

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

August 22, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSEPH EUGENE DIX,

Defendant - Appellant.

No. 23-3035
(D.C. No. 5:22-CR-40018-EFM-1)
(D. Kan.)

ORDER AND JUDGMENT*

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

Joseph Eugene Dix entered a conditional plea of guilty to one count of being a convicted felon in possession of a firearm and ammunition in violation of 18 U.S.C. § 922(g)(1). In relevant part, § 922(g)(1) makes it unlawful for a convicted felon to “possess in or affecting commerce, any firearm or ammunition.” In exchange for Dix’s plea, the government agreed he could appeal (1) the district court’s denial of his motion to dismiss the count on the ground that the passage of § 922(g)(1)

* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties’ request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

exceeded Congress’s Commerce Clause power;¹ and (2) the district court’s denial of his motion for a pretrial determination regarding his proposed jury instruction, which would have required the jury to find his possession of the firearm or ammunition contemporaneously affected interstate commerce.² In each ruling, the district court concluded that it was bound by precedent to reject Dix’s arguments.

On appeal, Dix concedes that this court’s precedents foreclose success on both of his arguments, explaining that he presents them to preserve further review. We agree with Dix’s concession. Dix’s argument that possession of a firearm or ammunition, as described in § 922(g)(1), requires a contemporaneous affect on interstate commerce is foreclosed by precedents of this court applying *Scarborough v. United States*, 431 U.S. 563 (1977), to § 922(g)(1). *See, e.g., United States v. Campbell*, 603 F.3d 1218, 1220 n.1 (10th Cir. 2010); *United States v. Patton*, 451 F.3d 615, 634–35 (10th Cir. 2006); *United States v. Dorris*, 236 F.3d 582, 584–86 (10th Cir. 2000). Dix’s argument that the “affecting commerce” element of § 922(g)(1) exceeds Congress’s powers under the Commerce Clause is also foreclosed by this circuit’s precedent. *See, e.g., Campbell*, 603 F.3d at 1220 n.1;

¹ The Commerce Clause, U.S. Const. art. I, § 8, cl. 3, provides: “The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]”

² The district court also overruled Dix’s objection to the government’s proposed instruction, which would have required the jury to find only that the firearm or ammunition had moved in interstate or foreign commerce at any time after manufacture. The parties agreed that the firearm and ammunition “had been shipped and transported in interstate or foreign commerce,” R., Vol. 1 at 60, but not that Dix had shipped or transported them.

United States v. Urbano, 563 F.3d 1150, 1154 (10th Cir. 2009); *Patton*, 451 F.3d at 634–35; *Dorris*, 236 F.3d at 584–86; *United States v. Farnsworth*, 92 F.3d 1001, 1006 (10th Cir. 1996); *United States v. Bolton*, 68 F.3d 396, 400 (10th Cir. 1995).

“We are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court.” *United States v. Manzanares*, 956 F.3d 1220, 1225 (10th Cir. 2020) (internal quotation marks omitted). Neither condition is satisfied here. Consequently, exercising jurisdiction under 28 U.S.C. § 1291, we affirm the district court’s judgment. We decline Dix’s invitation “to weigh in on the merits in anticipation of further review,” *Aplt. Reply Br.* at 1.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge

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United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

August 28, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DONOVAN T. PHELPS,

Defendant - Appellant.

No. 23-3012
(D.C. No. 5:21-CR-40098-TC-1)
(D. Kan.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **EID**, and **CARSON**, Circuit Judges.

Donovan T. Phelps appeals his conviction for being a felon in possession of a firearm under 18 U.S.C. § 922(g). He contends § 922(g)(1) violates the Commerce Clause, which he says requires a showing that his possession had a substantial effect on interstate commerce—that is, Phelps contends the government must show not only that he possessed a firearm that previously traveled in interstate commerce, but that he possessed it when it traveled in interstate commerce. Phelps acknowledges,

* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. 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.

however, that our cases have soundly rejected these arguments. *See* Aplt. Br. at 2 n.3; *id.* at 5, n.4. Indeed, both this court and the Supreme Court have held that a sufficient nexus to interstate commerce exists if the firearm traveled across state lines at some time. *See Scarborough v. United States*, 431 U.S. 563, 577 (1977) (addressing predecessor statute to § 922(g) and observing that “Congress sought to reach possessions broadly, with little concern for when the nexus with commerce occurred”); *United States v. Urbano*, 563 F.3d 1150, 1154 (10th Cir. 2009) (“[I]f a firearm has traveled across state lines, the minimal nexus with interstate commerce is met and the statute can be constitutionally applied.”); *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009) (recognizing this court has “explicitly rejected” the argument that “§ 922(g) violates the Commerce Clause where . . . the crime’s only connection to interstate commerce is the firearm’s crossing of state lines”); *United States v. Dorris*, 236 F.3d 582, 584-86 (10th Cir. 2000) (rejecting argument that the government must prove a substantial effect on interstate commerce and holding that post-*Scarborough* Supreme Court cases did not require overturning this court’s precedent); *United States v. Farnsworth*, 92 F.3d 1001, 1006 (10th Cir. 1996) (rejecting argument that the government must prove a substantial effect on interstate commerce and upholding conviction where evidence indicated “gun had been manufactured in a different state from that in which it was found”); *United States v. Bolton*, 68 F.3d 396, 400 (10th Cir. 1995) (“Section 922(g)’s requirement that the firearm have been, at some time, in interstate commerce is sufficient to establish its constitutionality under the Commerce Clause.”); *see also United States v. Campbell*,

603 F.3d 1218, 1220 n.1 (10th Cir. 2010) (rejecting “Commerce Clause challenge to [§] 922(g)(1)’s prohibition of felons’ intrastate possession of ammunition that once traveled in interstate commerce”); *United States v. Patton*, 451 F.3d 615, 634-36 (10th Cir. 2006) (relying on *Scarborough* to reject Commerce Clause challenge to prohibition on felons in possession of body armor that “moved across state lines at some point in its existence”). Given these authorities, Phelps’ arguments are unavailing.

Accordingly, the district court’s judgment is affirmed.

Entered for the Court

Timothy M. Tymkovich
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Case No. 22-40018-EFM

JOSEPH EUGENE DIX,

Defendant.

MEMORANDUM AND ORDER

Defendant Joseph Eugene Dix was charged by the Grand Jury with one count of possession of a firearm and ammunition by a convicted felon, in violation of [18 U.S.C. § 922\(g\)\(1\)](#). Dix now moves, under Rule 12 of the Federal Rules of Criminal Procedure, to dismiss the Indictment against him, on the ground that § 922(g) is an unconstitutional exercise of the Congress's power under the Commerce Clause in Article I, Section 8, Clause 3 of the United States Constitution. Dix recognizes that precedent is squarely against him on this issue and notes that he merely hopes to preserve the issue for appeal. The Court, bound by precedent, must deny Dix's Motion.

I. Factual and Procedural Background

According to the Indictment in this case, Dix was charged with knowingly possessing "in and affecting commerce" a firearm and miscellaneous ammunition while knowing that he had

previously been convicted of a crime punishable by a term of imprisonment exceeding one year—namely, use of a firearm during and in relation to a drug trafficking crime, in violation of [18 U.S.C. § 924\(c\)\(1\)\(A\)](#). The Indictment further charged that the firearm and ammunition “had been shipped and transported in interstate and foreign commerce.”

Dix anticipates that the evidence at trial will show that: (1) the firearm was manufactured in Yonkers, New York; (2) he came into possession of that firearm only days before his arrest on August 26, 2021 (3) he possessed the firearm wholly within the District of Kansas; and (4) he never transported or caused the firearm to be transported across state lines.

This matter is set for trial on November 7 and 8 of 2022. Dix moved to dismiss the indictment against him on September 1, 2022.

II. Legal Standard

Rule 12 of the Federal Rules of Criminal Procedure authorizes the district court to resolve before trial those motions “that the court can determine without a trial on the merits.”¹ The Supreme Court has held that Rule 12 permits a pretrial resolution of a motion to dismiss the indictment only when “trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense.”² According to the Tenth Circuit, a district court may consider a motion to dismiss the indictment even when it relies on facts outside the indictment where “[1] the operative facts are undisputed and [2] the government fails to object to the district court’s consideration of those undisputed facts, and [3] the district court can

¹ [Fed. R. Crim. P. 12\(b\)\(1\)](#).

² *United States v. Covington*, [395 U.S. 57, 60](#) (1969).

determine from them that, *as a matter of law*, the government is incapable of proving its case beyond a reasonable doubt.”³

III. Analysis

Dix moves to dismiss the indictment against him on the ground that [18 U.S.C. § 922\(g\)](#), the statute under which he is charged, exceeds the bounds of Congress’s authority under the Commerce Clause. The Commerce Clause gives Congress the power “to regulate commerce with the foreign nations, and among the several states, and with the Indian tribes.”⁴ Under this authority, [18 U.S.C. § 922\(g\)](#) makes it unlawful for “any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”

Interpreting this statute, the Supreme Court in *Scarborough v. United States*⁵ concluded that proof the possessed firearm previously traveled in interstate commerce was sufficient to satisfy the nexus between the possession of the firearm by the felon and commerce.⁶ After *Scarborough*, the Tenth Circuit held in *United States v. Bolton*⁷ that § 922(g) was a valid exercise of Congress’s power under the Commerce Clause.⁸ The Tenth Circuit later read *Scarborough* as “assum[ing]

³ *United States v. Pope*, [613 F.3d 1255, 1260](#) (10th Cir. 2010) (quotations omitted).

⁴ U.S. Const. art I, § 8, cl. 3.

⁵ [431 U.S. 563](#) (1977).

⁶ *Id.* at 577.

⁷ [68 F.3d 396](#) (10th Cir. 1995).

⁸ *Id.* at 400.

that Congress could constitutionally regulate the possession of firearms solely because they had previously moved across state lines.”⁹

The Court need not delve deep into Dix’s arguments to concur with his statement, at the outset, that precedent is against him on this issue. As noted above, he merely raises this issue to preserve it for appeal. This is a proper step, and the issue is of course preserved for appeal. But the Court is bound by precedent to conclude that § 922(g) represents a valid exercise of Congress’s power under the Commerce Clause. Therefore, Dix’s Motion to Dismiss the Indictment against him is denied.

IT IS THEREFORE ORDERED that Defendant’s Motion to Dismiss the Indictment ([Doc. 12](#)) is **DENIED**.

IT IS SO ORDERED.

Dated this 11th day of October, 2022.



ERIC F. MELGREN
CHIEF UNITED STATES DISTRICT JUDGE

⁹ *United States v. Patton*, [451 F.3d 615, 634](#) (10th Cir. 2006); see also *United States v. Urbano*, [563 F.3d 1150, 1153-55](#) (10th Cir. 2009).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Case No. 22-40018-EFM

JOSEPH EUGENE DIX,

Defendant.

MEMORANDUM AND ORDER

Before the Court is Defendant Joseph Dix’s Motion for a Pretrial Determination ([Doc. 23](#)) as to the jury instruction that will be given at his trial. The Court agrees to make such a determination, as Defendant represents it will satisfy his desire to preserve this issue for appellate review as well as possibly allow the resolution of the case without a jury trial. As laid out below, and as required by Tenth Circuit precedent, the Court rejects Defendant’s proposed jury instruction and overrules his objection to the Government’s proposed instruction.

Defendant is charged with possession of a firearm and ammunition when he was prohibited from doing so because of a prior felony conviction, in violation of [18 U.S.C. § 922\(g\)\(1\)](#). He asks the Court to instruct the jury that his possession of the firearm and ammunition must be contemporaneous with the “in or affecting” commerce jurisdictional element of the offense.

Specifically, Defendant offers the following proposed jury instruction as to the jurisdictional element of the offense: “Joseph Dix’s possession of the firearm or ammunition contemporaneously affected interstate commerce [or] occurred in interstate commerce.”

Defendant’s instruction conflicts with the Government’s proposed jurisdictional instruction, which would instruct the jury that, in order to return a guilty verdict, it must find:

[T]hat the firearm and/or ammunition, at any time after it was manufactured, moved from one state to another or from a foreign country into the United States. The travel need not have been connected to the charge in the indictment, need not have been in furtherance of any unlawful activity and need not have occurred while defendant possessed the firearm and/or ammunition.

Likewise, the Tenth Circuit Pattern Instruction provides that the jury must find that “before the defendant possessed the firearm [or ammunition], the firearm [or ammunition] had moved at some time from one state to another [or from a foreign country to the United States].”¹

Defendant objects to the Government’s proposed instruction. He also objects to the pattern instruction comment that states “[d]epending on the evidence, the court should also instruct that the government is not required to prove that the defendant himself moved the firearm or ammunition in interstate or foreign commerce.”² He, however, recognizes that the Court is bound by precedent to rule against him on this issue.³ Therefore, the Court rejects Defendant’s proposed jury instruction and overrules his objection to the Government’s proposed instruction.

¹ 10th Cir. Pattern Criminal Jury Instr. 2.44

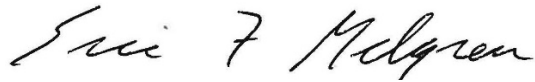
² *Id.* 2.44 cmt.

³ See *United States v. Urbano*, [563 F.3d 1150, 1152](#) (10th Cir. 2009) (“[T]his court’s precedent makes clear the government can meet § 922(g)(1)’s jurisdictional element by showing the firearm traveled in interstate commerce at some point in the past.”).

IT IS THEREFORE ORDERED that Defendant's Motion for a Pretrial Determination is ([Doc. 23](#)) is **GRANTED**. The Court rejects his proposed jury instruction and overrules his objection to the Government's proposed instruction.

IT IS SO ORDERED.

Dated this 19th day of October, 2022.

A handwritten signature in black ink, reading "Eric F. Melgren". The signature is written in a cursive, flowing style.

ERIC F. MELGREN
CHIEF UNITED STATES DISTRICT JUDGE

		Defendant Phelps. Defendant remanded to custody of US Marshals. (Court Reporter Sherry Harris) (ta) (Entered: 03/23/2022)
05/10/2022	<u>20</u>	Unopposed MOTION to Continue Status Conference by Donovan T. Phelps. (Folsom, Carl) (Entered: 05/10/2022)
05/10/2022	21	ORDER as to Defendant Donovan Phelps granting <u>20</u> Motion to Continue Status Conference. Defendant moves for a 45-day continuance of the May 11, 2022 status conference. Additional time is needed to permit Mr. Phelps to await resolution of significant legal issues to be decided in <i>United States v. Adams</i> . The government does not oppose requested continuance. Defendant's request for a continuance outweighs the interest of the public to a speedy trial as required by 18 U.S.C. § 3161(c)(1). Defendant has been advised of his speedy trial rights, agrees that a continuance is in his best interest, and understands the impact of a continuance on his speedy-trial time. The Court therefore finds under the ends-of-justice provision of the Speedy Trial Act that the ends of justice served by allowing Defendant and counsel time to accomplish the above tasks outweighs the best interests of the public and Defendant in a trial beginning by the current speedy trial deadline. Status Conference set for <u>6/29/2022 at 09:00 AM</u> in Topeka Courtroom 401 (TC) before District Judge Toby Crouse. The period of time between today and 6/29/2022 is deemed as excludable time under the Speedy Trial Act. Signed by District Judge Toby Crouse on 5/10/22. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (ta) (Entered: 05/10/2022)
06/29/2022	<u>22</u>	MINUTE ENTRY for proceedings held before District Judge Toby Crouse: STATUS CONFERENCE as to DONOVAN T. PHELPS held on 6/29/2022. <i>See Minute Sheet for details.</i> STATUS CONFERENCE set for <u>8/10/2022 at 09:00 AM</u> in Topeka Courtroom 401 (TC) before District Judge Toby Crouse. Court makes ends of justice findings pursuant to 18 U.S.C. § 3161(h)(7)(A) and speedy trial time is excluded from 6/29/2022 until 8/10/2022 as to Donovan T. Phelps. Defendant remanded to custody. (Court Reporter Sherry Harris) (jsh) (Entered: 06/30/2022)
08/10/2022	<u>23</u>	MINUTE ENTRY for proceedings held before District Judge Toby Crouse: STATUS CONFERENCE as to Donovan T. Phelps held on 8/10/2022. Motions due by 10/14/2022. Response deadline 10/28/2022. Reply deadline 11/4/2022. Motion Hearing set for <u>11/30/2022 at 01:30 PM</u> in Topeka Courtroom 401 (TC) before District Judge Toby Crouse. Status Conference set for <u>1/11/2023 at 09:00 AM</u> in Topeka Courtroom 401 (TC) before District Judge Toby Crouse. Court makes ends of justice findings pursuant to 18 U.S.C. § 3161(h)(7)(A) and speedy trial time is excluded from today until 1/11/23 as to Defendant Phelps. Defendant remanded to custody of the US Marshals. (Court Reporter Sherry Harris) (ta) (Entered: 08/10/2022)
08/29/2022	<u>24</u>	MOTION to Dismiss Indictment <i>and Memorandum in Support</i> by Donovan T. Phelps. (Folsom, Carl) (Entered: 08/29/2022)
08/30/2022	25	ORDER regarding <u>24</u> Motion to Dismiss Indictment as to Donovan T. Phelps (1). Government to respond by 9/6/22. Signed by District Judge Toby Crouse on 8/30/22. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (ta) (Entered: 08/30/2022)
09/06/2022	<u>26</u>	RESPONSE TO MOTION by USA as to Donovan T. Phelps re <u>24</u> MOTION to Dismiss Indictment <i>and Memorandum in Support</i> (Hunting, Stephen) (Entered: 09/06/2022)
09/08/2022	27	

		ORDER as to Donovan Phelps' Motion to Dismiss, Doc. <u>24</u> . For the reasons set forth by Mr. Phelps, Doc. 24 at 4, and the Government, Doc. 26 at 5–7, Mr. Phelps' motion to dismiss, Doc. 24, is DENIED. Signed by District Judge Toby Crouse on 9/8/22. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (ta) (Entered: 09/08/2022)
09/08/2022	<u>28</u>	NOTICE OF INTENT TO CHANGE PLEA and NOTICE OF HEARING. The defendant Donovan T. Phelps has notified the court as of this date that he intends to change his plea. The time from this notice until the change of plea hearing (including any continuances) is excludable time for speedy trial purposes. Change of Plea Hearing set for <u>9/29/2022 at 02:15 PM</u> in Topeka Courtroom 401 (TC) before District Judge Toby Crouse. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (ta) (Entered: 09/08/2022)
09/29/2022	<u>29</u>	MINUTE ENTRY for proceedings held before District Judge Toby Crouse: CHANGE OF PLEA HEARING as to Donovan T. Phelps held on 9/29/2022. Sentencing set for <u>1/11/2023 at 02:15 PM</u> in Topeka Courtroom 401 (TC) before District Judge Toby Crouse. Sentencing Memorandum Deadline set for 1/4/2023. Defendant remanded to custody. (Court Reporter Sherry Harris) (ta) (Entered: 09/29/2022)
09/29/2022	<u>30</u>	PETITION TO ENTER PLEA OF GUILTY AND ORDER ENTERING PLEA as to Donovan T. Phelps (1) Count 1. Signed by District Judge Toby Crouse on 9/29/2022. (kas) (Entered: 09/29/2022)
11/03/2022	<u>31</u>	MOTION for <i>Preliminary Order of Forfeiture of Property</i> by USA as to Donovan T. Phelps. (Smith, Aaron) (Entered: 11/03/2022)
11/07/2022	<u>32</u>	PRELIMINARY ORDER OF FORFEITURE: granting <u>31</u> Motion for Preliminary Order of Forfeiture of Property as to Donovan T. Phelps. Signed by District Judge Toby Crouse on 11/7/2022. (jal) (Entered: 11/07/2022)
11/17/2022	<u>33</u>	ENTRY OF APPEARANCE: by attorney Thomas W. Bartee appearing for Donovan T. Phelps (Bartee, Thomas) (Entered: 11/17/2022)
01/04/2023	<u>34</u>	PRESENTENCE INVESTIGATION REPORT as to Donovan T. Phelps (NOTE: Access to this document is restricted to the USA and this defendant.) (USPO) (Entered: 01/04/2023)
01/11/2023	<u>35</u>	MINUTE ENTRY for proceedings held before District Judge Toby Crouse: SENTENCING HEARING held on 1/11/2023 as to defendant Donovan T. Phelps. (Court Reporter Sherry Harris) (ta) (Entered: 01/11/2023)
01/11/2023	<u>36</u>	JUDGMENT as to Donovan T. Phelps (1) – Count 1, The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 46 months. Upon release from imprisonment, defendant will be on supervised release for a term of 2 years. Special Assessment \$100. Signed by District Judge Toby Crouse on 1/11/2023. (kas) (Entered: 01/11/2023)
01/11/2023	<u>37</u>	STATEMENT OF REASONS as to Donovan T. Phelps re <u>36</u> Judgment. (NOTE: Access to this document is restricted to the USA and this defendant.) (kas) (Entered: 01/11/2023)