

APPENDIX

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

August 16, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOEL FLORES,

Defendant - Appellant.

No. 22-1181
(D.C. No. 1:19-CR-00522-WJM-1)
(D. Colo.)

ORDER AND JUDGMENT*

Before **MORITZ, BALDOCK**, and **MURPHY**, Circuit Judges.**

Subsection (c)(1)(A)(i) of 18 U.S.C. § 924 provides in relevant part that “any person who, during and in relation to any . . . drug trafficking crime . . . uses or carries a firearm, *or* who, in furtherance of any such crime, possesses a firearm, shall . . . be sentenced to a term of imprisonment of not less than 5 years[.]” (emphasis added). A defendant who “*uses or carries*” a firearm “*during and in relation to*” a drug trafficking offense violates the subsection. (emphasis added). But so does a defendant who

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

“possesses” a firearm “*in furtherance of*” a drug trafficking offense. (emphasis added). In other words, subsection (c)(1)(A)(i) defines two crimes. See *United States v. Iiland*, 254 F.3d 1264, 1270–74 (10th Cir. 2001). A federal trial jury convicted Defendant Joel Flores of the second offense. According to Defendant, however, the evidence was insufficient to meet the standard that he “possessed” a firearm “in furtherance of” a drug trafficking offense because the Government presented no evidence beyond that which was necessary to meet the standard that he “possessed” a firearm “during and in relation to” the offense, which Defendant points out is not a crime under § 924(c)(1)(A)(i). Exercising appellate jurisdiction under 28 U.S.C. § 1291 and applying the appropriate standard of review for a challenge to the sufficiency of the evidence, see *United States v. King*, 632 F.3d 646, 650 (10th Cir. 2011), we hold the evidence was sufficient under our precedents to sustain Defendant’s conviction for possessing a firearm in furtherance of a drug trafficking offense and affirm.

Defendant admits the relevant facts proven at trial. Around 2:00 a.m. on April 17, 2019, Defendant was the lone passenger in a white sedan traveling the streets of Greeley, Colorado. When a police officer traveling in the opposite direction noticed the sedan’s rear license plate was not illuminated, he made a U-turn. Fearing the worst, the sedan’s driver accelerated to more than sixty-five miles an hour in a thirty-five mile an hour zone. The driver soon collided with a curb as he attempted to make a left-hand turn in front of a liquor store. The sedan’s airbags deployed and its back windshield shattered. Defendant and the driver fled from the scene in different directions. The officer lost site of the driver but observed Defendant run to the right, around the

backside of the liquor store. Large bushes covered the area beyond which was a six-foot fence surrounding an adjacent trailer park.

Backup assistance, including a police canine trained to detect human odor, soon arrived. A search of the abandoned sedan uncovered a spent 9mm shell casing in its front console. With the assistance of the canine, officers searched the trailer park and discovered Defendant hiding under a trailer porch. A search of Defendant's person revealed (1) a 9mm bullet in his jacket pocket, (2) cash in small denominations in the front pocket of his hoodie, and (3) 12.3 grams of 98% pure methamphetamine in the same location. Additional evidence, including a twenty- and fifty-dollar bill, were uncovered along Defendant's presumptive flight path. After the canine alerted to a scent in the bushes, officers located a 9mm Smith & Wesson handgun. The gun's magazine contained three bullets. A fourth bullet was in the gun's chamber ready to fire with the pull of a trigger. Defendant acknowledges that subsequent testing confirmed the shell casing discovered in the sedan had been used in the firearm located in the bushes. In an interview following Miranda warnings, Defendant admitted the firearm belonged to him and he intended to sell the methamphetamine found on his person. Defendant admitted discarding the gun behind the liquor store. When asked where he had been carrying the gun, Defendant indicated on his ankle.

As a result of the foregoing incident, a federal grand jury indicted Defendant for (1) being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) (Count I), (2) possessing with intent to distribute methamphetamine in violation of 21 U.S.C. § 841(a)(1) (Count II), and (3) possessing a firearm in furtherance of a drug

trafficking crime in violation of § 924(c)(1)(A)(i) (Count III). Following a trial, a jury convicted Defendant on all counts. The district court subsequently sentenced Defendant to concurrent 60-month terms of imprisonment on Counts I and II and a consecutive 60-month term of imprisonment on Count III. On appeal, Defendant challenges only his § 924(c)(1)(A)(i) conviction and its mandatory five-year sentence of imprisonment. Defendant acknowledges that he possessed a firearm at the same time he possessed methamphetamine with the requisite intent to distribute. But he says the evidence the Government presented at trial was insufficient to establish that the firearm he possessed was “in furtherance of” his drug trafficking activity. According to Defendant, “the Tenth Circuit’s current interpretation of ‘in furtherance of’ adds nothing to ‘during and in relation to,’ and is thus contrary to the expressed intent of Congress” that the former phrase imposes a greater burden of proof on the prosecution than the latter. We disagree. “Although the differences between the [two] standards are ‘subtle’ and ‘somewhat elusive,’ they exist nonetheless.” *United States v. Combs*, 369 F.3d 925, 933 (6th Cir. 2004).

We have explained that the “during and in relation to” language in subsection (c)(1)(A) means the gun used or carried “at least must facilitate, or have the *potential* of facilitating, the drug trafficking offense.” *Iiland*, 254 F.3d at 1271 (emphasis added) (brackets and quotation marks omitted) (quoting *Smith v. United States*, 508 U.S. 223, 238 (1993)). To establish that a defendant possessed the gun “in furtherance of” a drug trafficking offense, however, presents a “slightly higher standard.” *Id.* (emphasis omitted). The Government must establish more than just “potential,” perhaps because

the word “possesses” encompasses a broader physical spectrum than “uses or carries.” 18 U.S.C. § 924(c)(1)(A). *See United States v. Basham*, 268 F.3d 1199, 1207 (10th Cir. 2001) (describing *Iiland* as holding the “in furtherance of” requirement as a higher standard than the “during and in relation to” requirement). Namely, “we require that the weapon further, promote, or advance a drug trafficking crime.” *King*, 632 F.3d at 655. To show a firearm was possessed “in furtherance of” of drug-trafficking crime under §924(c)(1)(A), the Government “must establish some nexus between the firearm[] and the underlying drug trafficking crime.” *Id.*

Of course, an intent to possess a firearm “in furtherance of” a drug trafficking crime is usually proven, like it was here, through circumstantial evidence. *Id.* Our precedents have identified a nonexclusive list of factors that are relevant when assessing whether the Government has established the requisite nexus between the firearm and drug-trafficking offense. Among these factors are (1) the sort of drug activity being conducted, (2) the accessibility of the firearm, (3) the type of firearm, (4) the legal status of the firearm, (5) whether the firearm was loaded, (6) the proximity of the firearm to drugs and drug profits, and (7) the time and circumstances under which the firearm was found. *Id.* In this case, Defendant was in the business of selling “user” amounts of methamphetamine on the streets of Greeley, Colorado at 2:00 a.m. in the morning. Defendant admitted he had the gun strapped to his ankle just prior to discarding it while fleeing from the police. The firearm, of suspect origin, was chambered, loaded, and ready to fire. Defendant possessed the firearm in close proximity to both his drugs and apparent drug profits. A shell casing found in the

sedan was identified as coming from Defendant's firearm. The bottom line is a reasonable jury could conclude that Defendant had access to the firearm on his person while he conducted his drug transactions. As we have previously observed: "When guns and drugs are found together and a defendant has been convicted of possession with intent to distribute, the gun, whether kept for protection from robbery of drug-sale proceeds, or to enforce payment for drugs, may reasonably be considered to be possessed 'in furtherance of' an ongoing drug-trafficking crime." *United States v. Trotter*, 483 F.3d 694, 702 (10th Cir. 2007) (quoting *United States v. Garner*, 338 F.3d 78, 81 (1st Cir. 2003)).

AFFIRMED.

Entered for the Court

Bobby R. Baldock
Circuit Judge