OPINION

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RAYMOND L. ROGERS, Defendant-Appellant.

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

520 Fed. Appx. 727; 2013 U.S. App. LEXIS 6954

No. 12-3125

April 5, 2013, Filed

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Prior History

{2013 U.S. App. LEXIS 1}
(D.C. No. 6:10-CR-10186-JTM-1). (D. Kan.).

Disposition:

AFFIRMED.

Counsel For UNITED STATES OF AMERICA, Plaintiff - Appellee: James A. Brown, Office of the United States Attorney, District of Kansas, Topeka, KS.

For RAYMOND L. ROGERS, Defendant - Appellant: Sean C. McEnulty, McEnulty Law Firm, P.A., Wichita, KS.

Judges: Before HARTZ, BALDOCK, and GORSUCH, Circuit Judges.

CASE SUMMARY

PROCEDURAL POSTURE: A jury convicted defendant of robbing a federally-insured bank, brandishing a firearm during the robbery, and possessing a firearm after a felony conviction. The United States District Court for the District of Kansas sentenced defendant to 234 months imprisonment. Defendant appealed, challenging both his convictions and sentence.District court properly found the evidence of the actual robbery supported application of the two-point enhancement for physical restraint because defendant and his accomplices threatened the branch manager and the teller with handguns to facilitate the crime.

OVERVIEW: District court properly found the evidence of the actual robbery supported application of the two-point enhancement for physical restraint because defendant and his accomplices threatened the branch manager and the teller with handguns to facilitate the crime. Further, the enhancement was appropriate regardless of which of the three roles defendant played in the robbery because defendant was accountable at sentencing for all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant. Finally, given the overwhelming evidence of his guilt, defendant's roundabout attempt to undermine the jury's verdict based on the fact

that he wore a mask during the robbery to escape eyewitness identification was hardly mitigating evidence appropriate for allocution, and defendant failed to provide any objective basis to suggest the district court would have granted a lower sentence absent its obvious frustration with defendant's point (at the very least, a miscarriage of justice amounting to plain error could not be said to have occurred).

OUTCOME: The judgment of the district court was affirmed.

LexisNexis Headnotes

Criminal Law & Procedure > Trials > Motions for Acquittal
Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > Sufficiency of Evidence to Convict

An appellate court's review of the denial of a motion for judgment of acquittal pursuant to Fed. R. Crim. P. 29 is de novo. Viewing the evidence in the light most favorable to the Government, appellate courts ask whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. In so doing, appellate courts do not weigh evidence or credibility; appellate courts ask only whether the Government's evidence, credited as true, suffices to establish the elements of the crime.

U.S. Sentencing Guidelines Manual § 2B3.1(b)(4)(B) directs the court to increase a defendant's base offense level by two points if any person was physically restrained to facilitate the commission of the offense.

Criminal Law & Procedure > Sentencing > Adjustments
Evidence > Procedural Considerations > Burdens of Proof > Preponderance of Evidence

When determining the propriety of a sentence enhancement, appellate courts review the district court's factual findings for clear error and legal conclusions de novo. The Government bears the burden of establishing facts to support an enhancement by a preponderance of the evidence.

The enhancement for physical restraint is applicable when a defendant uses force, including force by gun point, to impede others from interfering with commission of the offense.

Criminal Law & Procedure > Sentencing > Adjustments

U.S. Sentencing Guidelines Manual § 1B1.3(a)(1)(A) explains that a defendant is accountable at sentencing for all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant.

Criminal Law & Procedure > Sentencing > Guidelines

Under U.S. Sentencing Guidelines Manual § 1B1.3(a)(1)(B), a defendant is responsible for all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction.

Criminal Law & Procedure > Sentencing > Imposition > Allocution
Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > Burdens of Proof

moments after the robbery, a motorist in the vicinity of the robbery reported red smoke coming from the Tahoe. Among the $102,743 stolen from the bank were bait money and dye-packs. A dye-pack is a bundle of what looks like money, but inside the bundle is a combustible canister of tear gas and red dye. Bait money is marked bills traceable to a specific bank. The responding officer found the Tahoe abandoned but saw a "large sum of money stained in red dye laying on the floor board."

Meanwhile, other officers were pursuing a blue Ford Escape that had been reported stolen at around the same time and from the same neighborhood as the Tahoe. The Escape neared an apartment {2013 U.S. App. LEXIS 4}complex about fourteen blocks from where the Tahoe had been abandoned. With the Escape still moving, three black men exited the vehicle and fled on foot. The two men {520 Fed. Appx. 729} who had jumped out of the passenger side of the vehicle ran toward building 12 of the complex. The driver fled in a different direction and was the first to be apprehended. Officers entered building 12 to search for the remaining two suspects. Officers apprehended the second man after they heard screaming coming from apartment 1211. At this point, the third man still remained at large. That man pounded on the door of apartment 1217 and entered uninvited when the tenant answered. According to the tenant, the man "looked like he had been running. He was sweaty." Officers proceeded to clear the apartments in building 12. In the process of removing five individuals from apartment 1217, an officer "saw a black male stick his head out from the . . . southwest bedroom into the hallway and look real quick and then go back . . . into the bedroom." Officers handcuffed that man, identified as Defendant.

Defendant wore a white t-shirt stained with red dye near its midsection. Forensics found the dye on Defendant's t-shirt to be consistent {2013 U.S. App. LEXIS 5}with the dye contained in a dye-pack. A search of apartment 1217 uncovered $62,300 wrapped in two bags in the bathroom's toilet tank. Some of the bills were stained with red dye. Some of the bills were bait money from Equity Bank. Inside the Chevy Tahoe investigators found a dye-stained bag, envelopes from Equity Bank, and several thousand dollars in dye-stained bills, including bait money and some specially marked $2 bills the branch manager had intended to give her children. Inside the Ford Escape investigators located numerous items of evidence linking the three men to the robbery including items of clothing, a wool cap with holes cut in it, and two loaded semiautomatic handguns-an Intratec AB-10 and a Bersa.

II.

Defendant first claims the evidence was insufficient to support his convictions because no one directly identified him as a participant in the bank robbery (perhaps because he was wearing a mask). 1 Our review of the denial of a motion for judgment of acquittal pursuant to Fed. R. Crim. P. 29 is de novo. See United States v. Vigil, 523 F.3d 1258, 1262 (10th Cir. 2008). Viewing the evidence in the light most favorable to the Government, we ask whether "any rational trier of {2013 U.S. App. LEXIS 6}fact could have found the essential elements of the crime beyond a reasonable doubt. In so doing, we do not weigh evidence or credibility; we ask only whether the Government's evidence, credited as true, suffices to establish the elements of the crime." United States v. Hutchinson, 573 F.3d 1011, 1033 (10th Cir. 2009) (internal citation omitted). Applying this standard to the record facts, we need not belabor the point. Suffice to say the Government presented ample evidence to support the jury's finding that Defendant was one of the three men who robbed Equity Bank.

Defendant next asserts the district court erred when it applied a two-point sentencing enhancement pursuant to U.S.S.G. § 2B3.1(b)(4)(B) to increase his base offense level. Subsection (b)(4)(B) directs the court to increase a defendant's base offense level by two points "if any person was physically restrained to facilitate the commission of the offense." When determining the propriety of a sentence

enhancement, {2013 U.S. App. LEXIS 7}we review the district court's factual findings for clear error and legal conclusions de novo. See United States v. {520 Fed. Appx. 730} Miera, 539 F.3d 1232, 1234 (10th Cir. 2008). The Government bears the burden of establishing facts to support an enhancement by a preponderance of the evidence. See United States v. Flonnory, 630 F.3d 1280, 1285-86 (10th Cir. 2011).

The enhancement for physical restraint is applicable when a defendant uses force, including force by gun point, to impede others from interfering with commission of the offense. See Miera 539 F.3d at 1234. Again, we need not tarry. In this case, the district court properly found the evidence of the actual robbery supported application of the two-point enhancement because Defendant and his accomplices threatened the branch manager and the teller with handguns to facilitate the crime. 2

Lastly, Defendant argues the district court denied him his right to allocution. Because the parties agree Defendant did not object in the district court, we review only for plain error pursuant to Fed. R. Crim P. 52(b). See United States v. Mendoza-Lopez, 669 F.3d 1148, 1150-51 (10th Cir. 2012). Before imposing sentence, the court "must . . . address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence." Fed. R. Crim. P. 32(i)(4)(A)(ii). "[A] defendant's right of allocution is violated if a district court indicates it is unwilling to listen to the statements or information a defendant wishes to offer in *mitigation* of his sentence." Mendoza-Lopez, 669 F.3d at 1151 (emphasis added).

The district court announced its proposed sentence and then asked Defendant {2013 U.S. App. LEXIS 9}"is there anything that you would like to say on your own behalf?" Defendant responded:

> Your Honor, . . . I've been convicted of these crimes and, you know, I apologize for . . . what's been done that's got us here in court today, but I don't think that a high end of a sentence like that is appropriate for me at this age that I am and, you know, given the fact that I got three kids and a wife, I mean, a low end would be justifiable for me, if you ask my consideration about anything. I mean, I didn't plan on getting 230 some months, that's like a lot of time to a person. But I guess it's really not too much I can say within the matter.When Defendant had concluded, the court thanked him and then explained in detail why its proposed sentence was the appropriate sentence. Defendant interjected and the following exchange took place:
>
> THE DEFENDANT: Can I ask you a question, Your Honor?
>
> THE COURT: Sure.
>
> THE DEFENDANT: I mean, no one really ever said that I was exactly robbed the bank or anything, but-
>
> THE COURT: Mr. Rogers, if you are trying to tell me now-
>
> THE DEFENDANT; No, I'm not saying-
>
> THE COURT: No, no, what you are trying to tell me now is that nobody {520 Fed. Appx. 731} said that you were one of the people {2013 U.S. App. LEXIS 10}in the bank. Well, the fact is they did say that. There was testimony at your trial about that, and a jury found even as an aider and abetter that you are every bit as responsible as a principal if you weren't a principal. And let me tell you something else, Mr. Rogers. If you try to excuse or diminish in any way, again, in hearing your involvement, your role in this, I'm going to look for a way to enhance your sentence even further. Do you understand that?
>
> THE DEFENDANT: Yes sir.
>
> THE COURT: All right. Were you about to tell me that you were not as important a part of this as

UNITED STATES MOTION TO DIMISS GRAND JURY'S
JUNE 21, 2011, FIRST SUPERSEDING INDICTMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Criminal Action
v.	)	No. 10-10186-01, 02, 03-JTM
	)	
RAYMOND L. ROGERS,	)	
DAVID L. HOLLIS III, and	)	
SHELAN D. PETERS,	)	
	)	
Defendant.	)	

MOTION TO DISMISS WITHOUT PREJUDICE

Comes now the United States of America, by and through Aaron L. Smith, Special Assistant United States Attorney, and moves the Court to dismiss without prejudice the First Superseding Indictment (Doc. #54) filed in this case on June 21, 2011. **The United States intends to proceed on the original indictment (Doc. #12) filed in this case on December 7, 2010.**

WHEREFORE, the United States respectfully requests that the Court dismiss without prejudice the First Superseding Indictment filed on June 21, 2011, in the above-captioned case.

Respectfully submitted,

BARRY R. GRISSOM
United States Attorney

s/ Aaron L. Smith
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CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2011, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following:

Sean McEnulty, *attorney for defendant Rogers.*

s/ Aaron L. Smith
AARON L. SMITH
Special Assistant United States Attorney

APPENDIX C

KANSAS DISTRICT DISMISSAL ORDER

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Criminal Action
v.	)	No. 10-10186-01, 02, 03-JTM
	)	
RAYMOND L. ROGERS,	)	
DAVID L. HOLLIS III, and	)	
SHELAN D. PETERS,	)	
	)	
Defendant.	)	

ORDER

Now on this 28th day of November, 2011, the Court, having read and considered the Motion to Dismiss Without Prejudice filed herein by the United States, and being satisfied good cause exists,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the First Superseding Indictment filed herein on June 21, 2011, is dismissed without prejudice. **The United States intends to proceed on the original indictment (Doc. #12) filed in this case on December 7, 2010.**

s/J. Thomas Marten
HONORABLE J. THOMAS MARTEN
UNITED STATES DISTRICT COURT JUDGE