

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL STEVEN SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

APPENDIX

/s/ Christy Posnett Martin

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INDEX TO APPENDICES

Appendix A Opinion of Fifth Circuit, CA No. 23-10303, *United States v. Smith*, 2024 WL 1049473 (5th Cir. March 11, 2024)(unpublished).

Appendix B Judgment and Sentence of the United States District Court for the Northern District of Texas, entered March 24, 2023. *United States v. Smith*, Dist. Court 4:22-CR-00347-O.

Appendix C Factual Resume in Support of Plea

APPENDIX A

2024 WL 1049473

Only the Westlaw citation is currently available.
United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff—Appellee,
v.

Michael Steven SMITH, Defendant—Appellant.

No. 23-10303

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Summary Calendar

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FILED March 11, 2024

Appeal from the United States District Court for the Northern District of Texas, USDC No. 4:22-CR-347-1

Attorneys and Law Firms

[Amber Michelle Grand](#), Attorney, [Brian W. McKay](#), Esq., Assistant U.S. Attorney, U.S. Attorney's Office, Dallas, TX, for Plaintiff—Appellee.

[Christy Martin](#), [Maria Gabriela Vega](#), Assistant Federal Public Defenders, Federal Public Defender's Office, Dallas, TX, for Defendant—Appellant.

Before [Jolly](#), [Higginson](#), and [Duncan](#), Circuit Judges.

Opinion

Per Curiam: *

*1 Michael Steven Smith appeals his conviction and 120-month sentence for stealing firearms from a licensed firearms dealer in violation of [18 U.S.C. § 922\(u\)](#) and [18 U.S.C. § 924\(i\)\(1\)](#). First, he challenges the district court's finding, in support of a sentencing enhancement under [U.S.S.G. § 2K2.1\(b\)\(6\)\(A\)](#), that he possessed or transferred a firearm with reason to believe it would be transported out of the

United States. We review the factual finding for clear error. *See United States v. Juarez*, 626 F.3d 246, 255 (5th Cir. 2010).

According to Smith, the only evidence supporting the enhancement was his statement to investigators that approximately 20 of the 27 stolen firearms were “in Mexico, for sure.” He argues that the comment—which he deems offhand, hyperbolic, conclusory, and speculative—was insufficient to support the significant guidelines enhancement. He further argues that the statement was unreliable because of his mental and physical state during the interview. Smith also asserts that evidence that he sold stolen firearms to a drug dealer who was trafficking kilogram quantities of narcotics and to a Hispanic man he suspected was involved with a drug cartel did not support the finding.

Smith's effort to downplay the significance of his own statement is unavailing because he explained to investigators the reasons why he believed the guns would be transported to Mexico. The district court was entitled to draw the same common-sense inference from the facts that Smith did—that there was reason to believe the firearms would be transferred out of the United States. *See id.* at 255-56. The district court's finding was plausible in light of the record as a whole and was not clearly erroneous. *See id.*

In addition, Smith asserts that Congress exceeded its authority under the Commerce Clause by criminalizing the theft of firearms that have previously travelled in interstate commerce. However, he correctly concedes that the argument is unavailing. *See United States v. Alcantar*, 733 F.3d 143, 145-46 (5th Cir. 2013).

AFFIRMED.

All Citations

Not Reported in Fed. Rptr., 2024 WL 1049473

Footnotes

* This opinion is not designated for publication. See 5th Cir. R. 47.5.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
Fort Worth Division

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

MICHAEL STEVEN SMITH

Case Number: 4:22-CR-00347-O(01)
U.S. Marshal's No.: 29834-510
Levi Thomas, Assistant U.S. Attorney
Andrenette Sullivan, Attorney for the Defendant

On November 30, 2022 the defendant, MICHAEL STEVEN SMITH, entered a plea of guilty as to Count One of the Information filed on November 16, 2022. Accordingly, the defendant is adjudged guilty of such Count, which involves the following offense:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. §§ 922(u), § 924(i)(1)	Theft of a Firearm from a Licensed Firearm Dealer	11/02/2021	One

The defendant is sentenced as provided in pages 2 through 4 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 Information filed on November 16, 2022.

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 24, 2023.



REED O'CONNOR
U.S. DISTRICT JUDGE

Signed March 24, 2023.

Judgment in a Criminal Case
Defendant: MICHAEL STEVEN SMITH
Case Number: 4:22-CR-00347-O(1)

Page 2 of 4

IMPRISONMENT

The defendant, MICHAEL STEVEN SMITH, is hereby committed to the custody of the Federal Bureau of Prisons (BOP) to be imprisoned for a term of **ONE HUNDRED TWENTY (120) MONTHS** as to Count One of the Information filed on November 16, 2022. This sentence shall run consecutive to any sentence imposed in Case No. CR21-00234, Aggravated Assault Public Servant; Case No. CR21-00500, Credit/Debit Card Abuse; Case No. CR2100436, Unlawful possession of a Firearm by a Felon, all pending in the 235th Judicial District Court, Cooke County, Texas, as they are not related to the instant federal offense.

The Court recommends to the BOP that the defendant be allowed to participate in mental health treatment and drug treatment services, if eligible.

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 **THREE (3) YEARS** as to Count One of the Information filed on November 16, 2022.

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

- (1) You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
- (2) After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
- (3) You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
- (4) You must answer truthfully the questions asked by your probation officer.
- (5) You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must 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, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
- (6) You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
- (7) You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job

Judgment in a Criminal Case

Page 3 of 4

Defendant: MICHAEL STEVEN SMITH
Case Number: 4:22-CR-00347-O(1)

responsibilities), you must 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, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

- (8) You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
- (9) If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
- (10) You must 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) You must not act or make any 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 you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
- (13) You must 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 illegally possess controlled substances;

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

not possess a firearm, ammunition, destructive device, or any dangerous weapon;

refrain from any unlawful use of a controlled substance. You must 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;

make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664;

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;

pay any remaining balance of restitution, as set out in this Judgment; and,

provide to the probation officer any requested financial information.

Judgment in a Criminal Case
Defendant: MICHAEL STEVEN SMITH
Case Number: 4:22-CR-00347-O(1)

Page 4 of 4

FINE/RESTITUTION

The Court does not order a fine or costs of incarceration because the defendant does not have the financial resources or future earning capacity to pay a fine or costs of incarceration.

The Court further orders that defendant shall make restitution in the amount of \$13,313. Restitution is payable immediately, but non-payment will not be a violation of defendant's conditions of supervised release so long as defendant pays as provided in defendant's conditions of supervised release. All restitution payments shall be made by defendant to the Clerk of the U.S. District Court, 501 West 10th Street, Room 310, Fort Worth, TX 76102, for disbursement to the following:

War Horse Weapons
2812 US-380
Decatur, Texas 76234
\$13,313

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

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA

v.

No. 4:22-CR-347-O

MICHAEL SMITH (01)

FACTUAL RESUME

- I. Plea: Defendant is pleading guilty to Count One, Theft of a Firearm from a Licensed Firearm Dealer, in violation of 18 U.S.C. § 922(u), §924(i)(1).
- II. Penalties: The maximum penalties the Court can impose include:
- a. imprisonment for a period not to exceed ten (10) years;
 - b. a fine not to exceed \$250,000, or both a fine and imprisonment;
 - c. a term of supervised release not to exceed three (3) years, which may be mandatory under the law and will follow any term of imprisonment. If the defendant violates any condition of supervised release, the Court may revoke such release term and require that the defendant serve any or all of such term as an additional period of confinement. The effect of a revocation of a term of super revised release is to make the overall period of incarceration longer;
 - d. a mandatory special assessment of \$100;
 - e. restitution to victims or to the community, which may be mandatory under the law; and
 - f. forfeiture of firearms and ammunition.
- III. Elements of the Offense:
In order to establish the offense alleged in Count One, the government must prove each of the following elements beyond a reasonable doubt:
- First: That the defendant stole or unlawfully took or carried away a firearm;
- Second: That the firearm was taken from a licensed firearm dealer;
- Third: That the firearm was in the inventory of the licensed firearm dealer; and
- Fourth: That the firearm was in or affecting interstate or foreign commerce.

IV. Stipulated Facts:

On or about November 2, 2021, defendant **Michael Smith** unlawfully entered the premises of War Horse Weapons and knowingly stole and unlawfully carried away from War Horse Weapons, the following firearms: a Rossi, model 943, .38 special caliber revolver, bearing serial number D276349; a Sig Sauer, model P220, .45 auto caliber pistol, bearing serial number G419492; a CMMG Inc., model MK47K, 7.62x39 caliber pistol, bearing serial number BSJ03685; a Taurus Int., model G2S, 9-millimeter pistol, bearing serial number ACH124305; a Ruger, model 77/22, .22 caliber rifle, bearing serial number 720-34559; a Palmetto State Armory, model PA15, Multi-Cal lower receiver, bearing serial number SCB118872; and a Yankee Hill Machine, Co., model resonator, .30 caliber silencer, bearing serial number R0748. At the time, War Horse Weapons was a federally licensed firearms dealer (FFL) and the firearms were part of War Horse Weapons' business inventory. Before being stolen by **Smith**, the firearms had traveled at some time in interstate or foreign commerce.

AGREED AND STIPULATED on this 10th day of November 2022.


MICHAEL SMITH
Defendant


ANDRENETTE SULLIVAN
Counsel for Defendant