

United States Court of Appeals for the Fifth Circuit

No. 22-10352
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

June 15, 2023

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ALFRED JOHN McDONALD,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:20-CR-242-1

Before KING, HIGGINSON, and WILLETT, *Circuit Judges.*

PER CURIAM:*

Alfred John McDonald pleaded guilty to conspiracy to possess with intent to distribute a controlled substance. The presentence report (PSR) assigned a base offense level of 30 based on 1,139.9 kilograms of marijuana. Among other adjustments, the PSR added two levels under U.S.S.G. § 2D1.1(b)(1) for possessing a dangerous weapon. McDonald was assigned

* This opinion is not designated for publication. See 5TH CIR. R. 47.5.

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14 criminal history points resulting in a criminal history category VI. Twelve of those points were from four aggravated robberies committed in 1995. This combination resulted in a recommended guidelines range of 360 to 480 months in prison. McDonald filed objections to the drug quantity finding, the dangerous-weapon enhancement, and his criminal history score. The district court overruled all the objections. The district court granted McDonald a downward variance and sentenced him to 150 months in prison and four years of supervised release.

McDonald challenges district court's factual finding on drug quantity based on drug ledgers and other documents. We review the district court's drug-quantity finding for clear error when, as here, a defendant objects to the finding in the district court and will affirm the quantity finding if it is plausible in the light of the entire record. *United States v. Betancourt*, 422 F.3d 240, 246 (5th Cir. 2005). The evidence supports the plausibility of the district court's interpretation of the ledgers and documents, and McDonald has not shown otherwise. See *United States v. Kearby*, 943 F.3d 969, 974 (5th Cir. 2019); *United States v. Fields*, 932 F.3d 316, 320 (5th Cir. 2019).

Next, McDonald argues that the district court erred by assigning 12 of the 14 criminal history points because the 1995 offenses were too far in the past to qualify for criminal history points under U.S.S.G. § 4A1.2(e)(1). McDonald challenges the finding that the relevant conduct for the current offense began in 2017. Relevant conduct is a factual question subject to clear error review. *United States v. Ekanem*, 555 F.3d 172, 175 (5th Cir. 2009). Contrary to McDonald's assertion, the relevant conduct finding was not based on unsupported statements in the PSR and was plausible in the light of the record as a whole. See *Kearby*, 943 F.3d at 974 n.3; *Betancourt*, 422 F.3d at 246.

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Finally, McDonald argues that the district court erred in applying a two-level enhancement for possession of a dangerous weapon under § 2D1.1(b)(1). The district court's application of § 2D1.1(b)(1) is a factual finding reviewed for clear error. *United States v. King*, 773 F.3d 48, 53 (5th Cir. 2014). The enhancement "reflects the increased danger of violence when drug traffickers possess weapons," and it should be applied "if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." *See* § 2D1.1, comment. (n.11(A)). Contrary to McDonald's argument, the district court in this case stated without ambiguity that it was applying the enhancement because the evidence established that the firearm was in the same location as the drugs and drug paraphernalia and could be used to protect the drug trafficking. *See King*, 773 F.3d at 53. Accordingly, it is not clearly improbable that the weapon was connected to the offense. *See id.* The district court's application of § 2D1.1(b)(1) was not clearly erroneous.

AFFIRMED.

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J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS
Fort Worth Division

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

ALFRED JOHN MCDONALD

Case Number: 4:20-CR-00242-P(01)

U.S. Marshal's No.: 05377-509

Shawn Smith, Assistant U.S. Attorney

Brian Poe, Attorney for the Defendant

On April 7, 2021 the defendant, ALFRED JOHN MCDONALD, entered a plea of guilty as to Count One of the Indictment filed on September 16, 2020. Accordingly, the defendant is adjudged guilty of such Count, which involves the following offense:

Title & Section

21 USC § 846

Nature of Offense

Conspiracy to Possess with Intent to Distribute a
Controlled Substance

Offense Ended

August 2020

Count

One

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to Title 18, United States Code § 3553(a), taking the guidelines issued by the United States Sentencing Commission pursuant to Title 28, United States Code § 994(a)(1), as advisory only.

The defendant shall pay immediately a special assessment of \$100.00 as to Count One of the Indictment filed on September 16, 2020.

The defendant shall notify the United States Attorney for this district within thirty days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Sentence imposed March 31, 2022.



MARK T. PITTMAN
U.S. DISTRICT JUDGE

Signed March 31, 2022.

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IMPRISONMENT

The defendant, ALFRED JOHN MCDONALD, is hereby committed to the custody of the Federal Bureau of Prisons (BOP) to be imprisoned for a term of **One Hundred Fifty (150) months** as to Count One of the Indictment filed on September 16, 2020.

The Court recommends to the Bureau of Prisons that the defendant be allowed to participate in the Inmate Financial Responsibility Program. The Court further recommends to the BOP that the defendant be incarcerated at FCI El Reno, or FMC Fort Worth, if he so qualifies.

The defendant is remanded to the custody of the United States Marshal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **Four (4) years** as to Count One of the Indictment filed on September 16, 2020.

While on supervised release, in compliance with the standard conditions of supervision adopted by the United States Sentencing Commission, the defendant shall:

- 1) The defendant shall report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame;
- 2) After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed;
- 3) The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer;
- 4) The defendant shall answer truthfully the questions asked by the probation officer;
- 5) The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change;
- 6) The defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that he or she observed in plain view;

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- 7) The defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the probation excuses the defendant from doing so. If the defendant does not have full-time employment, he or she shall try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her employment (such as the position or the job responsibilities), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change;
- 8) The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate or interact with that person without first getting the permission of the probation officer;
- 9) If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within 72 hours;
- 10) The defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed , or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers);
- 11) The defendant shall not act or make an agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court;
- 12) If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk; and,
- 13) The defendant shall follow the instructions of the probation officer related to the conditions of supervision.

In addition the defendant shall:

not commit another federal, state, or local crime;

not possess illegal controlled substances;

not possess a firearm, destructive device, or other dangerous weapon;

cooperate in the collection of DNA as directed by the U.S. probation officer;

submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court;

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pay the assessment imposed in accordance with 18 U.S.C. § 3013;

take notice that if this judgment imposes a fine, you must pay in accordance with the Schedule of Payments sheet of this judgment;

take notice that if, upon commencement of the term of supervised release, any part of the fine ordered by this judgment remains unpaid, the defendant shall make payments on such unpaid amount to the U.S. District Clerk, 501 West 10th Street, Room 310, Fort Worth, Texas 76102, at the rate of at least \$100 per month. The first such payment shall be made no later than 60 days after the defendant's release from confinement and another payment to be made on the same day of each month thereafter until the fine amount is paid in full. Any unpaid balance of the fine ordered by this judgment shall be paid in full 60 days prior to the termination of the term of supervised release;

provide to the probation officer complete access to all business and personal financial information; and,

participate in an outpatient program approved by the probation officer for treatment of narcotic or drug or alcohol dependency that will include testing for the detection of substance use, abstaining from the use of alcohol and all other intoxicants during and after completion of treatment, contributing to the costs of services rendered (copayment) at the rate of at least \$25 per month.

FINE/RESTITUTION

The defendant is ordered to pay a fine of \$5,000 through the office of the U.S. District Clerk, 501 West 10th Street, Room 310, Fort Worth, TX 76102-3673. This amount is the total of the fine imposed on Count 1 of the one-count Indictment. The Court has determined that the defendant does not have the ability to pay interest; therefore, the interest requirement is waived pursuant to 18 U.S.C. § 3612(f)(3). If, upon commencement of the term of supervised release, any part of the fine ordered by this judgment remains unpaid, the defendant shall make payments on such unpaid balance at the rate of at least \$100 per month. The first such payment shall be made no later than 60 days after the defendant's release from confinement and another payment shall be made on the same day of each month thereafter until the fine is paid in full.

Restitution is not ordered because there is no victim other than society at large.

FORFEITURE

Pursuant to 18 U.S.C. §982(a)(1) and 28 U.S.C. § 2461(c), it is hereby ordered that the defendant's interest in the following property is condemned and forfeited to the United States: \$384,247 seized on August 18, 2020, and a Smith & Wesson M&P Shield, .40-caliber handgun bearing Serial No. HWF4878, including any ammunition, magazines, and/or accessories recovered with the firearm.

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RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

United States Marshal

BY
Deputy Marshal