extraordinarily unfair under the context.
23 I think the ACCA was clearly designed to go after and
24 penalize people who had a firearm in the commission of a
11:26:39 25 functionally bad situation. I don't want to say necessarily

1 an offense, Judge, because that triggers something else, but
2 certainly the mere possession of this firearm to protect
3 one's family as they travel to the store in a high drug
4 activity area, to apply the ACCA to that seems to me
11:26:58 5 potentially the cruelest application of the ACCA in the
6 context of this defendant, Your Honor.

7 THE COURT: Mr. Howell.

8 MR. HOWELL: Your Honor, just in regards to
9 the Court's ruling on the objections, the only thing that I
11:27:16 10 intended to add the Court already covered. I was --

11 THE COURT: I'm sorry, no. I'm still with
12 Mr. O'Shea on his objections. Do you want to respond to his
13 arguments?

14 MR. HOWELL: Your Honor, as far as the Eighth
11:27:34 15 Amendment, I mean, I understand why he's making the
16 argument. It's the same discussion that we had at the
17 suppression hearing.

18 One of the things I will point out, that there were
19 other options discussed at that time that could have
11:27:45 20 happened between then and now that could have kind of taken
21 that issue off of the table. That was not taken advantage
22 of, so I would just say in regards to the Eighth Amendment,
23 I don't think there's any violation here. I think the Court
24 has correctly ruled on the ACCA as well, and I'm ready to be
11:28:01 25 heard at the appropriate time in regards to the appropriate

1 sentence, Your Honor.

2 THE COURT: Well, regarding the Eighth
3 Amendment argument, I know that the defendant pointed to the
4 *United States v. Young*. I'm aware of that. In that case,
11:28:21 5 the defendant was convicted under the Armed Career Criminal
6 Act for having in a drawer in his home seven shotgun shells
7 belonging to his widowed neighbor. Even under those
8 circumstances, the Sixth Circuit found no Eighth Amendment
9 violation.

11:28:42 10 So when I look at that case and I look at the facts in
11 this case, the Eighth Amendment argument simply fails.

12 Before I move on to sentencing, I am going to go back
13 to paragraph 34.

14 And, Mr. O'Shea, I appreciate the fact -- and
11:29:10 15 Mr. Howell said it as well -- that you were really
16 withdrawing your 15-year argument. How about if we just put
17 it that way. And I really -- because I didn't see that it
18 was withdrawn prior to today, and I can see that your client
19 needs a ruling on it. I'm going to make a ruling.

11:29:35 20 MR. O'SHEA: Thank you, Judge.

21 THE COURT: Even though you technically
22 withdrew it. I'm going to make a ruling.

23 I know that Mr. Alexander objects to the points, and
24 he noted that according to the sentencing guidelines, any
11:29:54 25 time a case commences 15 years prior to the instant offense,

1 zero points are assessed. I completely agree with the
2 response by the probation officer. Prior offenses will be
3 considered if the period of incarceration extended into the
4 15-year period leading up to the date of the instant
11:30:25 5 offense. Because defendant was released from prison in
6 2009, and this offense occurred in 2021, the prior offenses
7 are within the 15-year period.

8 MR. O'SHEA: Judge, just for clarification,
9 the sentencing in Case No. 20050920513, which is both the
11:30:45 10 aggravated robbery, felonious assault case that we've given
11 a lot of attention to this morning, the defendant was
12 actually sentenced in November of 2009 for that case and
13 given a five-year sentence. That's my understanding from
14 the docket in that case.

11:31:01 15 THE COURT: That's within the 15 years.

16 MR. O'SHEA: Fifteen years going forward.

17 Let's assume, Judge, that the agg rob case, he got
18 five years in 2009, that brings him up to 2014. We'd have
19 to go -- you know, that's the reason that we backed off the
11:31:17 20 15, because that easily meets that definition.

21 But I just want to -- I think you indicated that he
22 was released from prison in 2009, and I think that -- that
23 the sentencing I have took place in November 25th, 2009.

24 THE DEFENDANT: Can I speak on that, please?

11:31:31 25 MR. O'SHEA: And I know that sentence had

1 something to do with him coming back for a resentencing,
2 Judge, and I think that's what he means, but --

3 THE COURT: Ms. Newman.

4 PROBATION OFFICER: Your Honor, I have the
11:31:43 5 docket. He was sentenced on May 3rd, 2005, to a five-year
6 prison term, and then in November -- on November 25th, 2009,
7 he was resentenced to correct the original judgment, and he
8 was still placed on five years prison with a mandatory
9 post-release control.

11:32:03 10 So when he was released from prison, it was within the
11 15-year time period.

12 MR. O'SHEA: Enough said on that, Judge.

13 THE COURT: Objection is not well taken.

14 MR. O'SHEA: Thank you, Judge.

11:32:20 15 THE COURT: Okay. Now, on the issue of
16 sentencing.

17 Mr. O'Shea, should I turn to you first, or your
18 client?

19 MR. O'SHEA: Why don't you turn to my client
11:32:28 20 first, Judge.

21 THE COURT: All right.

22 Sir, do you have anything to say?

23 THE DEFENDANT: Yes, Your Honor, if it may
24 please the Court.

11:32:36 25 First of all, my name is Toddell Alexander. Yes, I

1 did get pulled over with a weapon in my car, but I feel like
2 I shouldn't get 15 years, though, for just a weapon. Plus
3 one of my predicates, I feel like is just from the law, the
4 *Derrick Johnson* case, physical harm in Ohio is -- is broad,
11:33:03 5 is already broader than the physical force is in the federal
6 sense. According to *Derrick Johnson*, the *Johnson v.*
7 *United States* case, 784. -- it's a Missouri case, but a
8 Sixth Circuit -- it reads the same as Ohio. The Government
9 in that case admitted that it reads the same as Ohio's
11:33:25 10 case -- case law.

11 That case was remanded and vacated for the facts of
12 physical harm can be committed through illness, as I quoted
13 in my objections. I wrote a three-page objection on that --
14 on that situation. Physical harm could be committed through
11:33:44 15 illness. I also gave proper case law to back myself up that
16 physical harm could be committed without even touching. I
17 don't know if you got those objections or that
18 three-page -- --

19 THE COURT: Yes, I did. Yes, I did.

11:33:58 20 THE DEFENDANT: -- I properly wrote that out,
21 took my time. Like my lawyer said, me and him was not
22 seeing eye to eye on that situation, but it's something I
23 took my time and looked it up because I wasn't trying to get
24 15 years. I mean, I do have a family also, like, you know.
11:34:14 25 So it could be committed without illness, though. So I feel

1 like I should argue that, though.

2 And that's -- that's actually too broad from the
3 federal sense, because the federal law says you can find a
4 way to commit a crime without force, any type of force. You
11:34:32 5 bring it up, and it could not be categorically fit. So I
6 argued that case, and I actually had you consider my
7 argument towards the sentence.

8 THE COURT: Mr. O'Shea.

9 MR. O'SHEA: I just incorporate by reference
11:34:49 10 what I've already presented to you, Judge, on this issue. I
11 think my client is arguing the same thing that we argued in
12 the sentencing memorandum as it relates to that. And I
13 think he also touched on that -- an Eighth Amendment
14 argument as well.

11:35:04 15 Judge, may he also talk a little bit about himself and
16 his family?

17 THE COURT: Of course, of course, of course.

18 THE DEFENDANT: Well, I'm 34. I'm engaged
19 right now. I got eight kids. I just had a baby since I've
11:35:19 20 been here. When I caught this case, they sent me to the
21 halfway house, so that's how I ended up having a baby, of
22 course.

23 But I keep a job. I was a kitchen manager at a
24 restaurant. As you can tell, I went to school. I got my
11:35:34 25 GED. Got a graphic design degree. I went to college. I

1 didn't finish college, though. I decided to work instead of
2 finish college because I had kids. I have a lot of kids.
3 My family is here today, the few that came.

4 I mean, I'm a family man, of course. Yes, I do get in
11:35:56 5 trouble, but I didn't break the law maliciously, though, and
6 I feel like 15 years would be a little heavy on me, though.
7 So, I don't know.

8 THE COURT: Mr. O'Shea.

9 MR. O'SHEA: Judge, you know, as I said
11:36:19 10 before, you know, with regard to whatever sentence you feel
11 compelled by statute or by guideline to impose here, I think
12 I said it during my Eighth Amendment argument.

13 It's just -- on that day my client is on his way to
14 get functionally food for his family, and that's got to be
11:36:44 15 differentiated between somebody who is out on the street
16 with just a gun in their belt, walking around trying to be a
17 gang banger, pardon the expression, Judge, or somebody who
18 is inside of a bar consuming alcohol, and they've got a gun
19 on them and they're causing a ruckus. And I think what
11:37:05 20 happened on the day that he was pulled over speaks a lot
21 of what he -- of where he was in his life at that point, and
22 what he wanted to do, take care of his family, be employed,
23 produce for his family.

24 You saw the -- on the video, and in the testimony of
11:37:21 25 the officers how polite he was, how cooperative he was.

1 That's the kind of guy -- and I always say the thing about
2 body cam video is that it shows everything, and sometimes
3 the bad thing about body cam is that it shows everything.
4 And in this case, the body cam showed that my client was a
11:37:40 5 pleasant, cooperative person, didn't give the police any
6 trouble. And I think there just has to be some coat put on
7 that hook when it comes to that type of stuff, particularly
8 when police officers go through what they go through and
9 what they see on the street. There could have been a much
11:37:56 10 different scenario than they saw that day.

11 And so I ask the Court to take that into
12 consideration. And take into consideration the other
13 biographical background factors that we have in the
14 presentence investigation in connection with whatever
11:38:11 15 sentence you have to issue here today, Judge.

16 THE COURT: Mr. Howell.

17 MR. HOWELL: Thank you, Your Honor.

18 Just looking at the history and characteristics of
19 Mr. Alexander, as the PSR indicates, there is a history with
11:38:23 20 him of violent convictions, and other convictions involving
21 a firearm. And one of the things I think, ultimately, this
22 comes down to are choices that this defendant makes. And
23 unfortunately, I understand what he indicates he was out
24 there doing that day, but he also chose to have a firearm
11:38:42 25 with him, and he knows that he cannot do that.

1 Looking through his prior convictions, the domestic
2 violence, the felonious assault, the aggravated robbery,
3 when you look on paper, and then you listen to
4 Mr. Alexander, who I've had the experience of -- I had
11:38:59 5 experience with him in state court, had experience with him
6 through the suppression hearing in this case here today. He
7 presents as different individuals. He acknowledges, yes, he
8 commits crime, he's a family man. I know the Court will
9 take all that into consideration. But the bottom line is he
11:39:17 10 cannot continuously possess a firearm based upon the things
11 that he's done in the past. And he's, unfortunately, chosen
12 to do that.

13 I also indicated to him on that day during the
14 suppression hearing, and just acknowledging again today,
11:39:32 15 there are other ways that this could have shaken out that,
16 you know, the Court's hands may not have been tied in
17 regards to the ACCA issue and the mandatory 15-year
18 sentence. That was not taken advantage of, and, you know,
19 that's another choice that Mr. Alexander made. And I
11:39:48 20 respect that, but I hope he understands that's just another
21 choice that he made.

22 Your Honor, based upon his history and
23 characteristics, based upon the Court's findings in regards
24 to the armed career criminal, we respectfully ask for the
11:40:03 25 mandatory minimum sentence for Mr. Alexander of 15 years.

1 THE COURT: Ms. Newman.

2 PRETRIAL SERVICES OFFICER: Your Honor, I
3 don't have anything else to say.

4 But one thing I did notice that no one mentioned, when
5 he was pulled over that day, he also had a protection order
6 on file, which prohibited him from having a firearm.

7 So to say that, you know, he shouldn't get Armed
8 Career Criminal based on that, I mean, he was a "prohibited
9 person," so he knew he shouldn't have had a firearm. But
10 there was a protection order in place which prohibited him
11 also from having a firearm, and he chose to have that.

16 It is the judgment of this Court, sir, that you be
17 committed to the custody of the Bureau of Prisons to be
18 imprisoned for a term of 180 months.

19 Upon release from imprisonment, you will be placed on
20 supervised release for a term of five years.

21 I am not ordering a fine, but there is a \$100 special
22 assessment due and payable today.

23 While on supervision, you must comply with all of the
24 mandatory and standard conditions adopted by this Court.

11:41:22 25 They are set forth in Part D of your report.

1 In addition, you're going to be drug tested within 15
2 days of release from imprisonment, and you must submit to at
3 least two periodic drug tests thereafter.

4 I am going to order substance abuse treatment as
11:41:40 5 deemed appropriate by your officer.

6 You may not use or possess alcohol.

7 You must submit to a warrantless search based only
8 upon reasonable suspicion of contraband or evidence of a
9 violation of a condition of release.

11:41:56 10 You must meet any legal obligation to support your
11 dependents. You must cooperate in the collection of DNA.

12 Let me inform you, sir, that you do have the right to
13 appeal your conviction and sentence. If you cannot afford
14 to appeal, the cost will be borne by the Government.

11:42:13 15 I do, in fact, find the sentence to be sufficient, but
16 not greater than necessary, to satisfy the purposes of
17 sentencing.

18 On one hand I do note that as an adult, Mr. Alexander
19 has had five felony convictions, aggravated robbery,
11:42:31 20 felonious assault, domestic violence, having a weapon while
21 under disability; four misdemeanor convictions, endangering
22 children, interference with custody. And I, too, noted the
23 protection order that was in place until, I believe it's in
24 place until June 6th, which prohibits the defendant from
11:42:53 25 having contact with three of his children and their mother.

1 On the other hand, I do, in fact, acknowledge that the
2 mandatory minimum of 180 months is a significant sentence.
3 I stand by all of my legal analysis regarding the Armed
4 Career Criminal enhancement. Therefore, the Court has no
11:43:26 5 option to give anything lower than 180 months.

6 But I do, in fact, find the 180 months is significant
7 enough, and certainly takes into account the prior
8 convictions, and the prior history of possession of weapons
9 and violence.

11:43:45 10 Mr. O'Shea, first of all, sir, any objections?

11 MR. O'SHEA: Other than what I've already set
12 forth, Your Honor, nothing further.

13 THE COURT: And is there anything further?

14 MR. O'SHEA: Procedurally, no, right now,
11:44:01 15 Your Honor.

16 THE COURT: Mr. Howell, first of all, sir, any
17 objections?

18 MR. HOWELL: No objections, Your Honor.

19 THE COURT: Secondly, anything further?

11:44:08 20 MR. HOWELL: No, Your Honor. Thank you.

21 THE COURT: Ms. Newman, did I miss anything?

22 PRETRIAL SERVICES OFFICER: No, Your Honor.

23 THE COURT: I'm sorry, sir, were you raising
24 your hand?

11:44:18 25 THE DEFENDANT: I was just about to say, I'm

1 just thankful for hearing my argument. I do want to put a
2 notice of appeal up there as for right now.

3 THE COURT: That's fine.

4 THE DEFENDANT: And I still want to argue that
11:44:30 5 *Johnson v. United States* is -- it's -- it's -- it's
6 Sixth Circuit, so I'm going to still argue that.

7 Thank you for your --

8 THE COURT: Certainly, certainly.

9 Mr. Alexander.

11:44:46 10 You understand your argument just does not have legal
11 support given your specific convictions.

12 But, Mr. O'Shea, I will turn to you and you can
13 certainly confer with Mr. Alexander. Of course, he can
14 appeal this.

11:45:03 15 Do you want the appeal?

16 THE DEFENDANT: Yes.

17 MR. O'SHEA: Sure.

18 Well, I think what she's asking --

19 THE COURT: No, no, no.

11:45:12 20 Mr. Alexander, do you want Mr. O'Shea to take the
21 appeal?

22 THE DEFENDANT: It's up to him. We don't see
23 eye to eye on this, though. So I might have to get another
24 lawyer. We actually don't see eye to eye at all.

11:45:22 25 THE COURT: So you would -- can you afford an

1 attorney?

2 THE DEFENDANT: They said -- I was told once I
3 file the appeal, they would appoint one to me.

4 THE COURT: Well, I'll go ahead and indicate
11:45:32 5 that you want to appeal, and I can appoint an attorney.

6 THE DEFENDANT: Thank you.

7 THE COURT: So my question to you, is, do you
8 want Mr. O'Shea or do you want me to appoint somebody
9 different?

11:45:43 10 THE DEFENDANT: You can appoint somebody
11 different. We don't see eye to eye, you know.

12 THE COURT: All right. That's fine. Mr.
13 Alexander, that is fine.

14 THE DEFENDANT: Yes, ma'am.

11:45:50 15 THE COURT: I understand. I understand.

16 Mr. O'Shea, you understand I'm not going to put you --

17 MR. O'SHEA: I do. No problem, Judge.

18 Two things procedurally. One, I --I think to finish
19 out the appointment here, I'll file the notice of appeal and
11:46:00 20 get that on there.

21 THE COURT: All right.

22 MR. O'SHEA: Get that docketed for my client.
23 Protect him in that way.

24 And secondly, Judge, as you may recall, in the plea
11:46:08 25 agreement, he also preserved his right to appeal the issues

1 related to the motion to suppress.

2 THE COURT: Oh, of course. Oh, of course.

3 (Discussion between defendant and attorney out of the
4 hearing of the reporter.)

11:46:17 5 MR. O'SHEA: I'm sorry? Sure.

6 Judge, one of the things my client is asking me now
7 about is placement. The placement issue.

8 THE COURT: Where would you like me to
9 recommend?

11:46:26 10 THE DEFENDANT: I would recommend, so my
11 family can come to see me, I go to Elkton, if possible.

12 Second opinion would be McKean.

13 THE COURT: I didn't hear that.

14 THE DEFENDANT: Elkton, if I could, so my
15 family could see me.

16 THE COURT: Right.

17 THE DEFENDANT: Secondly, would be McKean, if
18 possible.

19 THE COURT: Mr. Howell, do you have any
20 position regarding recommendation of placement?

21 MR. HOWELL: No, Your Honor.

22 THE COURT: And, Ms. Newman, do you wish to
23 weigh in?

24 PRETRIAL SERVICES OFFICER: No, Your Honor.

11:46:53 25 THE COURT: I'm happy to recommend either

1 Elkton or McKean.

2 THE DEFENDANT: Thank you.

3 THE COURT: Any other requests?

4 THE DEFENDANT: No, ma'am.

11:47:03 5 THE COURT: All right.

6 THE DEFENDANT: Thank you.

7 THE COURT: Good luck to you, sir, and good
8 luck to your family.

9 - - -

10 (Proceedings adjourned at 11:47 a.m.)

11

12 C E R T I F I C A T E

13 I certify that the foregoing is a correct transcript
14 from the record of proceedings in the above-entitled matter.

15 /s/ Donnalee Cotone 8th of June, 2022
16 DONNALEE COTONE, RMR, CRR, CRC DATE
Realtime Systems Administrator

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APPENDIX - B

UNITED STATES COURT OF APPEALS OPINION. (6th Circuit)

NOT RECOMMENDED FOR PUBLICATION
File Name: 23a0145n.06

No. 22-3448

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,)
Plaintiff-Appellee,)
v.)
TODDELL ALEXANDER,)
Defendant-Appellant.)

FILED
Mar 29, 2023
DEBORAH S. HUNT, Clerk

ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF
OHIO

OPINION

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

JANE B. STRANCH, Circuit Judge. Toddell Alexander appeals his 180-month sentence for possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and § 924(a)(2), as well as the denial of his motion to suppress statements that he claims were elicited without proper *Miranda* warnings. Because the district court properly classified Alexander as an armed career offender based on his multiple convictions for domestic violence under Ohio law, and because the district court properly found that Alexander was not in custody when he made the challenged statements, we **AFFIRM**.

I. BACKGROUND

A. The Traffic Stop

On February 2, 2021, Alexander was driving his car to a grocery store in Akron, Ohio, with his youngest child and the baby's mother. Akron Police Officers Mark Sember and Anthony Trimble were in the area in their patrol vehicle, saw Alexander's car, and ran its registration, which showed that Alexander was the registered owner and that his driver's license had been suspended.

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A state database also showed Trimble that Akron police had stopped Alexander in the same car a few weeks earlier and found ammunition. Because they suspected that Alexander was driving with a suspended license, Sember and Trimble activated their cruiser's lights and stopped him. When the officers approached the car, Alexander was in the driver's seat, a woman was in the passenger seat, and a child sat in the back. Trimble explained that they had stopped Alexander to investigate whether he was driving with a suspended license. He asked Alexander to step out of the car and go to the police cruiser so that Trimble could investigate his license and any outstanding warrants. As Alexander was about to get out of his car, Trimble asked whether he had anything illegal on his person.

Before seating Alexander in the back of the cruiser, Trimble patted him down and asked him to confirm that he did not have anything illegal on his person. While Trimble checked for Alexander's license and warrant status, Alexander sat in the cruiser's back seat. He was not handcuffed, and he was permitted to keep his phone. Trimble later testified that, at that point, he was not arresting Alexander for driving with a suspended license.

Sember remained by Alexander's car. Per Trimble's testimony, he was concerned for Sember's safety because he thought Alexander might have a firearm in the car. His apprehension was based on the prior traffic stop where police had found ammunition in that same car and an incident Trimble had investigated about two years before involving Alexander and a "shots fired" call. So, Trimble asked Alexander about the prior traffic stop and if there was currently a gun in the car. Alexander replied that he was not sure; he sometimes had a firearm in the car and could not remember whether he had removed it, but, he told Trimble, if it was in the car, it would be under one of the front seats. Trimble did not provide a *Miranda* warning during this questioning.

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Trimble subsequently found a pistol under the driver's seat of Alexander's car. He then read Alexander his *Miranda* rights because he planned to ask some questions about the firearm, and eventually informed Alexander that he was under arrest for possessing the firearm. Alexander was charged with unlawful possession of a firearm, knowing that he had been previously convicted of a felony criminal offense, in violation of 18 U.S.C. § 922(g)(1) and § 924(a)(2).

B. Suppression Hearing

During Alexander's ensuing prosecution, his attorney moved to suppress the statements Alexander made while seated in the cruiser during the traffic stop, before Trimble recovered the gun, on the basis that he had been in custody when he was questioned and should have been informed of his *Miranda* rights.¹ At the suppression hearing, Trimble acknowledged on cross-examination that, if someone is stopped while driving with a suspended license, that person is generally not free to leave during the investigation to determine whether that offense is arrestable. Trimble also agreed that, when Alexander was seated in the back of the cruiser, he could not open the car door from the inside and was not free to leave.

Applying the framework of *United States v. Salvo*, 133 F.3d 943, 950 (6th Cir. 1998), the district court found that, although Alexander was seated in a police car and unable to leave the vehicle, the questioning was brief and conducted to ensure officer safety, Trimble's tone was friendly and conversational (he did not exert undue coercive pressure), and the conversation lasted only two minutes or so. And, after the firearm was recovered, Trimble read Alexander his *Miranda* rights and arrested him with no improper questioning before doing so. The district court concluded

¹ Alexander also unsuccessfully argued that the traffic stop was not supported by reasonable suspicion, but he does not raise this argument on appeal.

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that Alexander was not in custody for purposes of *Miranda* when he was initially questioned, and therefore denied Alexander's suppression motion.

C. Plea and Sentencing Hearing

Alexander entered into a plea agreement on January 19, 2022, which contemplated that his prior felony convictions might qualify him for an enhanced penalty under 18 U.S.C. § 924(e) (the Armed Career Criminal Act, or ACCA) and the application of the Sentencing Guidelines' associated armed career criminal enhancement, USSG § 4B1.4. Alexander retained the right to appeal the district court's determination of his criminal history category and Guidelines range, as well as the denial of his suppression motion.

The Presentence Investigation Report (PSR) generated for Alexander identified four prior felony convictions for crimes of violence as defined by the Guidelines: aggravated robbery and felonious assault convictions from 2005, and two felony domestic violence convictions under Ohio Rev. Code § 2919.25(A) from 2011 and 2013. Applying the armed career criminal sentencing enhancement, Alexander's offense level was calculated as 33 and his criminal history category as V. Alexander objected to the PSR's conclusions, arguing, as relevant here, that the Ohio domestic violence statute was too broadly worded for his convictions to qualify as a crime of violence for ACCA purposes.

At sentencing, the court rejected Alexander's argument. Citing *United States v. Gatson*, 776 F.3d 405 (6th Cir. 2015), *United States v. Solomon*, 763 F. App'x 442 (6th Cir. 2019), and *United States v. Mickel*, No. 21-3561, 2022 WL 1100459 (6th Cir. Apr. 13, 2022), *cert. denied* (2022), the court concluded Sixth Circuit precedent established that Alexander's convictions "under [Ohio Rev. Code §] 2919.25(A) are categorically violent felonies for purposes of the Armed Career Criminal Act" and "crimes of violence for [G]uideline purposes." R. 50, Sentencing

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Hrg Tr., PageID 369-70. The district court sentenced Alexander to 15 years' imprisonment, the mandatory minimum sentence for a conviction under 18 U.S.C. § 922(g) based on Alexander's four previous convictions for violent felonies. This timely appeal followed.

II. ANALYSIS

A. Armed Career Offender Classification

Alexander was twice convicted under Ohio law for "knowingly caus[ing] or attempt[ing] to cause physical harm to a family or household member." Ohio Rev. Code § 2919.25(A). He challenges the district court's conclusion that those prior convictions constituted ACCA violent felonies. We review such determinations de novo. *Greer v. United States*, 938 F.3d 766, 770 (6th Cir. 2019).

In 2015, we held that a conviction under Ohio Rev. Code § 2919.25(A) categorically qualifies as an ACCA violent felony. *Gatson*, 776 F.3d at 411. The ACCA covers any crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another[,]" 18 U.S.C. § 924(e)(2)(B)(i)—i.e., "violent force . . . capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010). Citing the ACCA's "elements" clause, we explained in *Gatson* that knowingly causing, or attempting to cause, physical harm to a family or household member requires "to some extent, by definition," the use of force "capable of causing physical injury or pain to another[.]" 776 F.3d at 410-11 (quoting *Johnson*, 559 U.S. at 140).

Alexander acknowledges, as he must, that *Gatson* is this Circuit's "definitive" case on Ohio domestic violence offenses as ACCA predicates. Nevertheless, he argues that we should "revisit" its holding for two reasons. First, *Gatson* was decided before the ACCA's residual clause was

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conclude that we are bound by *Gatson*, and Alexander's domestic violence convictions qualify as violent felonies. *See Solomon*, 763 F. App'x at 445; *United States v. Melendez-Perez*, No. 20-3925, 2021 WL 3045781, at *3 (6th Cir. July 20, 2021); *Mickel*, 2022 WL 1100459, at *2; *United States v. Mitchell*, No. 21-3896, 2022 WL 12230276, at *3 (6th Cir. Oct. 21, 2022). The district court therefore properly classified Alexander as an armed career offender and properly applied the relevant Guidelines enhancement.

B. Custody for *Miranda* Purposes

Alexander next argues that the district court erred in determining that he was not in custody for *Miranda* purposes when he was seated in the back of the police cruiser and asked about the presence of a weapon in his car. When reviewing a district court's decision regarding a motion to suppress, we review factual findings for clear error and legal conclusions de novo. *United States v. Evans*, 581 F.3d 333, 340 (6th Cir. 2009). Whether a person is "in custody" for *Miranda* purposes is a mixed question of law and fact that is also reviewed de novo. *United States v. Levenderis*, 806 F.3d 390, 399 (6th Cir. 2015).

Law enforcement officials must advise a person of their *Miranda* rights before engaging in "custodial interrogation." *See Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966). "In determining whether a person is in custody in this sense, the initial step is to ascertain whether, in light of 'the objective circumstances of the interrogation,' a 'reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave.'" *Howes v. Fields*, 565 U.S. 499, 509 (2012) (cleaned up) (first quoting *Stansbury v. California*, 511 U.S. 318, 322-23 (1994) (per curiam), then quoting *Thompson v. Keohane*, 516 U.S. 99, 112 (1995)). Courts examine "all of the circumstances surrounding the interrogation," including the location of the questioning, its duration, statements made during the interview, the presence or absence of physical restraints

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during the interview, and the release of the interviewee at the end of the questioning. *Id.* (quoting *Stansbury*, 511 U.S. at 325); *see United States v. Hinojosa*, 606 F.3d 875, 883 (6th Cir. 2010) (identifying similar factors for courts' consideration and citing *Salvo*, 133 F.3d at 950).

Alexander's primary contention is that the initial traffic stop's objective was complete once his license had been run and confirmed to be suspended. He argues that Trimble's questions about the presence of a firearm came afterward and were unrelated to the traffic stop's purpose, thus converting the stop into an independent investigation. Alexander analogizes his circumstances to those of *United States v. Whitley*, 34 F.4th 522 (6th Cir. 2022), where we held that police questioning exceeded the scope and duration of a traffic stop based on traffic violations after officers saw a scale in the driver's lap and affirmatively decided to investigate the possibility of narcotics sales or possession. *Id.* at 530-31. But unlike the *Whitley* officers, Trimble asked Alexander about the prior traffic stop and his firearm while or just after retrieving information about Alexander's license and registration from the database. The questions "d[id] not measurably extend the duration of the stop": they occurred while it was happening. *Rodriguez v. United States*, 575 U.S. 348, 355 (2015); *United States v. Howard*, 815 F. App'x 69, 76 (6th Cir. 2020). Cf. *Whitley*, 34 F.4th at 527, 530-31 (questions after officers "abandoned their investigation of the traffic violation" exceeded scope of traffic stop).

More broadly, we find no error with the district court's analysis as to whether Alexander was in custody for *Miranda* purposes. As in *United States v. Wright*, 220 F. App'x 417 (6th Cir. 2007), Alexander was placed in the back of a police vehicle without handcuffs, and the questioning lasted only a couple of minutes. *Id.* at 421; *see Salvo*, 133 F.3d at 951; *Howard*, 815 F. App'x at 79. Especially important to our analysis is that Trimble's inquiries "address[ed] the traffic violation that warranted the stop . . . and attend[ed] to related safety concerns." *Rodriguez*, 575

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U.S. at 354; *see also United States v. Everett*, 601 F.3d 484, 495 (6th Cir. 2010) (“[O]fficers conducting a traffic stop may inquire about dangerous weapons.”), *abrogated on other grounds by Rodriguez*, 575 U.S. at 353, 356-67. Under the totality of these circumstances, the district court did not err by finding that no *Miranda* warning was required when Trimble initially questioned Alexander.

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** Alexander’s sentence and the district court’s order denying his November 14, 2021 motion to suppress.