IN THE
SUPREME COURT OF THE UNITED STATES

Warrington v. United States of America

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

ATTACHMENT A

78 F.4th 1158
United States Court of Appeals, Tenth Circuit.

UNITED STATES of America, Plaintiff - Appellee,
v.
Edmond Carl WARRINGTON, Defendant - Appellant.

No. 22-7003
|
FILED August 11, 2023

Synopsis

Background: In prosecution for sexual abuse, which began with charges in Oklahoma state court but with federal government taking over the prosecution, the United States District Court for the Eastern District of Oklahoma, David Cleveland Joseph, J., denied defendant's motion to suppress inculpatory statements he made to federal agents during transport from state custody to federal custody, and at jury trial defendant was convicted of three counts of sexual abuse in Indian Country, and was sentenced to 144 months' imprisonment on each count, to run concurrently, with $15,000 special assessment under Justice for Victims of Trafficking Act (JVTA), i.e., penalty of $5,000 for each count of conviction. Defendant appealed.

Holdings: The Court of Appeals, Seymour, Circuit Judge, held that:

defendant's Sixth Amendment right to counsel had not attached, with respect to federal charges, at time of federal agents' questioning;

as a matter of first impression, dual sovereignty doctrine extends to context of Sixth Amendment right to counsel;

defendant's waiver of *Miranda* rights was not based on a misrepresentation; and

as a matter of first impression, special assessment amount under JVTA, i.e., "an amount of $5,000" on any non-indigent person or entity convicted of an offense covered by the JVTA, is determined on per count basis rather than per offender basis.

Affirmed.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

***1162 Appeal from the United States District Court for the Eastern District of Oklahoma (D.C. No. 6:20-CR-00133-DCJ-1)**

Attorneys and Law Firms

John C. Arceci, Assistant Federal Public Defender (Virginia L. Grady, Federal Public Defender, with him on the briefs), Office of the Federal Public Defender, Denver, Colorado, for Defendant-Appellant.

Kyle J. Essley, Special Assistant United States Attorney (Linda A. Epperley, Assistant United States Attorney, with him on the brief), Office of the United States Attorney, Muskogee, Oklahoma, for Plaintiff-Appellee.

Before HARTZ, SEYMOUR, and MATHESON, Circuit Judges.

Opinion

SEYMOUR, Circuit Judge.

Edmond Carl Warrington was charged in Oklahoma state court after he engaged in sexual activity with his mentally disabled, 18-year-old adopted niece. When the U.S. Supreme Court decided *McGirt v. Oklahoma*, —— U.S. ——, 140 S. Ct. 2452, 207 L.Ed.2d 985 (2020), the federal government took over prosecution for the alleged sexual abuse. The district court denied a motion to suppress inculpatory statements Mr. Warrington made to federal agents during transport from state to federal custody. Mr. Warrington proceeded to trial, where he was convicted by a jury of three counts of sexual abuse in Indian Country and sentenced to 144 months' imprisonment on each count, to run concurrently. The court also imposed a $15,000 special assessment under the Justice for Victims of Trafficking Act of 2015 ("JVTA"), a penalty of $5,000 for each count of conviction.

There are two issues raised on appeal. First, Mr. Warrington, who was represented by counsel in the state case, asserts that the district court erred in denying his suppression motion because the agents questioned him in violation of the Sixth Amendment. But because we hold that the Sixth Amendment right to counsel had not yet attached in the federal proceeding and, in any event, Mr. Warrington voluntarily waived his right to counsel after receiving a *Miranda* warning, the district court did not err in denying the motion to suppress. Second,

Mr. Warrington claims the court plainly erred in imposing the JVTA assessment on a per count basis instead of imposing one $5,000 penalty in the case. This is an issue of first impression for our circuit, and we conclude that the court did not commit plain error. Accordingly, we affirm.

Background

This case originated with state criminal charges in Oklahoma. Mr. Warrington, a member of the Cherokee Nation, was accused of engaging in unlawful sexual activity with his mentally disabled, 18-year-old niece-by-adoption, S.R. Specifically, Mr. Warrington was charged with rape after S.R.'s father (Mr. Warrington's brother-in-law) discovered S.R. and Mr. Warrington in a compromised position in the pastures of their adjoining rural properties, which lie within the territorial boundaries of the Muscogee (Creek) Nation.

Mr. Warrington declined to speak with state and local authorities during the state investigation and retained an attorney to represent him. The state charges were still pending when the U.S. Supreme Court ***1163** decided *McGirt*, which held that the state of Oklahoma "lack[ed] jurisdiction to prosecute" Indian defendants for crimes occurring in Indian Country. 140 S. Ct. at 2474. *McGirt* also made clear that the federal government retained jurisdiction to prosecute offenses like those committed by Mr. Warrington. *See id.* at 2476, 2480.

Accordingly, on November 9, 2020, FBI Special Agent John Kowatch filed a federal criminal complaint against Mr. Warrington for the alleged unlawful sexual activity with S.R. After a magistrate judge issued an arrest warrant, Agent Kowatch and another agent arrested Mr. Warrington the following day when he appeared for a hearing in the state case at the Okfuskee County Courthouse.

Mr. Warrington was transported from the county courthouse to the federal courthouse in Muskogee, Oklahoma, for an initial appearance. Although Mr. Warrington's state attorney was present when the federal agents arrested him, the attorney did not specifically ask the federal agents if they intended to conduct questioning during transport. Nor did the attorney direct the federal agents not to do so.

As Mr. Warrington was placed into the transport car, the agents read him *Miranda* warnings and confirmed that he understood each right individually. Because he was handcuffed and unable to sign the *Miranda* form, Agent Kowatch noted on the form that Mr. Warrington "understood his rights and was willing to talk." Rec., vol. III at 23. During the transport, the two agents questioned Mr. Warrington and recorded the interaction. Mr. Warrington made several incriminating statements about sexual activity that had occurred between him and S.R. during the timeframe alleged.

That day, the state deferred prosecution in light of the now-federal case. Two days later, on November 12, 2020, Mr. Warrington appeared before a federal magistrate judge for an initial appearance. The following week, a federal grand jury indicted Mr. Warrington on three counts of aggravated sexual abuse in Indian country in violation of 18 U.S.C. §§ 1151, 1153, 2241(a), and 2246(2), and three counts of sexual abuse in Indian country in violation of 18 U.S.C. §§ 1151, 1153, 2242, and 2246(2).

Before trial, the government indicated that it would introduce excerpts of the audio-recorded interview as trial exhibits. In response, defense counsel moved to suppress the recordings. Counsel argued, in pertinent part, that the interview—conducted by two FBI agents while Mr. Warrington was handcuffed in the back of a law enforcement vehicle—was a custodial interrogation. And, because it occurred after Mr. Warrington already had counsel in the state case, the interrogation violated the Sixth Amendment. Although the suppression motion was untimely under Fed. R. Crim. P. 12(c)(3), the district court considered it on the merits and denied the motion. At trial, the jury convicted Mr. Warrington of three counts of sexual abuse in Indian country based on S.R. being "incapable of appraising the nature of the [sexual] conduct" charged. Rec., vol. I at 347, 349, 351.

At sentencing, the court imposed a within-guidelines range sentence of 144 months' imprisonment on each count of conviction, to run concurrently. The government then urged the court to impose a $5,000 assessment under the JVTA for each count of conviction. This was consistent with the Presentence Investigation Report ("PSR"), which stated that Mr. Warrington was subject to the JVTA and would be assessed $5,000 "per count." Rec., vol. II at 118. The court then imposed a $15,000 special assessment, $5,000 for each count of conviction. [1] Defense ***1164** counsel did not object to the PSR, the government's request, or the special assessment ultimately imposed by the court.

Discussion

A. Motion to Suppress

Mr. Warrington argues that the district court erred in denying his motion to suppress because his inculpatory statements were given in response to questioning that violated his Sixth Amendment right to counsel. In reviewing a denial of a suppression motion, we review the district court's legal conclusions de novo and its factual findings for clear error. *United States v. Baez-Acuna*, 54 F.3d 634, 636 (10th Cir. 1995). We consider the totality of the circumstances and view the evidence in the light most favorable to the government. *United States v. Koerber*, 10 F.4th 1083, 1103 (10th Cir. 2021), *cert. denied*, —— U.S. ——, 143 S. Ct. 326, 214 L.Ed.2d 145 (2022). We may affirm the denial on any ground supported by the record. *United States v. White*, 326 F.3d 1135, 1138 (10th Cir. 2003).

1. The Right to Counsel Had Not Attached in the Federal Proceeding

Mr. Warrington argues that, because he was represented by counsel in the state proceedings against him, the federal agents violated his Sixth Amendment rights by interviewing him during transport. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The right to counsel attaches once "a prosecution is commenced." *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 198, 128 S.Ct. 2578, 171 L.Ed.2d 366 (2008) (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 175, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991)). Commencement occurs at "a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction." *Id.* at 213, 128 S.Ct. 2578. Once the right has "attached," the government is prohibited from deliberately seeking information from the accused on the charged offenses in the absence of defense counsel. *See, e.g.*, *United States v. Mullins*, 613 F.3d 1273, 1286 (10th Cir. 2010). But the right to counsel is "offense specific" and "cannot be invoked once for all future prosecutions." *McNeil*, 501 U.S. at 175, 111 S.Ct. 2204. Accordingly, even when the right to counsel has attached for one crime, the government is free to question the accused with respect to other crimes for which the right has not yet attached. *Mullins*, 613 F.3d at 1286.

At the time Mr. Warrington talked with the federal agents on November 10, 2020, he had not yet appeared before a federal judge on the charges alleged in the federal complaint. He would not do so until two days later. As the district court found, Mr. Warrington's Sixth Amendment right to counsel had therefore not yet attached in the federal case at the time he was interviewed. Because the Constitution does not bar admission of incriminating statements relating to offenses "as to which the Sixth Amendment right ha[d] not yet attached," the court did not err in denying Mr. Warrington's motion to suppress. *Maine v. Moulton*, 474 U.S. 159, 180 n.16, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985); *see also Mullins*, 613 F.3d at 1286 (where right to counsel did not attach to offenses of conviction "no Sixth Amendment violation could have infected the criminal judgment rendered").

***1165** Mr. Warrington argues that his case is unique because the state proceedings had been ongoing for over two years when *McGirt* stripped the Oklahoma courts of jurisdiction. He asserts that during these proceedings he had exercised his right to counsel and declined to speak with investigators, which the federal agents were aware of. Therefore, Mr. Warrington argues, the agents should have anticipated that he would continue to retain counsel and remain silent. He fails, however, to provide any authority suggesting that these facts established a right to counsel during the federal transport but before the federal proceedings commenced.

Mr. Warrington also claims that the state and federal charges concerned the same offense. Because his Sixth Amendment right to counsel had attached in the state prosecution, he argues, the agents were precluded from talking to him without his state attorney present. We disagree.

The dual sovereignty doctrine provides that federal and state offenses covering the same conduct are not the same offense. As the Supreme Court has explained:

> Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.
>
> It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.

United States v. Lanza, 260 U.S. 377, 382, 43 S.Ct. 141, 67 L.Ed. 314 (1922). It is well established that under this doctrine, "prosecutions undertaken by separate sovereign governments, no matter how similar they may be in

character, do not raise the specter of double jeopardy as that constitutional doctrine is commonly understood." *United States v. Trammell*, 133 F.3d 1343, 1349 (10th Cir. 1998) (internal quotation marks and citation omitted). Although dual sovereignty has typically been discussed in the context of the Fifth Amendment, the Court explained in *Texas v. Cobb* that there is "no constitutional difference between the meaning of the term 'offense' in the contexts of double jeopardy and of the right to counsel" under the Sixth Amendment. 532 U.S. 162, 173 & n.3, 121 S.Ct. 1335, 149 L.Ed.2d 321 (2001). The majority of courts addressing the issue have therefore held that the dual sovereignty doctrine has equal application in the right to counsel context. *See Turner v. United States*, 885 F.3d 949, 954–55 (6th Cir. 2018) (en banc); *United States v. Burgest*, 519 F.3d 1307, 1310–11 (11th Cir. 2008); *United States v. Alvarado*, 440 F.3d 191, 196–98 (4th Cir. 2006); *United States v. Coker*, 433 F.3d 39, 43–45 (1st Cir. 2005); *United States v. Avants*, 278 F.3d 510, 517 (5th Cir. 2002). *But see United States v. Mills*, 412 F.3d 325, 330 (2d Cir. 2005) (holding that the dual sovereignty doctrine does not apply in the Sixth Amendment right to counsel context); *United States v. Red Bird*, 287 F.3d 709, 714–15 (8th Cir. 2002) (concluding that it is not "appropriate to fully rely on double jeopardy analysis" in determining whether tribal and federal complaints charged the same offense). In light of *Cobb*, we agree with the majority of the circuits that the dual sovereignty doctrine extends to this context.

Applying the dual sovereignty doctrine, the government argues that regardless of whether Mr. Warrington's state and federal charges were predicated on the same underlying conduct, the offenses were different. Accordingly, it reasons that even if Mr. Warrington's right to counsel in the state prosecution survived an effective dismissal of his state charges, that protection could not have barred his Mirandized conversation with the federal agents. Because Mr. Warrington fails to ***1166** make a convincing argument that the facts obviate the dual sovereignty doctrine, we agree. [2]

2. Mr. Warrington Waived Any Sixth Amendment Rights

The government argues that, even if Mr. Warrington's Sixth Amendment rights survived the effective state dismissal and attached in the federal proceeding, he waived them. "It is a bedrock principle that the waiver of one's Fifth Amendment privilege against self-incrimination must be made 'voluntarily, knowingly and intelligently.' " *United States v. Burson*, 531 F.3d 1254, 1256 (10th Cir. 2008) (quoting *United States v. Morris*, 287 F.3d 985, 988 (10th Cir. 2002)). Accordingly, as the Supreme Court reiterated in *Montejo v. Louisiana*, 556 U.S. 778, 786, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009), "when a defendant is read his *Miranda* rights (which include the right to have counsel present during interrogation) and agrees to waive those rights, that typically" also constitutes a waiver of his Sixth Amendment right to counsel.

The government has the burden to prove waiver by a preponderance. *Burson*, 531 F.3d at 1256. "Whether this standard is met depends in each case upon the particular facts and [the totality of the] circumstances surrounding that case, including the background, experience, and conduct of the accused." *Id.* (internal quotation marks and citations omitted). Although we review findings of fact for clear error, the ultimate question of whether the defendant voluntarily, knowingly, and intelligently waived his *Miranda* rights is a legal conclusion we review de novo. *Id.* Even on de novo review, where there is evidence that a defendant was of sound mind and understood his rights, and the consequences of abandoning them, that is sufficient to establish waiver by a preponderance. *Id.* at 1258.

In support of waiver, the government proffered evidence that Mr. Warrington was college educated, of sound mind, had prior experience with the criminal justice system, and had been Mirandized in the state case and consequently had refused to speak with investigators. In addition, almost halfway through the transport, Mr. Warrington acknowledged the conversation was being recorded and continued speaking with the agents anyway.

There is no dispute that the federal agents informed Mr. Warrington of his *Miranda* rights prior to the transport. During the suppression hearing, Agent Kowatch testified that he read the *Miranda* rights individually from a form, asked Mr. Warrington if he understood each before proceeding to the next, and showed Mr. Warrington the form to read himself. This process occurred prior to the recorded conversation while Mr. Warrington was being placed into the federal vehicle. Based on the totality of the circumstances, including Mr. Warrington's intelligence, prior experience with the law, and knowledge of his rights, the government asserts that, regardless of anything that occurred in the state proceeding, he voluntarily waived any Sixth Amendment right to counsel during the federal transport.

Mr. Warrington argues that his waiver was invalid because it was obtained based on a misrepresentation. Specifically, Mr. Warrington asked if the conversation was being recorded and expressed that he ***1167** thought the recording would be turned over to an attorney. One of the agents told Mr. Warrington that they were recording "to make sure no one comes back and says that we were threatening you, or anything like that." Rec., vol. III at 27. Although this statement indicated that the purpose of recording the conversation did not concern the prosecution against Mr. Warrington, the agents did not promise that the recording or the statements made on the recording would not be given to the government attorneys or otherwise used in the prosecution against him. Moreover, this statement was made long after Mr. Warrington had voluntarily waived his *Miranda* rights, about twenty-eight minutes into the recording.

The state prosecution was effectively terminated at the time Mr. Warrington spoke with the federal agents, and the Sixth Amendment right to counsel had not attached in the federal proceedings. Although Mr. Warrington still had the protections of the Fifth Amendment *Miranda* rights, he received and waived those rights. *See Cobb*, 532 U.S. at 171–72 & n.2, 121 S.Ct. 1335 (recognizing that even where the Sixth Amendment right to counsel has not attached, the Fifth Amendment has a role in protecting the right not to incriminate oneself). In any event, even if Mr. Warrington had Sixth Amendment rights at the time of the interview, he waived them. We therefore hold the district court did not err in denying the motion to suppress the inculpatory statements Mr. Warrington made to the federal agents.

B. Special Assessment

The JVTA, codified in relevant part at 18 U.S.C. § 3014, mandates a $5,000 special assessment for defendants convicted of certain crimes, including sexual abuse. The district court calculated Mr. Warrington's JVTA special assessment on a per count basis, imposing a total penalty of $15,000—$5,000 for each count of conviction. On appeal, Mr. Warrington argues this was plainly erroneous and that the court should have calculated the special assessment on a per offender basis, imposing only one $5,000 special assessment.

Mr. Warrington did not object to the $15,000 assessment in the district court. We therefore review for plain error. "To satisfy the plain error standard, a defendant must show that (1) the district court erred; (2) the error was plain; (3) the error affects the defendant's substantial rights; and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Sabillon-Umana*, 772 F.3d 1328, 1333 (10th Cir. 2014). "An error is plain if it is clear or obvious under current, well-settled law." *United States v. Wolfname*, 835 F.3d 1214, 1221 (10th Cir. 2016) (internal quotation marks and citation omitted). "A law is well-settled in the Tenth Circuit if there is precedent directly on point from the Supreme Court or the Tenth Circuit, or if there is a consensus in the other circuits." *United States v. Egli*, 13 F.4th 1139, 1146 (10th Cir. 2021). "In the absence of Supreme Court or circuit precedent directly addressing a particular issue, a circuit split on that issue weighs against a finding of plain error." *United States v. Koch*, 978 F.3d 719, 726 (10th Cir. 2020) (quoting *United States v. Salas*, 889 F.3d 681, 687 (10th Cir. 2018)); *see also United States v. Teague*, 443 F.3d 1310, 1319 (10th Cir. 2006) ("If neither the Supreme Court nor the Tenth Circuit has ruled on the subject, we cannot find plain error if the authority in other circuits is split.").

Neither our court nor the Supreme Court has addressed the issue of whether the JVTA special assessment should be imposed on a per count or per offender basis. Although three of our sister circuits have spoken on the issue, they are split ***1168** with the Second Circuit adopting Mr. Warrington's position, *see United States v. Haverkamp*, 958 F.3d 145 (2d Cir. 2020), and the Third and Ninth Circuits adopting the government's per count position, *see United States v. Johnman*, 948 F.3d 612 (3d Cir. 2020); *United States v. Randall*, 34 F.4th 867 (9th Cir. 2022), *cert. denied*, —— U.S. ——, 143 S. Ct. 1061, 215 L.Ed.2d 283 (2023). This may be enough to end our inquiry. But Mr. Warrington argues that we can nonetheless find plain error because the text of § 3014 clearly and obviously establishes a per offender scheme.

Section 3014 provides:

> (a) ... Beginning on the date of enactment of the Justice for Victims of Trafficking Act of 2015 and ending on December 23, 2024, in addition to the assessment imposed under section 3013, *the court shall assess an amount of $5,000 on any non-indigent person or entity convicted of an offense* under—
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> (1) chapter 77 (relating to peonage, slavery, and trafficking in persons);
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> (2) chapter 109A (relating to sexual abuse);
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> (3) chapter 110 (relating to sexual exploitation and other abuse of children);

> (4) chapter 117 (relating to transportation for illegal sexual activity and related crimes); or
>
> (5) section 274 of the Immigration and Nationality Act (8 U.S.C. 1324) (relating to human smuggling) ....

§ 3014(a) (emphasis added). Mr. Warrington's offenses of conviction fall under chapter 109A (relating to sexual abuse). He contends that, by using the words "*an* amount of $5,000 on any non-indigent person," § 3014 unambiguously dictates that only one $5,000 assessment can be imposed on a single offender. He relies in part on the Second Circuit's decision in *Haverkamp* where the court held, on a "relaxed" plain error review, that § 3014 "on its face, provides that the assessment is to be applied on a per-offender basis." 958 F.3d at 150. The *Haverkamp* court reasoned that, "[a]s a matter of grammar and common understanding, 'an amount' on any person convicted means the amount is assessed one time. It does not mean an amount for each count of conviction." *Id.* at 149. Mr. Warrington also argues that the $5,000 value should be understood as fixed because "the word 'amount' is followed by 'of' and a specific numerical value." Aplt. Br. at 15.

We are not persuaded that § 3014's text clearly dictates the assessment should be imposed on a per offender basis. The Third Circuit held, also on plain error review, that "the words of § 3014 confirm" the special assessment should be imposed on a per count basis. *Johnman*, 948 F.3d at 619. The court reasoned that " 'offense' is best read to refer to a discrete criminal act" and " 'convicted' as normally understood is an offense-specific term." *Id.* at 617. Therefore, a defendant convicted of multiple counts is convicted of separate offenses and should be assessed $5,000 for each conviction. *Id.* The court also concluded that the "most natural reading of the phrase 'convicted of an offense' means an assessment imposed on each qualifying conviction" because "the statute uses the singular construction" of "an offense." *Id.* The Ninth Circuit agreed with this analysis in holding, on de novo review, that § 3014 mandates the $5,000 assessment be imposed on a per count basis. *Randall*, 34 F.4th at 876.

The inter-circuit conflict over the interpretation of § 3014's text leads us to conclude that, if the special assessment is meant to be imposed on a per offender basis, it is not clear or obvious from the statutory text. Mr. Warrington's argument ***1169** therefore fails on the second prong of the plain error test.

In addition to being persuaded by the Third and Ninth Circuits' textual analysis, a review of § 3014 in context leads us to conclude that Mr. Warrington's argument fails on the first prong of the plain error test as well. As the government and other courts have pointed out, § 3014 is closely tied to 18 U.S.C. § 3013, the statute mandating special assessments for all federal convictions. Section 3013, which is explicitly cross referenced in § 3014(a), provides that sentencing courts "shall assess on any person convicted of an offense against the United States" a special assessment varying in amount based on the grade or classification of the offense. *See* § 3014(a) (imposing a special assessment "in addition to the assessment imposed under section 3013"). Both statutes therefore impose special assessments on individuals "convicted of an offense." Both statutes were also enacted to provide financial resources to crime victims. *Randall*, 34 F.4th at 875. "In sum, § 3014 is closely related to § 3013 in terms of text, purpose, and statutory structure." *Id.* It has long been established that sentencing courts must impose a separate special assessment under § 3013 for every conviction, and that each conviction amounts to a separate punishment. *Rutledge v. United States*, 517 U.S. 292, 301, 116 S.Ct. 1241, 134 L.Ed.2d 419 (1996); *United States v. Smith*, 857 F.2d 682, 685–86 (10th Cir. 1988). When the meaning of an existing statutory provision has been settled by the courts, repetition of the same language in a new statute generally indicates the intent to incorporate the same judicial interpretation. *Bragdon v. Abbott*, 524 U.S. 624, 644–45, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998). We are therefore persuaded that by making explicit reference to § 3013, employing the same "convicted of an offense" language, and including no clear language to establish a per offender scheme, Congress intended § 3014(a) to be applied in the same per count manner.

Mr. Warrington highlights differences between §§ 3013 and 3014 in arguing that § 3014 should not be applied in the same manner as § 3013. He argues that, aside from the shared use of "convicted of an offense," the two statutes are textually and structurally different. In particular, § 3013 uses the phrase "the amount" instead of "an amount." Section 3013 also establishes nominal and varying assessment amounts based on the class of the offense of conviction, whereas § 3014 establishes a relatively high assessment amount for all offenses falling under certain chapters in Title 18. Mr. Warrington further notes that the funds derived from each statute go to different victim funds and argues that if Congress wanted the JVTA special assessment to be applied on a per count basis, it would have amended § 3013 instead of enacting § 3014.

These differences do not persuade us that Congress meant § 3014 to be interpreted in a different manner than § 3013. First, both "the amount" and "an amount" are singular constructions. Next, the varying amounts applicable under § 3013 merely signify Congress' judgment that higher penalties should apply to more serious offenses, and the high assessment amount under § 3014 signifies a judgment about the severity of the offenses covered under that section. These amounts, and the fact that they support different victim funds, tell us nothing about whether the penalties should apply on a per count or per offender basis. In sum, § 3014 need not be identical to § 3013 for us to find meaningful similarities between the two and to conclude that § 3013 is a helpful guide in interpreting § 3014. Our conclusion is not weakened by the fact that the JVTA, which applies to a narrow subsection of offenses, was enacted as a stand-alone ***1170** statute rather than an amendment to § 3013, which broadly applies to all federal criminal offenses. Considering that § 3014 establishes the fund it supports, provides guidelines for the permissible uses of funds, and includes a sunset provision, it made sense for Congress to enact a new statute irrespective of the clear relation to § 3013.

Mr. Warrington turns to legislative history, relying on statements made by three congressmen. Specifically, during debates one representative spoke in support of the JVTA, which would establish "a domestic trafficking victims fund ... funded by a $5,000 penalty assessed on convicted offenders." 161 Cong. Rec. H3280 (daily ed. May 18, 2015) (statement of Rep. Smith). In a hearing on the implementation of the JVTA, a senator described the law as "aim[ing] to increase existing resources for survivors by establishing a Domestic Trafficking Victims' Fund with money raised from a new $5,000 special assessment imposed on defendants convicted of trafficking crimes." *One Year After Enactment: Implementation of the Justice for Victims of Trafficking Act of 2015*: *Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (June 28, 2016) (statement of Sen. Leahy, Member, S. Comm. on the Judiciary). On the two-year anniversary of the JVTA's passing, the law's sponsor described it as "allow[ing] a federal judge to impose an additional assessment of up to $5,000." 163 Cong. Rec. H4564 (daily ed. May 24, 2017) (statement of Rep. Poe).

It is unclear how the first two statements support Mr. Warrington's position. They merely convey what is evident from the text of the statute: that defendants convicted of a qualifying offense are subject to a $5,000 assessment. As discussed, this does not persuade us that § 3014 should be applied on a per offender basis. The support Mr. Warrington finds in the third statement is limited because it was made after the JVTA was enacted. *See Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242, 131 S.Ct. 1068, 179 L.Ed.2d 1 (2011) ("[P]ost-enactment legislative history by definition could have had no effect on the congressional vote." (internal quotation marks and citation omitted)). And as the Third Circuit noted, the statement, which indicates that the special assessment is permissive, conflicts with the statutory text, which establishes that the assessment is mandatory. *Johnman*, 948 F.3d at 620 n.8. The statement also indicates that sentencing courts could impose assessments of less than $5,000, whereas the statutory text makes clear that a convicted defendant is assessed $5,000. Clearly, the sponsor's post-enactment statement is not the best resource for interpreting the statute.

Finally, common sense supports the per count interpretation. Under Mr. Warrington's construction, he would be subject to $15,000 in total JVTA assessments if he was tried for each count in separate proceedings but not in the instant case where all offenses were prosecuted in one proceeding. "[I]t is illogical to read § 3014's application to depend not upon the number of offenses of which [the defendant] was convicted, but on the happenstance of whether she was tried for those offenses in one or more proceedings." *Randall*, 34 F.4th at 876 (quoting *Johnman*, 948 F.3d at 619) (second alteration in original). The applicable special assessment amount under the JVTA should not turn on prosecutorial charging decisions. A per count construction makes further sense when considering a situation in which a defendant is convicted of offenses under multiple chapters subject to the JVTA assessment. We are not persuaded Congress intended that a defendant convicted of both sexual abuse and human trafficking, for example, be subject to only one $5,000 penalty.

***1171** Therefore, Mr. Warrington's argument fails on both the first and second prong of the plain error test.

Conclusion

We hold that the district court did not err in denying Mr. Warrington's motion to suppress. Nor did the court plainly err in imposing the JVTA assessment on a per count basis. Accordingly, we affirm Mr. Warrington's convictions and sentence.

All Citations

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Footnotes

1 The court also imposed a mandatory $300 special assessment under 18 U.S.C. § 3013. This appeal concerns only the JVTA special assessment, and any references to the special assessment imposed therefore do not include the § 3013 assessment.

2 The government makes several additional arguments, including that Mr. Warrington waived his arguments by filing an untimely motion to suppress and that the federal and state offenses were not actually the same under the *Blockburger* test. We need not address these arguments given our conclusion on dual sovereignty.