

No.

In the Supreme Court of the United States

Sean Robert Wathen, Petitioner

vs.

United States of America, Respondent

*ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Is the sentencing court required to make specific findings of fact, supported by the record, that a defendant possessed a dangerous weapon in connection with the offense of conviction, before applying a two-level enhancement under U.S.S. G. § 2D1.1(b)(1), and did the district court do so in this case?

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Petitioner Sean Wathen respectfully petitions for review of the Ninth Circuit's decision upholding application of a sentencing enhancement because the record does not support its application.

OPINIONS BELOW

1. Opinion, United States Court of Appeals for the Ninth Circuit, United States of America v. Sean Robert Wathen, Court of Appeals No. 22-30138, affirming the district court, October 27, 2023.
2. Judgment, United States District Court for the District of Idaho, United States of America v. Sean Robert Wathen, District Court 2:20-cr-00117-BLW-3, sentencing Mr. Wathen to 138 months in prison, August 9, 2022.

JURISDICTIONAL STATEMENT

The district court sentenced Mr. Wathen and entered the Judgment on August 9, 2022. Mr. Wathen timely appealed his conviction and sentence. The United States Court of Appeals for the Ninth Circuit entered its Memorandum affirming the conviction, sentence, and judgment on October 27, 2023. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1). Rule 13.1 of the Supreme Court allows ninety days to file a Petition for a Writ of Certiorari after entry of the judgment of the Court of Appeals. Accordingly, this Petition is timely filed.

Pursuant to Rule 29.4(a), service will be made to the Solicitor General of the United States and to Assistant United States Attorney Bryce Ellsworth, who appeared in the United States Court of Appeals for the Ninth Circuit on behalf of

the United States Attorney's Office for the District of Idaho, a federal office authorized by law to appear before this Court on its own behalf.

Petitioner Wathen respectfully asks that a Writ of Certiorari issue to review the judgment and Memorandum of the United States Court of Appeals for the Ninth Circuit. App. 1-7. In particular, Mr. Wathen seeks review of the Ninth Circuit's decision to affirm the district court's application of a two-level sentencing enhancement for possession of a dangerous weapon under United States Sentencing Guideline §2D1.1(b)(1).

STATUTORY PROVISION AND GUIDELINE INVOLVED

18 U.S. Code § 3553:

"The [district] court shall impose a sentence [that] consider[s] . . . the guidelines—(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress . . ."

U.S.S. G. § 2D1.1(b)(1):

Regarding a crime involving trafficking or possession with intent to commit a qualifying controlled substance offense or conspiracy offense, "[i]f a dangerous weapon (including a firearm) was possessed increase by 2 levels."

STATEMENT OF THE CASE AND FACTS

After six days of trial, a jury found Petitioner Sean Wathen guilty of conspiracy to distribute methamphetamine. At sentencing, the district court adopted the findings of the Presentence Report, considered Mr. Wathen's one criminal history point and several specific offense characteristics, calculated the Sentencing Guideline Range at 188 to 235 months, varied downward, and sentenced

Mr. Wathen to 138 months in prison with five years of supervised release. App. at 8-9 (Judgment); 43-514 (Sent. Tr.).

Mr. Wathen timely appealed the jury's guilty verdict and the judgment of conviction imposing the 138-month prison sentence. Relevant here, he argued that the district court incorrectly applied Sentencing Guideline enhancements to increase the guideline range and imposed an overall unreasonable sentence.¹ Mr. Wathen submits that the district court clearly erred in finding that he possessed a gun and, as a result, inappropriately applied a two-level weapon enhancement to his offense level under U.S.S.G. § 2D1.1(b)(1).

The district court applied this 2D1.1(b)(1) weapon enhancement upon the request of the Government (App. 26-27) and relying on the Presentence Report's recitation of testimony related to the enhancement (App., at 46; Sent. Tr. p.32, Ls.2-3). The application note for this Guideline explains that the enhancement "reflects the increased danger of violence when drug traffickers possess weapons. The enhancement should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." U.S.S.G. § 2D1.1 cmt. app. n.11(A).

The Ninth Circuit Court of Appeals observed that the district court's application of this enhancement was "a closer call" than the other enhancements applied at Mr. Wathen's sentencing, but concluded the court "did not clearly err in concluding that [Mr.] Wathen possessed a dangerous weapon in connection with the

¹ The Ninth Circuit addressed five issues raised on appeal by Mr. Wathen; this Petition relates only the two-level sentencing enhancement applied under U.S.S.G. § 2D1.1(b)(1).

offense.” App. 5. The Ninth Circuit briefly described testimony in the record from witnesses that might support the enhancement: “Gohl testified that Wathen sold or gave Garcia (Gohl’s methamphetamine supplier) one or two guns during a methamphetamine transaction.” App. 5. Another witness, Delewese, “added that, during the same transaction, she heard the transaction participants discussing a gun (but did not see the transaction or a gun).” App. 5-6. The court then noted that Mr. Wathen’s trial counsel “did not cross-examine either witness on this point,” and Mr. Wathen in his trial testimony “did not deny possessing a gun when he took the stand.” App. at 6. Additionally, the Ninth Circuit considered that Mr. Wathen’s trial counsel “did not present at trial or at sentencing any argument other than that Gohl was a liar whom Wathen had never met.” *Id.*

As the Ninth Circuit then “stress[ed], . . . it would have been prudent for the district court to inquire further and make specific findings, at sentencing, to clarify that [Mr.] Wathen himself actually possessed the gun.” App. at 6. Although the Ninth Circuit acknowledged one witness, Gohl, provided testimony that “was no model of clarity”, it relied on a deferential standard of review to conclude that the district court did not “clearly err[] in crediting this unchallenged testimony.” *Id.*

Mr. Wathen submits that the district court should have made specific factual findings to support application of the enhancement, particularly where the testimony relied on is from witnesses who had difficulty remembering and did not provide clear testimony on the matter.

REASONS FOR GRANTING THE WRIT

Mr. Wathen recognizes that a “petition for a writ of certiorari will be granted only for compelling reasons” and “is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.” S. Ct. R. 10. Nonetheless, he has asked CJA counsel to seek review² because the record does not support the district court’s factual findings used to apply an enhancement for possession of a weapon. As a result, the preponderance of the evidence does not support the enhancement.

ARGUMENT

A. The Testimony Underlying the District Court’s Application of the Enhancement

The district court explained its rationale for the 2D1.1(b)(1) enhancement in two sentences, stating: “Two witnesses testified clearly that firearms were used in a drug exchange. That is clearly what the guidelines envision where the enhancement applies.” App. 45 (Sent. Tr., p. 31, Ls. 5-8). The court also adopted generally the findings of the Presentence Report, which included the enhancement in the report after the Government objected to its exclusion. App. 46 (Sent. Tr., p. 32, Ls. 2-3). An addendum to the Presentence Report explains the objection and the Probation Officer’s Response:

² The Ninth Circuit Court of Appeals appointed Katherine Ball as counsel under the Criminal Justice Act to represent Mr. Wathen in his appeal. He was represented by CJA counsel and then a retained attorney in the district court. It was just recently that Mr. Wathen asked counsel to file a petition for certiorari on the issue raised in this petition. Based on the timing, counsel is following Ninth Circuit Rule 4-1(e) and submitting this petition as the client has requested.

The government asserts that during the jury trial in this case, two witnesses testified regarding their interactions with the defendant. Specifically, Leah Marie Delewese and Craig Michael Gohl both testified that around August 2015, they went to Sean Robert Wathen's residence with Craig Michael Gohl's source of supply, Gabriel Garcia Jr. The purpose of the visit was to distribute methamphetamine to Sean Robert Wathen. Pursuant to the testimony, both individuals *reported they observed a firearm present during the transaction.* Craig Michael Gohl specifically testified that the firearm was initially possessed by Sean Robert Wathen and was traded by him to Gabriel Garcia Jr. as part of the drug transaction. Of note, both of the witnesses were subject to cross-examination and their testimony regarding the firearm was not challenged. As such, the government asserts the two level enhancement for possession of a firearm should apply.

...

Probation Officer's Response

After reviewing the jury trial transcripts provided by the government, it appears the government is correct. The two level enhancement pursuant to § 2D1.1(b)(1) was assessed. . . . ³

(Emphasis added).

Mr. Wathen argues that the testimony does not support a finding that the witnesses "observed" a firearm. Witness Leah Delewese's only testimony about a firearm includes the responses noted below:

Q. Did you ever *see* any firearms during this transaction?

A. *No, but I heard.* I heard them discussing it.

Q. What did you hear discussed?

³ Because this Addendum to the Presentence Report is sealed in the district court record (District of Idaho Case No. 2:20-CR-00117-003, ECF No. 295-1, at 1) and in the Ninth Circuit Record (Ninth Circuit Case No. 22-30138, Sealed Sentencing Documents, at 55), it is not included in the Appendix.

A. Bebe really wanted a gun, *I believe*, that Sean had. And so he kept asking Craig to ask Sean, but *I never witnessed* any transaction or any deal being made or anything.

App. at 66 (Trial Tr., p. 104, Ls. 1-6) (emphases added). The other witness, Craig Gohl, provided the testimony the Ninth Circuit referred to as “no model of clarity.” App. at 6. His testimony simply provided:

... A. Most people don't want you to meet their plug, you know, their person. But Sean and him decided something, and *Bebe bought a couple guns -- or Sean gave him a gun, and Bebe bought one gun; I can't remember that either.* But -- like I said, *it was a long time ago.* But, yeah, that's --

Q. This is all during the drug transaction?

A. Yes.

App. at 68 (Trial Tr., p. 26, Ls.3-9) (emphases added).

These statements are the sole support for the 2.D1.1(b)(1) enhancement. Mr. Wathen submits that this testimony is not sufficient to support the district court's view that there was clear testimony “that firearms were used in a drug exchange.” See App. 45 (Sent. Tr., p. 31, Ls. 5-8).

B. Preponderance of the Evidence Does Not Support Applying the Enhancement in this Case

This Court has stated that “application of the preponderance standard at sentencing generally satisfies due process.” *United States v. Watts*, 519 U.S. 148, 156, 117 S. Ct. 633, 637 (1997). However, this assumes that the facts are clear and have support in the record. Here, the fact of Mr. Wathen's possession of a firearm in connection with the offense is not clear from the trial testimony and the district

court did not adequately explain its finding that Mr. Wathen possessed a firearm.

The preponderance of the evidence does not support applying the enhancement.

The Ninth Circuit in its Memorandum affirming Mr. Wathen's sentence "stress[ed,] . . . it would have been prudent for the district court to inquire further and make specific findings, at sentencing, to clarify that [Mr.] Wathen himself actually possessed the gun." App. at 6. Mr. Wathen submits that it is more than prudent, it is required, particularly where the Presentence Report does not support the finding. He asks this Court to grant review so it can consider the standards applied when district courts consider this enhancement.

The Ninth Circuit has interpreted the § 2D1.1(b)(1) enhancement and application note "broadly". . . *United States v. Gomez*, 6 F.4th 992, 1008 (9th Cir. 2021). The Ninth Circuit also has stated that "the government *simply* bears the burden of proving that the weapon was possessed at the time of the offense. . . . The enhancement then applies unless the defendant can show it was 'clearly improbable' that the weapon was possessed in connection with the offense." *United States v. Alaniz*, 69 F.4th 1124, 1126–27 (9th Cir. 2023) (internal citation and quotation marks omitted; emphasis added). Other Circuits require that "a nexus" "be shown between the weapon and the criminal act." See, e.g., *United States v. Miller*, 890 F.3d 317, 328 (D.C. Cir. 2018) (citing *United States v. Pineda*, 981 F.2d 569, 573 (1st Cir. 1992)).

Mr. Wathen recognizes that the Ninth Circuit allows the enhancement to apply if the possession of the firearm was "actual or constructive." *Gomez*, 6 F.4th at

1008. However, he suggests that even if the possession is constructive, the district court should make findings of fact concerning whether or not the defendant actually possessed a dangerous weapon in connection with the crime charged, or as relevant conduct. Additionally, relying on the findings in the Presentence Report does not satisfy the requirement to make a specific factual finding where the report is no clearer on the matter than the district court's statements. In the Ninth Circuit, a district "court may adopt the factual findings of the presentence report," but should not "adopt conclusory statements unsupported by facts or the Guidelines." *United States v. Navarro*, 979 F.2d 786, 789 (9th Cir. 1992).

C. The Misapplication of Section 2D1.1(b)(1) Makes a Difference in Mr. Wathen's Potential Sentence

The district court's ultimate sentencing decision is discretionary, but the Guidelines are "the framework for sentencing" and "anchor[s] ... the district court" discretion." *Molina-Martinez v. United States*, 578 U.S. 189, 198–99, 136 S. Ct. 1338 (2016) (citation and internal quotation marks omitted). "Even if the sentencing judge sees a reason to vary from the Guidelines, if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, *then the Guidelines are in a real sense the basis for the sentence.*" *Id.* at 199, 133 S.Ct., at 1345 (citation and internal quotation marks omitted; emphasis in original).

Although Mr. Wathen received a below-Guidelines sentence, he submits that his sentence could have been even lower if the Guideline range had been appropriately set to exclude the firearm enhancement. As this Court has explained: "[i]n most cases the Guidelines range will affect the sentence. . . . When that is so, a

defendant sentenced under an incorrect Guidelines range should be able to rely on that fact to show a reasonable probability that the district court would have imposed a different sentence under the correct range.” *Molina-Martinez*, 578 U.S. at 204, 136 S. Ct. at 1349.

CONCLUSION

For the reasons explained above, the Petitioner urges the Court to grant certiorari review in this case. He seeks to have the judgment of the Ninth Circuit Court of Appeals vacated, and the case remanded for further consideration.