NO. _____

In the Supreme Court of the United States

AVONTAE TUCKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Supreme Court

APPENDIX

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA,	)	Criminal No. 4:22-cr-164
	)	
v.	)	INDICTMENT
	)	
AVONTAE LAMAR TUCKER,	)	T. 18 U.S.C. § 922(g)(3)
	)	T. 18 U.S.C. § 924(a)(8)
Defendant.	)	T. 18 U.S.C. § 924(c)(1)(A)(i)
	)	T. 18 U.S.C. § 924(c)(1)(A)(ii)
	)	T. 18 U.S.C. § 924(d)
	)	T. 18 U.S.C. § 1951
	)	T. 28 U.S.C. § 2461
	)	

THE GRAND JURY CHARGES:

COUNT 1
(Interference with Commerce Through Robbery)

On or about September 23, 2022, in the Southern District of Iowa, the defendant, AVONTAE LAMAR TUCKER, knowingly and unlawfully obstructed, delayed, and affected commerce, as that term is defined in Title 18, United States Code, Section 1951, and the movement of articles and commodities in such commerce, through the commission of a robbery, as that term is defined in Title 18, United States Code, Section 1951, in that the defendant unlawfully took and obtained property, consisting of U.S. currency and other property, from the Git N Go located at 2140 East Park Avenue, Des Moines, Iowa, a business that affects interstate commerce, from the person and presence of an employee of that business, against their will, by means of actual or threatened force or violence.

This is a violation of Title 18, United States Code, Section 1951.

THE GRAND JURY FURTHER CHARGES:

COUNT 2
(Possessing and Brandishing a Firearm in Furtherance of a Crime of Violence)

On or about September 23, 2022, in the Southern District of Iowa, the defendant, AVONTAE LAMAR TUCKER, knowingly possessed and brandished a firearm in furtherance of a crime of violence for which he may be prosecuted in a court of the United States, that is, interfering with commerce by robbery, as alleged in Count 1 of this Indictment.

This is a violation of Title 18, United States Code, Section 924(c)(1)(A)(i) and 924(c)(1)(A)(ii).

THE GRAND JURY FURTHER CHARGES:

COUNT 3
(Unlawful User in Possession of a Firearm)

On or about September 28, 2022, in the Southern District of Iowa, the defendant, AVONTAE LAMAR TUCKER, in and affecting commerce, knowingly possessed a firearm, namely, one or more of the following firearms:

1. a loaded Glock, model 19, nine-millimeter pistol, with serial number BCVU827; and

2. a loaded Diamondback Firearms, model DB15, 5.56-millimeter rifle, with serial number DB2012970.

At the time of the offense, the defendant knew he was an unlawful user of or addicted to a controlled substance.

This is a violation of Title 18, United States Code, Sections 922(g)(3) and 924(a)(8).

THE GRAND JURY FINDS:

NOTICE OF FORFEITURE

Upon conviction for the offense(s) alleged in Count 2 and/or 3 of this Indictment, the defendant, AVONTAE LAMAR TUCKER, shall forfeit to the United States, pursuant to Title 18, United States Code, Section 924(d), and Title 28, United States Code, Section 2461(c), all firearms, magazines, and ammunition involved in the commission of said offenses, including, but not limited to, the firearm and ammunition identified in Counts 2 and/or 3 of this Indictment.

This is pursuant to Title 18, United States Code, Section 924(d) and Title 28, United States Code, Section 2461(c).

A TRUE BILL.

FOREPERSON

Richard D. Westphal
United States Attorney

By: KMHerrera
Kristin M. Herrera
Assistant United States Attorney

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	Case No. 4:22-cr-00164
	:	
AVONTAE LAMAR TUCKER,	:	PLEA HEARING TRANSCRIPT
	:	
Defendant.	:	

Courtroom, Fourth Floor
U.S. Courthouse
123 East Walnut Street
Des Moines, Iowa
Tuesday, March 14, 2023
2:05 p.m.

BEFORE: THE HONORABLE HELEN C. ADAMS, Chief Magistrate Judge.

APPEARANCES:

For the Plaintiff: JONATHAN L. HOLSCHER, ESQ.
United States Attorney's Office
U.S. Courthouse Annex
110 East Court Avenue, Suite 286
Des Moines, Iowa 50309

For the Defendant: ALFREDO G. PARRISH, ESQ.
Parrish Kruidenier Law Firm
2910 Grand Avenue
Des Moines, Iowa 50312

KELLI M. MULCAHY, CSR, RDR, CRR
United States Courthouse
123 East Walnut Street, Room 115
Des Moines, Iowa 50309

P R O C E E D I N G S

(In open court, with the defendant present.)

THE COURT: All right. The next matter we have up is United States of America vs. Avontae Lamar Tucker. That is Criminal Case 4:22-cr-164. Mr. Tucker is here in the courtroom. He's here with his attorney, Alfredo Parrish; and Mr. Holscher is here on behalf of the United States Government.

Mr. Parrish, it's my understanding that we're here today because Mr. Tucker does intend to enter pleas of guilty to the three counts pending against him, which are Counts 1, 2, and 3, today. Is that correct?

MR. PARRISH: That is correct, Your Honor.

THE COURT: All right. And, Mr. Holscher, we're going to do that without a plea agreement; is that also correct?

MR. HOLSCHER: That's correct, Your Honor.

THE COURT: And there are no counts to dismiss, correct?

MR. HOLSCHER: That's correct.

THE COURT: Thank you.

Mr. Tucker, I'm Judge Adams. I'm not the judge who is going to determine your sentence in this case. That's going to be Judge Rebecca Goodgame Ebinger. I can hold today's hearing with your consent. So what happens is I hold the hearing and then I make a recommendation to Judge Ebinger as to whether to accept your guilty pleas.

The decision, though, as to whether to accept your guilty pleas and the decision as to what your sentence will be is entirely up to Judge Ebinger, just as if she'd have held today's hearing.

So I do have a consent form here. It appears to have your signature it. Did you sign that form today, sir?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And did you get an opportunity to discuss that form with Mr. Parrish before you signed it?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And did you get an opportunity to read it before you signed it?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And was it your decision to sign it, Mr. Tucker?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. I do note for the record it's also been signed by counsel for the defense and counsel for the Government. We'll get that into the court's records when we conclude here today.

Mr. Tucker, I know that you've had the chance to talk with Mr. Parrish about your decision to enter pleas of guilty. I do need to have a conversation, though, with you here today in court. The reason I do that is I want to make sure you understand what it is you're agreeing to, that you understand

the consequences of your decision to enter a plea of guilty, and I also have to determine that there is actually a factual basis that will support your pleas to Counts 1, 2, and 3.

During today's hearing, I'm going to ask you some questions. Before I do that, though, I'm going to ask my courtroom deputy here in front of me to place you under oath. So if you could stand for me, sir, and, to the extent you can, raise your right hand.

AVONTAE LAMAR TUCKER, DEFENDANT, SWORN

THE DEPUTY CLERK: Thank you. You may be seated.

THE COURT: Mr. Tucker, do you understand that you're now under oath and have to answer truthfully?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And do you understand that if you gave false information today that the Government could later bring a claim against you for making a false statement?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. Can you please state your full name for me and tell me your age for the record?

THE DEFENDANT: Avontae Lamar Tucker, and my age is 19.

THE COURT: All right. And how far did you go in school?

THE DEFENDANT: Senior in high school.

THE COURT: All right. How far were you in your senior year?

THE DEFENDANT: I had three months to finish.

THE COURT: Okay. Any difficulty reading or understanding English?

THE DEFENDANT: No, Your Honor.

THE COURT: All right. It is important that you understand everything we do here today, so if anything happens here in the courtroom that you don't hear or don't understand, would you tell me that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. I'm going to ask you some questions now, and the reason I'm asking them is I need to make sure that you've got a good clear mind today because this is an important day in terms of the decisions you have to make.

Have you ever suffered from or been treated for any kind of mental health condition? That could include depression or anxiety.

THE DEFENDANT: No, Your Honor.

THE COURT: All right. Are you receiving any kind of medication at the jail?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Tell me what you're taking there.

THE DEFENDANT: I'm taking PTSD medication.

THE COURT: Okay. And when were you diagnosed with PTSD?

THE DEFENDANT: November 2nd of 2022.

THE COURT: So just this past year?
THE DEFENDANT: Yes, Your Honor.
THE COURT: Okay. And was there an event that happened that people believe may have caused you to get PTSD in and around that time frame?
THE DEFENDANT: Yes, Your Honor.
THE COURT: Can you tell me what that was?
THE DEFENDANT: I got shot.
THE COURT: Okay. And was that here in Des Moines?
THE DEFENDANT: Yes, Your Honor.
THE COURT: All right. Are you taking any other kind of medication at the jail, other than for PTSD?
THE DEFENDANT: No, Your Honor.
THE COURT: Okay. How often do you take the medication that they're giving you for the PTSD?
THE DEFENDANT: Every day morning and nighttime.
THE COURT: Do you remember what the name of it is, by any chance?
THE DEFENDANT: No, Your Honor.
THE COURT: Okay. In your own words, what, if anything, do you feel that that medication does for you?
THE DEFENDANT: It just makes me calm and less -- less worried, and then it helps me from having bad dreams at night.
THE COURT: Okay. And did you take it last night when you normally would have?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And did you take it today, this morning, when you normally would have?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. Is there anything about the fact that you had the experience in November and have been diagnosed with PTSD or the medication you're taking that you think in any way would cause you not to understand what we're doing here today?

THE DEFENDANT: No, Your Honor.

THE COURT: Okay. Have you ever suffered from or been treated for addiction to alcohol?

THE DEFENDANT: No, Your Honor.

THE COURT: Have you used drugs in the past?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And what drugs have you used?

THE DEFENDANT: Marijuana.

THE COURT: Anything else?

THE DEFENDANT: No, Your Honor.

THE COURT: Have you ever gone through any kind of substance abuse treatment?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you remember when you would have done that?

THE DEFENDANT: About three years ago.

THE COURT: Okay. And is there anything about your past usage of marijuana or the treatment that you've gone through that you think in any way would affect your ability to understand today's proceeding?

THE DEFENDANT: No, Your Honor.

THE COURT: In the last 48 hours, other than your prescription medication that you've told me about, have you had any alcohol, medicine, or other drugs?

THE DEFENDANT: No, Your Honor.

THE COURT: And let me ask you this: Do you take any medication for any physical issues that you might have related to the shooting or anything of that nature?

THE DEFENDANT: No, Your Honor.

THE COURT: Okay. Mr. Parrish, do you have any reason to believe that Mr. Tucker would not be competent to enter a guilty plea today?

MR. PARRISH: I don't, Your Honor. He did -- from, I think, when he was 12, 13, and 14, he was on ADHD medication. I guess that's adult, but it was the -- the medication, he knows the name of that medication.

Do you want to tell the judge what you were on?

THE DEFENDANT: Focalin.

THE COURT: Okay.

MR. PARRISH: Other than that, Judge, I've spent a lot of time with him, both in iWeb visits, we did personal visits.

I did one last Friday and another one today.

As I have indicated to the Court off the record, I have spoken to his grandmother here. I spoke to his -- well, she's not technically his counselor, but he was friends with a teacher at one of the schools through her sons. I visited with her. She prepared a letter for me when I was doing the detention hearing.

And I had talked to his grandmother in Chicago as recently as yesterday and again today and his aunt in Chicago yesterday. And I have visited with his mother, but, as I told the Court, his mother now is being held pending trial for federal court.

But I've visited with all those folks, and, Judge, my interactions with him, he's a bright young man, but he does have some -- some difficulties, but nothing that stops him from being able to enter into a colloquy with the Court for the plea.

THE COURT: Okay.

MR. PARRISH: Thank you.

THE COURT: Thank you.

Do you have a copy of the indictment that you could share with him, Mr. Parrish?

MR. PARRISH: I do, Your Honor. He has it in front of him. Thank you.

THE COURT: Mr. Tucker, I'm just going to draw your attention to that indictment. You were charged in three separate counts. In Count 1, you were charged with interference

with commerce through robbery. That would be in violation of Title 18, United States Code, Section 1951. In Count 2, you were charged with possessing and brandishing a firearm in furtherance of a crime of violence. That would be in violation of Title 18, United States Code, Sections 924(c)(1)(A)(i) and 924(c)(1)(A)(ii). And in Count 3, you were charged with being an unlawful user in possession of a firearm in violation of Title 18, United States Code, Sections 922(g)(3) and 924(a)(8).

And then on the last page of the indictment, there's a notice of forfeiture having to do with any firearms and magazines or ammunition involved with those firearms.

Are you aware of the criminal charges pending against you?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Have you had a chance to discuss those criminal charges with Mr. Parrish?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Have you also had a chance to talk with Mr. Parrish about what he thinks might happen at trial if you went to trial?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Now, Mr. Parrish tells me that you intend to enter pleas of guilty to the three counts today. Is that what you're planning to do?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. Next thing that I need to do is

just remind you of your right to an attorney. You do have the right to a lawyer to assist you with respect to every aspect of the case. The Court has previously appointed Mr. Parrish to represent you. He would continue to represent you throughout any remaining proceedings, including trial, if you wanted to go to trial, and that would also be at no cost to you.

Do you understand your right to a lawyer?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Are you fully satisfied with the legal advice and counsel that Mr. Parrish has given to you in this case?

THE DEFENDANT: Yes, Your Honor.

THE COURT: The next few things I want to talk to you about are some of the consequences of your decision to enter a plea of guilty. The first of those is that, as part of your plea, it's my understanding that you're agreeing to forfeit or give up any right or ownership interest that you might have in the guns and ammunition that is mentioned in the indictment.

Do you understand that's part of your plea agreement?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Or plea. Excuse me. It's not an agreement. I apologize. Part of your plea.

All right. The next thing I want to talk to you about is the fact that you currently have the right to a jury trial. By pleading guilty here today, though, you're going to give up that

right to a jury trial, so I want to make sure you understand what it is you're giving up.

If you wanted to have a jury trial, all you need to do is continue to plead not guilty. You've been set in for trial. It's a trial that would be set without unnecessary delay. It would also be a trial that is open to the public.

At that trial, a jury of 12 people would decide if you were guilty or not guilty of the charges. You could not be found guilty of any charge, though, unless the Government proved each and every element of the charge beyond a reasonable doubt.

At the trial, you'd have the right to see and hear the Government's witnesses testify under oath and have Mr. Parrish cross-examine those witnesses on your behalf. You would have no burden to prove anything at the trial, but you'd have the right to present evidence and to compel the attendance of witnesses to testify.

No one could force you to testify at that trial. You could choose to testify in your own defense if you wanted, and if you chose not to testify, the judge would tell the jury they could not consider that fact in deciding if you were guilty or not guilty.

You also have the right to what we call a unanimous jury verdict, so all 12 people on the jury have to agree before you can be found guilty of any offense. And then if you would be convicted after a trial, you'd have the right to appeal. On

appeal, you'd be given a free lawyer if you could not afford one and a free transcript of the trial proceedings.

Mr. Tucker, do you understand that you do have the right to plead not guilty if you want to and go to trial?

THE DEFENDANT: Yes, Your Honor.

THE COURT: If you do plead guilty today, you will not come back here for a trial. You will come back here for a sentencing hearing, and I'll give you that date today. But you're going to get judged guilty based upon the guilty pleas that you enter today just as if a jury had returned a guilty verdict against you.

Do you understand that by entering the plea of guilty, you will be giving up your right to a jury trial on these charges?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. It's also important that you understand that you won't be able to withdraw your plea, even if you disagree with the sentence that the judge gives you. Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. Are you also a United States citizen, Mr. Tucker?

THE DEFENDANT: Yes, Your Honor.

THE COURT: You will lose some rights of citizenship. That includes the right to vote, to serve on a jury, to hold public office, and to possess firearms and ammunition.

Do you understand the loss of those rights as well?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Mr. Holscher, are you aware of any other collateral consequences of a plea that I have not yet mentioned?

MR. HOLSCHER: No, Your Honor.

THE COURT: Any that you're aware of, Mr. Parrish?

MR. PARRISH: No, Your Honor.

THE COURT: All right. Thank you.

All right. The next thing that we're going to do, Mr. Tucker, I'm going to ask the Government's lawyer to please state for the record the elements that the Government would have to prove with respect to all three counts if you went to trial.

If you want to follow along with Mr. Holscher, if you want to look at the March 8th letter that's addressed to me and turn to page 4 of that letter.

MR. PARRISH: For some reason, I'm not getting the Wi-Fi here. I had reviewed the letter, Judge, that was sent to the Court, but for some reason, I'm not getting Wi-Fi. I don't know what it is.

THE COURT: Jonathan, do you have a copy there that we could make a copy of?

MR. HOLSCHER: Yeah. I just have the one copy here.

THE COURT: We'll make one for Mr. Parrish. Thank you.

MR. PARRISH: While they're doing that, Your Honor -- oh, it just kicked in.

THE COURT: Okay.

MR. PARRISH: At the appropriate time, Your Honor, I'd like to make my objection to Count 3, once we get to that one, Judge, on the constitutional grounds.

THE COURT: All right.

MR. PARRISH: Thank you.

THE COURT: We'll do that.

MR. PARRISH: Thank you.

I have that here now.

THE COURT: Mr. Holscher, we let Judge Gritzner's office know that you are running a few minutes behind.

MR. HOLSCHER: Oh, thank you.

THE COURT: You're welcome.

MR. PARRISH: Thank you.

And I have outlined those for him, Judge, and gone through those things with him, so he's familiar with them.

MR. HOLSCHER: For Count 1, the crime of interference with commerce through robbery, the Government would have to prove the following elements: element one, the defendant obtained or attempted to obtain property from another without that person's consent; element two, that the defendant did so by wrongful use of action or threatened force, violence, or fear; and, element three, that as a result of the defendant's actions, interstate commerce or an item moving in interstate commerce was actually or potentially delayed, obstructed, or affected in any

way or degree.

For Count 2, possessing and brandishing a firearm in furtherance of a crime of violence, the Government would have to prove the following elements: element one, that the defendant committed a crime of violence, which in this case is interference with commerce by robbery as charged in Count 1; and, element two, the defendant knowingly possessed and brandished a firearm in furtherance of that crime of violence.

For Count 3, unlawful user in possession of a firearm, the Government would have to prove the following elements: that, element one, on or before the date charged, the defendant was an unlawful user of a controlled substance and knew of such unlawful use; element two, that on or about the date charged, the defendant knowingly possessed a firearm while he was an unlawful user of a controlled substance; and, element three, the firearm was transported across a state line at some point or during -- at some point during or before the defendant's possession of the firearm.

THE COURT: Thank you, Mr. Holscher.

Do you want to go ahead and make your record now, Mr. Parrish?

MR. PARRISH: I do, Your Honor.

There is a case that was issued by Judge Wyrick, W-y-r-i-c-k, a federal judge in Oklahoma. It's cited as *United States vs. Harrison*. The case number on it, since this does not

have a Federal Reporter number, it's Case No. CR-22-00328-PRW, all caps. And it was issued February the 3rd, Your Honor. It's in the F.Supp.3d but doesn't have a number on it by our last pulling up of this document. It has a Westlaw cite, though. The Westlaw cite is 2023 WL 1771138.

And, Judge, I believe I might be past the deadline for filing motions. I think I am because I had two cases tracking on this same one with Mr. Tucker and Mr. Gonzalez Olivas, and I know I filed a motion in Mr. Gonzalez Olivas' case about a week and a half ago.

But in reviewing this, Judge, and the difficulties I've had with some direction from Mr. Tucker, I would ask the Court to allow me at least additional time for which to make a constitutional objection to the statute in this case as in the opinion of the *United States vs. Harrison*. I can, Your Honor, be prepared to file a written document within seven days asking for a dismissal of the indictment based upon the unconstitutionality of the statute.

That's the only case we've been able to find directly on point that uses the *Heller* case and the case that references the New York City ordinance. And we're asking that the charge, Count 3, be dismissed based on the unconstitutionality of the statute as based upon the recent Supreme Court decisions.

THE COURT: Thank you, Mr. Parrish.

MR. PARRISH: Thank you.

THE COURT: Mr. Holscher, does the Government have any objection to the Court going ahead and proceeding with the plea hearing today subject to Mr. Parrish filing a motion relating to Count 3 and his allegation of unconstitutionality relating to that count?

MR. HOLSCHER: No, Your Honor.

THE COURT: All right. I don't know what Judge Ebinger will do, Mr. Parrish. I will give you permission to file the motion --

MR. PARRISH: Thank you, Your Honor.

THE COURT: -- within seven days, and then it will be up to her what she wants to do, whether she'll deem it to be too late or whether she'll go ahead and hear it at that point in time, okay?

MR. PARRISH: Thank you, Judge. And I'll put my good cause reasons in there when I file it.

THE COURT: Okay.

MR. PARRISH: Thank you, Judge.

THE COURT: You're welcome.

All right. Mr. Tucker, I'm going to ask you some questions about the factual basis for the charges against you. Is it true that on September 23 of 2022, you robbed the Git N Go convenience store located on East Park Avenue in Des Moines, Iowa?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And is it true that on that date you entered the store and pointed a gun at the clerk and a customer and ordered them to give you cash from the store registry and safe and some other items from the store?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. When you went into the store, did you have the gun out so that they could see it?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. And you knew you were in possession of the gun at that time, correct, that you used in the robbery?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Is it true that you're admitting that the Git N Go store is, in fact, a store that affects interstate commerce because it sells items that travel from state to state?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And are you also admitting the Git N Go has locations in more than one state in the United States?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. Is it true that on September 28th of 2022, you had an encounter with law enforcement here in Des Moines, Iowa?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And on that date that you were in possession of a Glock 9-millimeter pistol?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And that you knew that you were in possession of that pistol on September 28th; is that correct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And is it also true that on September 28, law enforcement executed a search warrant at your residence in Des Moines, Iowa?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And inside your residence, they located a loaded Diamondback firearm rifle; is that correct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And did you know that you were in possession of that rifle on September 28th?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And is it also true that on or before September 28th of 2022, you knew that you were an unlawful user of marijuana on that date?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. Mr. Holscher, do you believe I have developed an -- and did one or more of the guns have to travel across a state line before it came into your possession?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. Mr. Holscher, do you believe I have developed an adequate factual basis for the plea?

MR. HOLSCHER: Yes, Your Honor.

THE COURT: All right. Mr. Parrish, do you believe I have developed an adequate factual basis for the pleas?

MR. PARRISH: I do, Your Honor.

THE COURT: Have you also had access to the discovery materials in the case, Mr. Parrish?

MR. PARRISH: Yes, Your Honor. For the record, I will say that we got the discovery early on. Ms. Herrera was forthcoming with regard to this information. We also got a substantial amount of discovery I had written a letter about during the detention hearing, and she provided the additional information. I believe I had it -- I don't have my notes right in front of me or my dates, but even before the indictments came down.

We also had a couple of -- I know for one day we had two separate meetings at the Polk County Jail, and I was provided that information beforehand, and I had a chance to discuss with the officers who were there during the breaks some of their thoughts on the case.

So I've had all the discovery. I had a chance to also review the discovery with Mr. Tucker.

Thank you.

THE COURT: All right. And have you also had a chance to talk with him about any possible defenses he might have?

MR. PARRISH: I did, Your Honor. And the defenses we looked at, obviously, were the issues of his post-traumatic

stress disorder, the possession of the firearms. Not only was he shot and seriously injured, but his mother was also shot four times during the same incident. It appeared to me from the information I had that it was some type of retaliation regarding gang activity. At least that was my assessment of it.

And I know in talking with his mother, his house was also shot at least one time with a number of bullets being fired at his home, and it might be another couple of incidents that he was involved in.

I resolved this in my work by thinking it would go to some mitigating factors regarding his sentencing and also tie in to his post-traumatic stress disorder and his ADHD. And I thought it was best utilized not as a defense, but as a mitigating factor on the 3553(a), and that's how I've explained how I thought we should approach this case.

THE COURT: All right. Thank you.

All right. The next thing we need to talk about, Mr. Tucker, is potential penalties. As I told you, I won't decide that, that will be up to Judge Ebinger, but I need to go over that with you, so if you'll turn to page 3 of that letter.

The penalty for Count 1, which is the interference with commerce through robbery count, it does carry a prison term of up to 20 years, a fine not to exceed $250,000, and the judge could impose both a fine and a prison term, and also up to three years of supervised release and a $100 special assessment.

Do you understand what the maximum punishment is that the Court could give you for Count 1?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. And then Count 2, which is the brandishing count, carries a mandatory minimum prison sentence of seven years, and that could be longer. It could be up to lifetime. There's the potential for a fine of up to $250,000. And, again, the Court can give you both a fine and prison term. And then also a term of supervised release of up to five years and another $100 special assessment.

Do you understand the maximum punishment that the Court could give you with respect to Count 2?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And it's important that you understand that any prison term that you get on Count 2 must be served consecutively or after any prison term that you would get for either Count 1 or Count 3.

Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. And then lastly, with respect to the third count, which is the unlawful user count in possession of a firearm, that carries a penalty of up to 15 years in prison, a fine not to exceed $250,000, and, again, the Court could impose both a prison term and a fine. And also there's the potential for up to three years of supervised

release and another $100 mandatory assessment.

Do you understand the potential penalties that the Court could impose for Count 3?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Also, the Court can impose a mandatory restitution amount that you would be responsible for paying to the victims of the offenses. Do you understand that as well?

THE DEFENDANT: Yes, Your Honor.

THE COURT: It's very important, if you're on supervised release, you follow all of those conditions the Court places upon you. If you fail to follow any, you could be arrested. At that time the Court could sentence you to up to five years in prison for violating the conditions of your supervised release without giving you any credit for time served.

Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. Let's talk about what's going to happen after today. A couple things. First of all, I'm going to ask the probation office to prepare a Presentence Investigation Report. They'll give you an opportunity to provide them with some information for that report.

When they get a draft of the report, Mr. Parrish is going to get it. When he gets it, go over it with him. Let him know if you think any of the information in the report is not correct

or if there is information missing from that report. That's important because it's going to go to Judge Ebinger. She'll have an opportunity to review it before she decides what your sentence is going to be.

Also, the information in that Presentence Investigation Report, you can only share it with your lawyer. If you did share it with somebody else, you could be held in contempt of court. That could result in a prison term, a fine, or both. Understand?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. In addition to looking at the information in the Presentence Investigation Report, Judge Ebinger will also look at the federal sentencing guidelines. Those are advisory guidelines. They are going to consider factors relevant to your situation, such as the nature of the charge to which you're pleading guilty, the amount and number of firearms involved, any criminal history that you might have, and other factors relevant to your specific situation.

Those factors will then suggest to her a possible range of what might be appropriate sentences for you. While she has to consider those ranges, she does not have to sentence you within them, as long as the sentence she does give you is one that's allowed by law.

You're also going to come back here to court for a hearing in front of Judge Ebinger. At that time, Mr. Parrish can make

arguments as to what you think your sentence should be. And on that day, if you want to, you'll get the chance to talk directly to Judge Ebinger. I suggest you talk to Mr. Parrish about that in advance so you've got plenty of time to think about what you'd like to say to her. You can write it down, if you want to, and bring that in with you, if that's helpful to you.

After she's seen and heard all that information, then she'll tell you what your sentences are going to be. Do you understand that the decision as to what your sentences will be is up to Judge Ebinger?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. I don't know what your sentences will be. Mr. Parrish does not know. I know he's given you some advice as to what he thinks a possible or likely sentence might be. Please understand that's his best advice. It's not a promise or guarantee. Understand?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. Mr. Tucker, when did you turn 19?

THE DEFENDANT: July 11th.

THE COURT: Of 2022?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. Thank you.

Has anybody forced or pressured you at all to plead guilty today?

THE DEFENDANT: No, Your Honor.

THE COURT: Has anybody made any promises to get you to plead guilty today?

THE DEFENDANT: No, Your Honor.

THE COURT: Mr. Parrish, do you believe guilty pleas to Counts 1, 2, and 3 would be knowing and voluntary?

MR. PARRISH: I do, Your Honor.

THE COURT: And can you think of any legal reason why the pleas should not be accepted?

MR. PARRISH: Other than the objections we made to the constitutionality of the statute on Count 3, Judge, I cannot think of any legal reasons. And I think the Court has completed a -- done a complete colloquy with regard to each of the counts.

THE COURT: Thank you.

Mr. Tucker, just a few more questions before we finish up. The first is: Have you answered all my questions today truthfully?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Have you understood everything we've discussed?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you have any questions for me or Mr. Parrish at this time?

THE DEFENDANT: No, Your Honor.

THE COURT: All right. Mr. Holscher, do you believe

the Court has met the requirements of Rule 11 for taking a plea?

MR. HOLSCHER: Yes, Your Honor.

THE COURT: Mr. Parrish, do you believe the Court's met the requirements of Rule 11 for taking pleas today?

MR. PARRISH: Yes, Your Honor.

THE COURT: All right. Mr. Tucker, I'm going to have you stand with Mr. Parrish so that I can formally and for the record take your pleas.

With respect to interference with commerce through robbery in violation of Title 18, United States Code, Section 1951, how do you plead, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: And then with respect to Count 2, which charges you with possessing and brandishing a firearm in furtherance of a crime of violence in violation of Title 18, United States Code, Sections 924(c)(1)(A)(i) and 924(c)(1)(A)(ii), how do you plead, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: All right. And then lastly, with respect to unlawful user in possession of a firearm that charges you with Title 18, United States Code, Sections 924(g)(3) and 924(a)(8), subject to a motion to dismiss that Mr. Parrish plans to file, how do you plead to that count, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: Okay. You can be seated.

Mr. Tucker, I do find that you're fully competent and capable of entering an informed guilty plea. I do find that it's a voluntary decision that you have made after you've had a full and fair opportunity to discuss it with Mr. Parrish.

I find that your decision to plead guilty is not the result of any threats, force, pressure, or coercion of any kind. It's also not the result of any promises that anyone has made to you.

I have advised you of the maximum punishment that can be imposed, and you do understand that; and I have advised you of your right to trial by jury, and you understand that by pleading guilty on these charges, you are giving up that jury trial.

Also, based upon your statements in open court here, I do find that there is a factual basis that will support your pleas to Counts 1, 2, and 3.

For those reasons, I will file a report and recommendation recommending to Judge Ebinger that she accept your pleas of guilty. I will indicate in there that Defendant is planning to file a motion to dismiss Count 3 on constitutional grounds subject to Judge Ebinger's review and ruling of that motion.

Judge Ebinger has set the sentencing date for July 20th, 2023, at 9:30 a.m. And then a separate order will come from her chambers that schedules the Government's offense conduct statement deadline, the status conference date, and the Presentence Investigation Report deadlines, all of which will need to be completed before the sentencing date.

All right. It's my understanding Mr. Tucker's going to remain detained pending the sentencing. Is that correct, Mr. Parrish?

MR. PARRISH: That is correct, Your Honor.

THE COURT: All right. Anything further, Mr. Holscher?

MR. HOLSCHER: No, Your Honor.

THE COURT: All right. Mr. Parrish?

MR. PARRISH: Thank you, Your Honor. Nothing further.

THE COURT: All right. We're in recess.

MR. PARRISH: Thank you, Judge.

(Proceedings concluded at 2:41 p.m.)

C E R T I F I C A T E

I, Kelli M. Mulcahy, a Certified Shorthand Reporter of the State of Iowa and Federal Official Realtime Court Reporter in and for the United States District Court for the Southern District of Iowa, do hereby certify, pursuant to Title 28, United States Code, Section 753, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated at Des Moines, Iowa, this 25th day of March, 2023.

Kelli M. Mulcahy

Kelli M. Mulcahy, CSR, RDR, CRR
Federal Official Court Reporter

AO 245B (Rev. 09/19) Judgment in a Criminal Case
v1 Sheet 1

036a

APPENDIX C

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA
v.
AVONTAE LAMAR TUCKER

JUDGMENT IN A CRIMINAL CASE

Case Number: 4:22-cr-00164-001

USM Number: 29701-510

Alfredo G. Parrish
Defendant's Attorney

THE DEFENDANT:

☑ pleaded guilty to count(s) One, Two, and Three of the Indictment filed on October 18, 2022.

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☐ was found guilty on count(s) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1951	Interference with Commerce Through Robbery	09/23/2022	One
18 U.S.C. § 924(c)(1)(A)(i) 924(c)(1)(A)(ii)	Possessing and Brandishing a Firearm in Furtherance of a Crime of Violence	09/23/2022	Two

☑ See additional count(s) on page 2

The defendant is sentenced as provided in pages 3 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 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. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

July 20, 2023
Date of Imposition of Judgment

Signature of Judge

Rebecca Goodgame Ebinger, U.S. District Judge
Name of Judge Title of Judge

July 20, 2023
Date

DEFENDANT: AVONTAE LAMAR TUCKER
CASE NUMBER: 4:22-cr-00164-001

ADDITIONAL COUNTS OF CONVICTION

Title & Section ?	Nature of Offense	Offense Ended	Count
18 U.S.C. §§ 922(g)(3), 924(a)(8)	Unlawful User in Possession of a Firearm	09/28/2022	Three

DEFENDANT: AVONTAE LAMAR TUCKER
CASE NUMBER: 4:22-cr-00164-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

192 months, consisting of 108 months as to Counts One and Three, to be served concurrently, and 84 months as to Count Two of the Indictment filed on October 18, 2022, to be served consecutively.

☑ The court makes the following recommendations to the Bureau of Prisons:

The defendant be evaluated for and receive appropriate mental health treatment, afforded the opportunity to participate in the 500-hour residential drug abuse treatment program (RDAP) and any other substance abuse treatment programs, designated to FCI Oxford, and offered the opportunity to participate in welding and any other available vocational training.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant is remanded to the custody of the United States Marshal for surrender to the ICE detainer.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: AVONTAE LAMAR TUCKER
CASE NUMBER: 4:22-cr-00164-001

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

Five years, consisting of three years as to each of Counts One and Three and five years as to Count Two of the Indictment filed on October 18, 2022, to be served concurrently.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must 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.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq*.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: AVONTAE LAMAR TUCKER
CASE NUMBER: 4:22-cr-00164-001

STANDARD CONDITIONS OF SUPERVISION

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 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.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: AVONTAE LAMAR TUCKER
CASE NUMBER: 4:22-cr-00164-001

SPECIAL CONDITIONS OF SUPERVISION

You must participate in a program of testing and/or treatment for substance abuse, as directed by the Probation Officer, until such time as the defendant is released from the program by the Probation Office. At the direction of the probation office, you must receive a substance abuse evaluation and participate in inpatient and/or outpatient treatment, as recommended. Participation may also include compliance with a medication regimen. You will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third-party payment. You must not use alcohol and/or other intoxicants during the course of supervision.

You must submit to a mental health evaluation. If treatment is recommended, you must participate in an approved treatment program and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment and/or compliance with a medication regimen. You will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third-party payment.

You shall not knowingly associate or communicate with any member of the SMG (Self Made Gangsters) or OMB (Only My Brothers) criminal street gangs, or any other criminal street gang.

If not obtained while in Bureau of Prisons' custody, you must participate in GED classes as approved by the U.S. Probation Office.

You will submit to a search of your person, property, residence, adjacent structures, office, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), and other electronic communications or data storage devices or media, conducted by a U.S. Probation Officer. Failure to submit to a search may be grounds for revocation. You must warn any other residents or occupants that the premises and/or vehicle may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that you have violated a condition of your release and/or that the area(s) or item(s) to be searched contain evidence of this violation or contain contraband. Any search must be conducted at a reasonable time and in a reasonable manner. This condition may be invoked with or without the assistance of law enforcement, including the U.S. Marshals Service.

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Sheet 5 — Criminal Monetary Penalties
v1

DEFENDANT: AVONTAE LAMAR TUCKER
CASE NUMBER: 4:22-cr-00164-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

☐ Pursuant to 18 U.S.C. § 3573, upon the motion of the government, the Court hereby remits the defendant's Special Penalty Assessment; the fee is waived and no payment is required.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$ 300.00	$0.00	$ 0.00	$ 0.00	$ 0.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage
TOTALS	$0.00	$0.00	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

*Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: AVONTAE LAMAR TUCKER
CASE NUMBER: 4:22-cr-00164-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 300.00 due immediately, balance due

☐ not later than _____, or
☑ in accordance ☐ C, ☐ D, ☐ E, or ☑ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:

All criminal monetary payments are to be made to:
Clerk's Office, United States District Court, P.O. Box 9344, Des Moines, IA 50306-9344.

While on supervised release, you shall cooperate with the United States Probation Office in developing a monthly payment plan, which shall be subject to the approval of the Court, consistent with a schedule of allowable expenses provided by the United States Probation Office.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All crimnal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number Defendant and Co-Defendant Names *(including defendant number)*	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☑ The defendant shall forfeit the defendant's interest in the following property to the United States:

A loaded Glock, model 19, 9mm pistol (SN: BCVU827); and a loaded Diamondback Firearms, Model DB15, 5.56mm rifle (SN: DB2012970), as outlined in the Preliminary Order of Forfeiture entered on July 20, 2023.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

APPENDIX D

United States Court of Appeals
For the Eighth Circuit

No. 23-2758

United States of America

Plaintiff - Appellee

v.

Avontae Lamar Tucker

Defendant - Appellant

Appeal from United States District Court
for the Southern District of Iowa

Submitted: April 12, 2024
Filed: August 2, 2024
[Unpublished]

Before BENTON, GRASZ, and STRAS, Circuit Judges.

PER CURIAM.

Avontae Tucker robbed a convenience store at gunpoint and, days later, led police on a high-speed car chase after they attempted to pull him over. He pled guilty to Hobbs Act Robbery (Count 1), 18 U.S.C. § 1951; possessing and brandishing a firearm in furtherance of a crime of violence (Count 2), 18 U.S.C. § 924(c)(1)(A)(i) and (ii); and unlawfully possessing a firearm as a user of a

controlled substance (Count 3), 18 U.S.C. §§ 922(g)(3), 924(a)(8). The district court[1] sentenced Tucker to a total of 192 months of imprisonment; 108 months on Counts 1 and 3 to be served concurrently, and 84 months on Count 2, to be served consecutively. Tucker appeals, challenging the constitutionality of 18 U.S.C. § 922(g)(3) and the district court's denial of a two-level reduction in his offense level for an acceptance of responsibility under the United States Sentencing Guidelines Manual (U.S.S.G. or Guidelines) § 3E1.1(a).

I. Background

On September 23, 2022, Tucker robbed a convenience store in Des Moines, Iowa, using an AR-15 style rifle. On September 28, 2022, a police officer attempted to stop a vehicle, driven by Tucker. Tucker briefly pulled over before accelerating away from the scene. After a car chase, which resulted in several collisions, Tucker fled on foot, only to be caught by the police officers shortly after. At the time, Tucker was in possession of a loaded Glock pistol and 35 fentanyl pills. Police officers later searched Tucker's residence, finding marijuana, methamphetamine tablets, and a loaded rifle with 30 rounds of ammunition. Tucker admitted to being a daily drug user.

Tucker was indicted in October 2022. He initially pled not guilty to all charges. Tucker then changed his plea and pled guilty to all counts unconditionally. Twenty days after the deadline for pretrial motions, Tucker filed a motion to dismiss Count 3 of the indictment, arguing 18 U.S.C. § 922(g)(3)'s prohibition against possessing a firearm as a user of a controlled substance violates the Second Amendment of the United States Constitution. The district court denied Tucker's motion as untimely, as well as on its merits.

[1]The Honorable Rebecca Goodgame Ebinger, United States District Judge for the Southern District of Iowa.

During Tucker's sentencing hearing, the district court denied Tucker's request for a reduction to his offense level for acceptance of responsibility under U.S.S.G. § 3E1.1(a), explaining the reduction was not warranted because of Tucker's misconduct in jail while awaiting sentencing. While in jail, Tucker was involved in several physical altercations with other prisoners, disobeyed orders from the correctional officers, and tampered with security equipment.

II. Analysis

Tucker raises two arguments on appeal. First, he argues 18 U.S.C. § 922(g)(3) is unconstitutional, both facially and as applied to him. Second, he contends the district court clearly erred in not applying a sentencing reduction for his acceptance of responsibility under U.S.S.G. § 3E1.1(a).

A. Constitutional Challenge

We review de novo a denial of a motion to dismiss when a defendant alleges his or her conviction violates the Second Amendment. *See United States v. Sitladeen*, 64 F.4th 978, 983 (8th Cir. 2023).

Tucker filed a motion to dismiss Count 3, arguing 18 U.S.C. § 922(g)(3) is unconstitutional because it "prohibits users of marijuana and other controlled substances from exercising their Second Amendment right to keep and bear arms." The district court denied this motion on its merits, holding the law is constitutional under the test laid out in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022).

18 U.S.C. § 922(g)(3) makes it "unlawful for any person who is an unlawful user of or addicted to any controlled substance . . . [to] possess in or affecting commerce, any firearm or ammunition . . . ." Tucker argues § 922(g)(3) is facially unconstitutional because "[m]arijuana users are not excluded from 'the people' entitled to Second Amendment protections." We reject Tucker's facial challenge to

§ 922(g)(3) because, since this appeal, another panel of this court held the law is not facially unconstitutional. *United States v. Veasley*, 96 F.4th 906, 908 (8th Cir. 2024) ("The question is whether criminalizing this conduct *always* violates the Second Amendment. The answer is no, so we reject [the] facial challenge to the statute.").

To the extent Tucker makes an as-applied challenge to § 922(g)(3), we must reject it in light of his guilty plea: "A 'knowing and intelligent guilty plea' generally 'forecloses independent claims relating to the deprivation of constitutional rights that occurred before the entry of the guilty plea.'" *United States v. Deng*, 104 F.4th 1052, 1054 (8th Cir. 2024) (quoting *United States v. Morgan*, 230 F.3d 1067, 1071 (8th Cir. 2000)); *see also United States v. Seay*, 620 F.3d 919, 922 (8th Cir. 2010) (noting a voluntary guilty plea constitutes a waiver of non-jurisdictional defects).

Here, Tucker waived his right to challenge § 922(g)(3) when he knowingly and intelligently made a guilty plea and admitted to the factual basis for each charge. Thus, we affirm the district court's denial of Tucker's motion to dismiss Count 3.[2]

B. Denial of Sentencing Reduction

We next consider Tucker's argument that he was entitled to a two-level reduction for his offense level under U.S.S.G. § 3E1.1(a). We review for clear error the denial of a sentence reduction for acceptance of responsibility. *United States v. Davis*, 875 F.3d 869, 875 (8th Cir. 2017).

U.S.S.G. § 3E1.1 allows for a sentencing reduction if "[a] defendant clearly demonstrates acceptance of responsibility for his offense . . . ." But "[a] defendant who enters a guilty plea is not entitled to credit for acceptance of responsibility as a matter of right," *United States v. Torres-Rivas*, 825 F.3d 483, 486 (8th Cir. 2006) (quoting *United States v. Shade*, 661 F.3d 1159, 1167 (8th Cir. 2011)), and the

[2]The government also argues the motion to dismiss Count 3 was untimely because it was filed two weeks after the deadline. We need not reach this issue in light of our holding.

burden of proof is on a defendant to show he is entitled to the reduction, *United States v. Vega*, 676 F.3d 708, 723 (8th Cir. 2012). The district court may consider a defendant's conduct outside the charges, including noncriminal conduct, to determine whether he is truly sorry for his actions. *United States v. Atlas*, 94 F.3d 447, 451 (8th Cir. 1996).

Here, the district court found Tucker's misconduct in jail—which involved physical altercations with other prisoners, disobedience to correctional officers' orders, and tampering with security equipment—demonstrated "a disrespect and disregard for the management of the jail." Tucker has failed to show this determination was clearly erroneous. *See id.*; *United States v. Chappell*, 69 F.4th 492, 494 (8th Cir. 2023) (affirming the district court's decision to deny defendant's reduction for acceptance of responsibility based on post-plea, pre-sentencing conduct). We thus affirm the district court's denial of the § 3E1.1 reduction.

III. Conclusion

We affirm the district court's judgment.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
NO. 23-2758

UNITED STATES OF AMERICA,
Plaintiff-Appellee

vs.

AVONTAE TUCKER,
Defendant-Appellant.

APPEAL FROM THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION,
HONORABLE REBECCA GOODGAME EBINGER

APPELLANT'S PETITION FOR REHEARING EN BANC (FED. R. APP. P. 35 & 8TH CIR. R. 35A)

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INTRODUCTION

The Court should grant Mr. Tucker's petition for rehearing en banc because the panel decision conflicts with a decision of the United States Supreme Court. *See* Fed. R. App. P. 35(b)(1)(A). The panel affirmed the district court's decision by relying on *United States v. Veasley*, 96 F.4th 906 (8th Cir. 2024).[1] However, the panel's reliance on *Veasley* is misplaced, as that decision directly conflicts with the United States Supreme Court's decision in *United States v. Rahimi*, 144 S. Ct. 1889 (2024).

The Court should also grant rehearing en banc because the proceeding involves a question of exceptional importance. *See* Fed. R. App. P. 35(b)(1)(B). Mr. Tucker pleaded guilty and accepted responsibility for his actions. However, he was involved in several incidents while at county jail awaiting sentencing. The district court denied him a two-level reduction for acceptance of responsibility based on these incidents. The panel affirmed the district court's decision, but failed to take into account the context out of which these incidents arose, specifically the dangerous environment that

[1] A petition for writ of certiorari in *Veasley v. United States*, Sup. Ct. No. 23-1114, was distributed for conference of September 30, 2024.

Mr. Tucker was placed in and the efforts he took to remove himself from this environment prior to the occurrence of these incidents.

FACTUAL AND PROCEDURAL HISTORY

Avontae Tucker's charges arose out of a robbery in the Southern District of Iowa, committed when he was 19. Count 3 of the indictment charged him with possession of a firearm as an unlawful user in violation of 18 U.S.C. § 922(g)(3), because he knowingly possessed a firearm while being an unlawful user of or addicted to a controlled substance. On March 21, 2023, Mr. Tucker filed a motion to dismiss Count 3 of the Government's indictment, arguing that the statute is unconstitutional. The Court denied Mr. Tucker's motion.

Ultimately, Mr. Tucker pled guilty. After his plea, but prior to sentencing, jail officials moved him into an area containing several members of rival gangs and friends of rival gang members. (Sent. Tr. 27:1-7). Mr. Tucker feared for his own safety, as he had recently been shot and two of his closest friends had recently been killed in gang-related shootings at a local school. (Sent. Tr. 26:2-11). Anticipating violence from the rival members, Mr. Tucker approached the jail officials and requested to be transferred to another pod. (Sent. Tr. 27:14-15). His request was denied. Mr. Tucker was then involved in

several altercations with the rival members or their friends which he participated in because he believed it necessary to defend himself. (Sent. Tr. 29:25).

The presentence report (PSR) recommended that Mr. Tucker's acceptance of responsibility adjustment be taken away, claiming that his altercations in jail were criminal conduct. Mr. Tucker was never charged with any additional crimes relating to his conduct in jail. At sentencing, the Court agreed with the PSR's conclusion that Mr. Tucker had not sufficiently demonstrated an acceptance of responsibility.

Mr. Tucker filed a notice of appeal on August 1, 2023. He argued that his conviction under § 922(g)(3) was an unconstitutional violation of his Second Amendment rights under *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022). He also argued that the incidents in county jail were insufficient to deprive him of the 3-level reduction for acceptance of responsibility.

On August 2, 2024, the panel issued its opinion, affirming the district court's judgment. *United States v. Tucker*, No. 23-2758 (8th Cir. Aug. 2, 2024). Mr. Tucker now petitions the court for rehearing en banc.

ARGUMENT

I. The Court should grant en banc review because its panel decision conflicts with *United States v. Rahimi*.

The panel rejected Mr. Tucker's constitutional challenge because, since Mr. Tucker had initiated his appeal, the question had already been decided elsewhere in the 8th Circuit. As the panel explained:

> We reject Tucker's facial challenge to § 922(g)(3) because, since this appeal, another panel of this court held the law is not facially unconstitutional. *United States v. Veasley*, 96 F.4th 906, 908 (8th Cir. 2024).

Tucker, at 3-4. The panel did not offer any further comment on the statute's facial constitutionality.

However, *Veasley*, on which the panel's decision solely relies, directly conflicts with the Supreme Court's decision in *United States v. Rahimi*, 144 S. Ct. 1889 (2024), which analyzed the constitutionality of § 922(g)(8). In *Rahimi*, the Supreme Court made clear that (1) lower courts must follow the methodology for Second Amendment analysis set forth in *Bruen*, and (2) "clarified" that methodology. *See* 144 S. Ct. at 1898. Under this methodology, to justify a firearm law infringing on otherwise protected conduct, "the government must demonstrate that the regulation is consistent with

this Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 17. Then, "[a] court must ascertain whether the new law is relevantly similar to laws that our tradition is understood to permit, applying faithfully the balance struck by the founding generation to modern circumstances." *Rahimi*, 144 S. Ct. at 1898 (cleaned up).

Although *Rahimi* found that § 922(g)(8) was constitutional, its historical analysis of this statute demonstrates that there is no suitable historical analogue for § 922(g)(3). *Rahimi* made clear that our nation's historical tradition of firearm regulation has always included "significant procedural protections." *Id.* at 1900. § 922(g)(8) is constitutional because it applies only "to individuals *found to* threaten the physical safety of another." *Id.* at 1901 (emphasis added). As the Court explained:

> we note that Section 922(g)(8) *applies only once a court has found* that the defendant "represents a credible threat to the physical safety" of another. § 922(g)(8)(C)(i). That matches the surety and going armed laws, *which involved judicial determinations* of whether a particular defendant likely would threaten or had threatened another with a weapon.

Id. at 1901-02 (emphasis added). § 922(g)(8) is constitutional because a conviction under that section necessarily involves a prior determination that the defendant presents a credible threat of danger

to others. The defendant is afforded prior notice of his status as an unlawful possessor of firearms.

This directly conflicts with the Eighth Circuit's prior holding in *Veasley*. On appeal, Veasley argued that the Government's analogy to historical statutes disarming the mentally ill is flawed because confining someone has always required a judicial finding. *Veasley*, 98 F.4th at 916. The Eight Circuit rejected Veasley's argument "for two reasons":

> The first is the historical record, which shows that there was limited process accompanying the confinement of the mentally ill…Second, there is a finding required under § 922(g)(3), it just comes later. Getting a conviction requires proof beyond a reasonable doubt of "regular drug use," and possession of a firearm, not to mention close timing between the two…The procedure may not be identical, but it does not have to be.

Id. (citations omitted). *Veasley* went on to cite another historical analogue, "taking up arms to terrify people," an ancient common-law offense dating back to 1328, as further proof of § 922(g)(3)'s constitutionality. *Id.* Notably absent in this discussion is any consideration of the procedural protections these historical statutes provided.

But *Rahimi* makes clear that concerns about a lack of due process cannot be so easily pushed aside. There must be some level of procedural protection in place for the statute to withstand judicial scrutiny. *Rahimi* analyzed these same "taking up arms to terrify" laws, but only found them to be a suitable historical analogue because of the "significant procedural protections" these historical laws offered. 144 S. Ct. at 1901. As the Court explained, "Our Nation's tradition of firearm regulation distinguishes citizens who have been found to pose a credible threat to the physical safety of others from those who have not." *Id.* at 1902. "An individual *found by a court* to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment." *Id.* at 1903 (emphasis added). *Veasley* is no longer good law following *Rahimi*.

§ 922(g)(8) was able to withstand judicial scrutiny because, as with the historical analogues discussed in *Rahimi*, it too offers significant procedural protections. A prior judicial finding that a defendant poses a credible threat to the safety of others is required before a defendant can be convicted for violating the statute. The defendant is on notice of his unlawful status due to this prior finding.

§ 922(g)(3) does not offer any procedural protections; no prior judicial finding is required. Therefore, the law is facially unconstitutional under *Rahimi*, which made clear that some degree of due process is required for the statute to withstand scrutiny under the Second Amendment analysis laid out in *Bruen*.

The panel's decision relied exclusively on *Veasley* to dismiss Mr. Tucker's constitutional arguments. As *Veasley* is no longer good law in the wake of *Rahimi*, the Court must grant en banc review.

II. The Court should grant en banc review because Mr. Tucker is entitled to a two-level reduction for acceptance of responsibility.

The panel found that Mr. Tucker failed to demonstrate that the district court's decision to deny him a two-level reduction under § 3E1.1 was "clearly erroneous." *Tucker*, at 5. The panel held that Mr. Tucker's conduct "demonstrated a disrespect and disregard for the management of the jail." *Id.* However, the panel's opinion failed to consider the environment that Mr. Tucker was placed in and how that environment contributed to the incidents at the jail.

After Mr. Tucker entered the plea agreement, but prior to sentencing, jail officials moved him into an area containing several members of rival gangs and friends of rival gang members. (Sent. Tr.

27:1-7). Mr. Tucker feared for his own safety, as he had recently been shot and two of his closest friends had recently been killed in gang-related shootings at a local school. (Sent. Tr. 26:2-11). Anticipating violence from the rival members, Mr. Tucker approached the jail officials and requested to be transferred to another pod. (Sent. Tr. 27:14-15). His request was denied. Mr. Tucker was then involved in several altercations with the rival members or their friends which he participated in because he believed it necessary to defend himself. (Sent. Tr. 29:25).

Mr. Tucker was not well-equipped to handle this stressful environment. His family was dysfunctional, with his mother, father, grandmother, and stepfather all incarcerated for extended periods of time. (Sent. Tr. 44:8-23). His stepfather severely beat him as a child. (Sent. Tr. 44:21-23). He suffers from PTSD from the time when he was shot and has been prescribed medication for PTSD and anxiety. (Sent. Tr. 7:9-12). He was not taking his medication when these incidents took place. (Sent. Tr. 37:12-13). The two-level reduction is intended "to distinguish a sincerely remorseful defendant from a defendant not manifesting penitence." *United States v. Chappell*, 69 F.4th 492, 494 (8th Cir. 2023). Mr. Tucker's behavior does not

indicate a lack of remorse. On the contrary, he tried to remove himself from this situation, but his request was denied. Under such stressful circumstances, Mr. Tucker's behavior is more indicative of self-defense combined with unresolved trauma from his childhood and the recent death of his friends, rather than an ongoing criminal mentality.

CONCLUSION

The panel should grant rehearing en banc because its decision relied exclusively on *United States v. Veasley* in affirming the district court's decision. *Veasley* is no longer controlling following the United States Supreme Court's decision in *United States v. Rahimi*. *Rahimi* overruled key aspects of *Veasley's* Second Amendment analysis. Therefore, the panel's analysis based on *Veasley* directly conflicts with the Supreme Court's decision in *Rahimi*.

The panel should also grant en banc review of the panel's affirmance of the district court's denial of a two-level reduction for acceptance of responsibility. The panel's decision failed to take into account the particular context out of which Mr. Tucker's incidents at jail arose. When properly understood, it is clear that Mr. Tucker's

conduct while awaiting sentencing was not indicative of a lack of remorse. The panel's analysis was misguided, and en banc review is necessary to correct these errors.

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CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

The undersigned hereby certifies on this 12th day of August 2024 that upon receipt of the notice from CM/ECF system that the brief and addendum have been filed, the foregoing Defendant-Appellant's brief will be served upon counsel by depositing one copy thereof in the U.S. Mail, postage prepaid, in an envelope addressed to the following counsel:

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 35(b)(2) (less than 3,900 words) because this brief contains 1996 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f)(7), which include corporate disclosure statements, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules, or regulations, and any certificates of counsel.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in font size 14, Bookman Old Style.

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/s/ Alfredo Parrish
Alfredo Parrish, Attorney

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-2758

United States of America

Appellee

v.

Avontae Lamar Tucker

Appellant

Appeal from U.S. District Court for the Southern District of Iowa - Central
(4:22-cr-00164-RGE-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 03, 2024

Order Entered at the Direction of the Court:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Maureen W. Gornik

797 Fed.Appx. 233
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally
governing citation of judicial decisions issued on or after
Jan. 1, 2007. See also U.S.Ct. of App. 6th Cir. Rule 32.1.
United States Court of Appeals, Sixth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Roger Max AUSTIN, Defendant-Appellant.

No. 18-2040
|
FILED December 19, 2019

Synopsis

Background: Defendant was convicted in the United States District Court for the Eastern District of Michigan, Robert H. Cleland, Senior District Judge, of being a felon in possession of a firearm, carrying a firearm during a drug trafficking crime, and conspiring to manufacture, distribute, and possess with intent to distribute controlled substances. Defendant appealed.

Holdings: The Court of Appeals, Cole, Chief Judge, held that:

[1] delay between defendant's request to represent himself and district court's granting of such request did not violate defendant's Sixth Amendment right to self-representation;

[2] manner of disposal of hazardous substance supported substantial-risk-of-harm enhancement of sentence for drug distribution conspiracy;

[3] location of laboratory where hazardous substance was produced supported substantial-risk-of-harm enhancement;

[4] district court's failure to address two factors for substantial-risk-of-harm enhancement did not affect defendant's substantial rights;

[5] even if defendant did not personally maintain drug house, any error was not plain as to drug-house sentence enhancement; and

[6] sentence reduction for acceptance of responsibility was not warranted.

Affirmed.

Procedural Posture(s): Appellate Review.

West Headnotes (7)

[1] Criminal Law Decisions, findings, and order

Delay between defendant's request to represent himself and district court's granting of such request did not violate defendant's Sixth Amendment right to self-representation in prosecution for being a felon in possession of a firearm, carrying a firearm during a drug trafficking crime, and conspiring to manufacture, distribute, and possess with intent to distribute controlled substances; although district court did not grant request until one week before trial, 19 days after defendant made request, which defendant argued deprived him of adequate time to meaningfully prepare for trial, defendant repeatedly told court he was prepared to proceed to trial while representing himself and indicated he was ready to defend himself day before motion was granted. U.S. Const. Amend. 6; 18 U.S.C.A. §§ 922(g)(1), 924(c); Comprehensive Drug Abuse Prevention and Control Act of 1970 §§ 401, 406, 21 U.S.C.A. §§ 841(a)(1), 846.

6 Cases that cite this headnote

[2] Sentencing and Punishment Drugs and narcotics

Manner of disposal of hazardous substance supported substantial-risk-of-harm enhancement of offense level under Sentencing Guidelines, at sentencing for conspiring to manufacture, distribute, and possess with intent to distribute controlled substances; "burn pit" was within feet of methamphetamine production facility, and co-conspirators dumped chemical by-products onto

ground near pit, where they could potentially leach into environment. Comprehensive Drug Abuse Prevention and Control Act of 1970 §§ 401, 406, 21 U.S.C.A. §§ 841(a)(1), 846; U.S.S.G. § 2D1.1(b)(13)(C)(ii).

[3] **Sentencing and Punishment** Drugs and narcotics

Location of laboratory where hazardous substance was produced supported substantial-risk-of-harm enhancement of offense level under Sentencing Guidelines, at sentencing for conspiring to manufacture, distribute, and possess with intent to distribute controlled substances; laboratory that co-conspirators used to produce methamphetamine was located in residential area in close proximity to where people were residing. Comprehensive Drug Abuse Prevention and Control Act of 1970 §§ 401, 406, 21 U.S.C.A. §§ 841(a)(1), 846; U.S.S.G. § 2D1.1(b)(13)(C)(ii).

[4] **Criminal Law** Sentencing and Punishment

Sentencing and Punishment Objections and disposition thereof

District court's question to defendant, after court pronounced sentence but before adjournment of sentencing hearing, regarding whether there were any objections, misstatements, or corrections defendant needed to bring to court's attention satisfied requirement that court ask defendant about any objections to sentence that had not previously been raised, and thus defendant's objections to district court's failure to consider two factors in imposing sentencing enhancement for substantial risk of harm, which he raised for first time on appeal, were subject to plain error review in prosecution for conspiring to manufacture, distribute, and possess with intent to distribute controlled substances. Comprehensive Drug Abuse Prevention and Control Act of 1970 §§ 401, 406, 21 U.S.C.A. §§ 841(a)(1), 846; U.S.S.G. § 2D1.1(b)(13)(C)(ii).

[5] **Criminal Law** Sentencing and Punishment

District court's failure to address two factors of test for determining whether drug offense created substantial risk of harm to human life or environment, as necessary to impose sentencing enhancement, which required court to consider quantity of chemicals found at laboratory and manner in which they were stored and duration of offense and extent of manufacturing operation, did not affect defendant's substantial rights, as would be required for reversal of sentence on plain error review; government asserted at sentencing that pop bottles in varying degrees of manufacturing process were found at co-conspirators' methamphetamine laboratory and defendant approximated that he had known co-conspirators for less than two weeks. Comprehensive Drug Abuse Prevention and Control Act of 1970 §§ 401, 406, 21 U.S.C.A. §§ 841(a)(1), 846; U.S.S.G. § 2D1.1(b)(13)(C)(ii).

[6] **Criminal Law** Sentencing and Punishment

Even if defendant did not personally maintain drug house, any error was not plain as to applying, based on conduct of co-conspirators, drug-house enhancement of offense level under Sentencing Guidelines, at sentencing for conspiring to manufacture, distribute, and possess with intent to distribute controlled substances; district court lacked binding case law on question of appropriateness of applying enhancement based on co-conspirators' actions. Comprehensive Drug Abuse Prevention and Control Act of 1970 §§ 401, 406, 21 U.S.C.A. §§ 841(a)(1), 846; U.S.S.G. §§ 1B1.3(a)(1)(B), 2D1.1(b)(12).

1 Case that cites this headnote

[7] **Sentencing and Punishment** Acceptance of responsibility

Sentence reduction for acceptance of responsibility was not warranted in prosecution for being a felon in possession of a firearm, carrying a firearm during a drug trafficking crime, and conspiring to manufacture, distribute, and possess with intent to distribute controlled substances; although defendant argued that he admitted at trial that he had possessed gun and drugs at issue, he denied that he had joined conspiracy or sold methamphetamine and persisted in maintaining innocence as to conspiracy charge through sentencing, it would have been difficult for defendant to deny possessing gun and drugs, and his admission to possession of methamphetamine was admission to crime for which he was not charged. 18 U.S.C.A. §§ 922(g)(1), 924(c); Comprehensive Drug Abuse Prevention and Control Act of 1970 §§ 401, 406, 21 U.S.C.A. §§ 841(a)(1), 846; U.S.S.G. § 3E1.1.

5 Cases that cite this headnote

***235** ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

Attorneys and Law Firms

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Travis Alan Rossman, Law Office, Barbourville, KY, for Defendant - Appellant

BEFORE: COLE, Chief Judge; MERRITT and LARSEN, Circuit Judges.

OPINION

COLE, Chief Judge.

Defendant-Appellant Roger Max Austin was convicted by a jury of three counts related to his involvement in a methamphetamine-manufacturing conspiracy and was sentenced by the district court to 255 months in prison. Austin appeals his convictions and sentence. We affirm.

I. BACKGROUND

Roger Max Austin and 19 co-defendants were indicted for their involvement in a conspiracy to manufacture and distribute methamphetamine. Austin, the only defendant who proceeded to trial, was alleged to have joined the conspiracy in 2015 after it had been ongoing for several years. By 2015, the hub of the conspiracy's manufacturing operations was in a house on Stewart Street in Warren, Michigan (referred to as the "Stewart house"). A tarp was set up in a tent-like structure in the Stewart house's garage to facilitate meth production, and meth was cooked at the house on numerous occasions.

At trial, witnesses testified regarding Austin's friendship with occupants of the Stewart house. William Cornacchia, a meth producer, testified that one of the Stewart house's residents encouraged Cornacchia to meet Austin and had implied to Cornacchia that Austin also cooked meth. Cornacchia's girlfriend testified that another occupant of the house told her that Austin could get a lot of boxes of Sudafed to be used as an ingredient for meth production.

Austin, a member of the Devils Diciples [sic] Motorcycle Club, vehemently denied having joined the conspiracy, arguing at trial that he was instead in a buyer-seller relationship with the relevant individuals. Austin argued that he bartered Sudafed to obtain drugs, but that did "not make [him] involved in a conspiracy." (Def. Closing, Trial Tr., R. 520, PageID 4455.) According to Austin, bartering Sudafed for methamphetamine was cheaper than using cash because in exchange for one $10 box of Sudafed, he could receive an amount of methamphetamine worth $80 to $100.

A police investigation began in August 2015 in response to an informant's tip regarding methamphetamine production at the Stewart house. While conducting surveillance on September 10, 2015, police observed Austin at the house and smelled odors indicating methamphetamine was cooking. The next day, police observed Austin stop at Walgreens and CVS pharmacies and then return to the Stewart house.

Officers arrested Austin later that day as he was leaving a bar, as he had an outstanding felony warrant. On Austin's person, police found a loaded firearm and ***236** an Altoids tin containing baggies of crystal methamphetamine. In a pouch

on Austin's motorcycle, police located prescription pills and a box of Sudafed.

The officers later searched the Stewart house, where they found methamphetamine and evidence of its manufacture. The house's detached garage contained evidence that it had served as a methamphetamine laboratory, including a "one-pot methamphetamine lab" in a plastic bottle, and two bottles with acid used for cooking meth. (Off. Bradshaw Testimony, Trial Tr., R. 337, PageID 2506–09.) Behind the garage was a burn pit containing burned bottles and battery shells.

Austin was indicted by a grand jury on September 29, 2015. Several superseding indictments were brought as additional co-defendants were added. An attorney was appointed to represent Austin, but the district court allowed him to withdraw in July 2016 after a breakdown in attorney-client communication.

Attorney Michael McCarthy was then appointed to represent Austin. On June 22, 2017, Austin attended an arraignment before a magistrate judge on his Third Superseding Indictment. At the end of the hearing, Austin indicated his desire to dismiss McCarthy and represent himself pro se. The magistrate judge responded, "I'm going to let you take that up at a later time and not at this moment, but that's between you and Mr. McCarthy." (Arraignment Tr., R. 517, PageID 4270.)

On September 15, 2017, Austin attended a pretrial conference before the district court, at which time he was also arraigned on the Fourth Superseding Indictment. At that conference, Austin told the court, "I want to continue on pro se." (Pretrial Hr'g Tr., R. 518, PageID 4283.) The court responded by asking McCarthy if this had been raised before, at which time McCarthy alerted the court to what Austin had told the magistrate judge at the arraignment on the Third Superseding Indictment.

Austin stated that he wanted to represent himself because he "believe[d]" he knew his "case well" and was "prepared to defend" himself. (*Id*. at PageID 4286.) The court then asked Austin a series of questions about his education, knowledge of the rules of evidence and criminal procedure, mental health history, and his understanding of his rights and the potential sentence he might face if convicted. The court also asked, "You understand I'm not going to change the schedule of this case if you decide to represent yourself?" (*Id.* at PageID 4291.) Austin replied, "Yes, your honor." (*Id.*)

The court declined to rule on Austin's request at the hearing, explaining it "need[ed] to think about this." (*Id.* at PageID 4292.) As "far as the Court [was] concerned," Austin was now raising his request "for the first time." (*Id*.) The court indicated that it "need[ed] to go over the case law," and "it may well be the case that [Austin was] too late to advance this request" given that the trial was approximately three weeks away. (*Id.* at PageID 4292–93.) On the other hand, the court indicated that it had "no interest in depriving ... [Austin] of his Sixth Amendment right to self-representation." (*Id.* at PageID 4293.)

On October 3, 2017, the district court held a status conference. At that conference, the court asked Austin if he was "ready to defend" and "represent" himself, to which Austin replied, "Yes sir, I am." (Hr'g Tr., R. 367, PageID 3018.) The court asked Austin if he was "asking for a delay" or trying to "upset[ ] the schedule," to which Austin said, "No." (*Id.* at PageID 3025.) The court then stated that "the weight of the case authority" indicated ***237** that the court should permit Austin to represent himself. (*Id*.) The next day, the court entered an order formally granting Austin's request to proceed pro se, finding that Austin had knowingly and intelligently waived his right to counsel and remarking that Austin's request was not seeking to "upset or delay ... the court's trial schedule." (Self-Rep. Order, R. 327, PageID 1847–48.) The court appointed McCarthy as standby counsel.

The next day, October 5, a jury was impaneled. Austin was also arraigned on the Fifth Superseding Indictment, which outlined the three charges for which Austin was tried: 1) being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) (Count I); 2) carrying a firearm during a drug trafficking crime in violation of 18 U.S.C. § 924(c) (Count II); and 3) conspiring to manufacture, distribute, and possess with intent to distribute controlled substances in violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 846 (Count III).

The trial began with opening statements on October 10, 2017. In Austin's opening, he admitted that he was guilty of the first charge against him, being a felon in possession. However, he denied that he was guilty of Counts II and III. Austin told the jury, "I did buy Sudafed, and I used it to purchase meth, but I did not join no conspiracy or sell methamphetamine to nobody." (Def. Opening, Trial Tr., R. 332, PageID 1927.)

The jury returned a verdict on October 18, finding Austin guilty on all three counts on which he was tried. The jury's

verdict as to the conspiracy count also made a specific finding regarding the quantity of methamphetamine that Austin agreed would be involved in the conspiracy: 50 grams of methamphetamine or 500 grams or more of a mixture containing methamphetamine.

Austin's sentencing hearing took place on August 21, 2018. Just like at his trial, Austin represented himself with McCarthy serving as standby counsel. Austin made several objections to the sentencing guidelines calculations articulated in the probation department's presentence report. Of particular relevance to his appeal, Austin stated an objection to the application of a three-point enhancement under § 2D1.1(b)(13)(C)(ii) for creating a substantial risk of harm to human life or the environment, which the district court overruled.

Austin also stated a narrow objection to the application of a two-point enhancement for maintaining a drug house under U.S.S.G. § 2D1.1(b)(12). He made a factual objection to the notion that he had extensive personal ties to the Stewart house. The prosecutor responded that the drug-house enhancement could nonetheless apply because Austin could be held responsible for the reasonably foreseeable conduct of his co-conspirators. Austin did not object to this proposition, and the district court, in turn, applied the drug-house enhancement on the basis that Austin was responsible for his co-conspirators' maintenance of the Stewart house.

Austin also requested a two-point offense level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1. The court rejected this request given that Austin had consistently denied having participated in the conspiracy and had required the government to prove its case at trial.

The district court calculated Austin's offense level under the sentencing guidelines at 33. The number 33 was determined as follows: The base offense level was calculated at 30 under U.S.S.G. § 2D1.1(a)(5) due to the quantity of drugs found by the jury. The two-point drug-house enhancement under U.S.S.G. § 2D1.1(b)(12) and the three-point substantial-risk-of-harm ***238** enhancement under § 2D1.1(b)(13)(C)(ii) brought the offense level up to 35. Then the court applied a two-point reduction for the defendant having been a "minor participant" in the criminal activity under § 3B1.2, resulting in a final offense level calculation of 33.

Given the defendant's criminal history category of III, his guidelines range was 168–210 months for Counts I and III, which were grouped pursuant to § 3D1.2(c). In addition, the conviction on Count II under 18 U.S.C. § 924(c) required an additional 60-month mandatory consecutive sentence. The court imposed a sentence within the guidelines range, sentencing Austin to 120 months on Count I, 195 months on Count III to run concurrent with Count I, and 60 months on Count II to run consecutive to Counts I and III.

After imposing the sentence, the district court inquired of the defendant whether he had "any objections, misstatements, corrections, or anything of that nature that [he] need[ed] to bring to the Court's attention," to which Austin replied, "No, your honor." (Sentencing Hr'g Tr., R. 522, PageID 4596.) Austin filed a timely notice of appeal.

II. ANALYSIS

Austin raises one argument on appeal to challenge his convictions, asserting that the district court erred by delaying its grant of Austin's request to represent himself pro se until the eve of trial, thereby depriving him of sufficient time to prepare. Because this argument is without merit, we affirm Austin's convictions.

Austin also appeals his sentence, raising three challenges to the district court's calculation of his offense level under the 2016 sentencing guidelines—the version of the guidelines that governed his sentence and govern this appeal. *See* 18 U.S.C. § 3553(a)(4)(A)(ii) (providing that a court shall consider the sentencing range set forth in the guidelines that are "in effect on the date the defendant is sentenced"). Austin contends that the district court erred when it: 1) applied a three-level enhancement for creating a substantial risk of harm to human life or the environment under U.S.S.G. § 2D1.1(b)(13)(C)(ii) because the court failed to address all four factors required by Application Note 18(B); 2) applied a two-level enhancement for maintaining a premises for the purpose of manufacturing or distributing a controlled substance under U.S.S.G. § 2D1.1(b)(12), given that Austin did not personally maintain the premises; and 3) declined to apply a two-point reduction for acceptance of responsibility under U.S.S.G. § 3E1.1. As explained below, we reject Austin's challenges and affirm. [1]

A. The Defendant's Self-Representation Request

Austin first argues that the district court violated his Sixth Amendment rights by delaying the grant of his self-representation request until the eve of jury selection and nearly three weeks after it was ***239** made, thereby depriving Austin of adequate time to meaningfully prepare for trial. While the parties dispute which standard of review should govern the court's consideration of this claim, we need not decide which standard governs, as Austin's claim is meritless even under de novo review. *See* *United States v. Powell*, 847 F.3d 760, 774 (6th Cir. 2017).

The Sixth Amendment provides the accused with "the right to self-representation—to make one's own defense personally." *Faretta v. California*, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). However, this right is "not absolute." *Martinez v. Ct. of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 161, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000). A criminal defendant may only represent himself at trial if he "knowingly and intelligently waive[s] his right to counsel," *United States v. McBride*, 362 F.3d 360, 366 (6th Cir. 2004), and makes his self-representation request "in a timely manner," *United States v. Martin*, 25 F.3d 293, 295–96 (6th Cir. 1994).

Austin's argument relies on the Ninth Circuit's decision in *United States v. Farias*, in which the defendant made his self-representation request one day before trial. 618 F.3d 1049, 1050–51 (9th Cir. 2010). The district court in *Farias* told the defendant that the trial would not be continued, and thus he would only have one day to prepare to represent himself. *Id.* As a result, the defendant proceeded to trial with counsel. *Id.* The Ninth Circuit vacated the defendant's conviction, finding that the lower court had committed structural error by "foreclosing any possibility of a continuance" and thereby "effectively den[ying the defendant] the right to meaningfully represent himself." *Id.* at 1055. The Ninth Circuit proclaimed that "a right to proceed pro se without adequate time to prepare renders that right 'meaningless.' " *Id.* at 1054.

[1] Contrary to Austin's argument, the facts in *Farias* are not comparable to the case at hand. Here, there was no suggestion to the district court that Austin lacked sufficient time to prepare to represent himself. To the contrary, Austin repeatedly told the court that he was prepared to proceed to trial while representing himself. On September 15, he told the district court that he "believe[d]" he knew his "case well" and was "prepared to defend" himself, (Pretrial Hr'g Tr., R. 518, PageID 4286), and on October 3, when the court asked Austin if he was "ready to defend" and "represent" himself, Austin responded, "Yes sir, I am," (Hr'g Tr., R. 367, PageID 3018). Not only did Austin never imply that he wanted a continuance, he affirmatively indicated to the court that one was not needed.

Austin asserts that the district court's error was not in failing to sua sponte grant a continuance, but in the court's taking until October 4 to issue an order granting his request, nineteen days after Austin made his request on September 15. Yet Austin's criticism of the district court's delay is unavailing. The district court indicated on September 15 that it needed time to research the caselaw before making the consequential decision to grant Austin's request to represent himself. We are reluctant to demand district courts rush their decisions and rule from the bench on self-representation requests instead of prudently taking the time to review caselaw, as the district court chose to do here.

There may be cases where a district court's delay in ruling is sufficiently extreme that a defendant could reasonably argue he was unfairly prejudiced, or where a court abuses its discretion in denying a continuance after issuing a delayed ruling. *See, e.g.*, ***240** *United States v. Gallo*, 763 F.2d 1504, 1524 (6th Cir. 1985) (explaining the district court abused its discretion in denying a reasonable request for a continuance that resulted in defense counsel only having ten days after arraignment to prepare for a complex trial). This is not such a case. Austin repeatedly represented to the court that he was prepared to represent himself, on the regularly scheduled trial date, without any need for a continuance. We thus reject Austin's contention that the district court committed reversible error in delaying its grant of his self-representation request.

B. The Substantial-Risk-of-Harm Sentencing Enhancement

Section 2D1.1(b)(13)(C)(ii) of the 2016 sentencing guidelines provides a three-level enhancement if "the offense involved the manufacture of amphetamine or methamphetamine and the offense creates a substantial risk of harm to (I)

human life ...; or (II) the environment." Application Note 18(B) provides four factors that a court must consider in applying this enhancement, which is often referred to as the "substantial-risk-of-harm enhancement." *See* U.S.S.G. § 2D1.1 cmt. n.18(B); *United States v. Layne*, 324 F.3d 464, 469 (6th Cir. 2003) (describing that "consideration of the factors set out in the Application Note[ ] ... [is] mandatory").

Austin argues that the court erred when it applied the substantial-risk-of-harm enhancement. He asserts that: 1) the district court's findings "were procedurally deficient" because the court failed to address all four factors required by Application Note 18(B), and 2) its "substantive conclusions" were also "erroneous" and "warrant reversal." (Austin Br. 34.) Austin objected at sentencing to the general applicability of this enhancement, but he did not specifically object to the court's procedural failure to address each of the four factors required by Application Note 18(B). For the reasons described below, we reject Austin's argument that the district court reversibly erred in its application of this enhancement.

1. The Factors Applicable to the Substantial-Risk-of-Harm Enhancement

Application Note 18(B) provides that in determining "whether the offense created a substantial risk of harm to human life or the environment, the court *shall* include consideration of the following factors:

> (I) The quantity of any chemicals or hazardous or toxic substances found at the laboratory, and the manner in which the chemicals or substances were stored.
>
> (II) The manner in which hazardous or toxic substances were disposed, and the likelihood of release into the environment of hazardous or toxic substances.
>
> (III) The duration of the offense, and the extent of the manufacturing operation.
>
> (IV) The location of the laboratory (*e.g.*, whether the laboratory is located in a residential neighborhood or a remote area), and the number of human lives placed at substantial risk of harm."

U.S.S.G. § 2D1.1 n.18(B)(i) (emphasis added). At Austin's sentencing hearing, the court did not explicitly address each factor. The court's analysis focused on the fourth factor and emphasized that the conspiracy's meth manufacturing took place in "a residential area in close proximity to where people are residing," not a "commercial or industrial area away from human habitation." (Sentencing Hr'g Tr., R. 522, PageID 4508–09.) The court also addressed the second factor regarding disposal, commenting that the burn pit associated ***241** with the methamphetamine production was a "place where undesired chemical by-products are disposed of, dumped on the ground and potentially leach into the environment." (*Id.* at PageID 4508.)

In regard to the first factor—concerning the quantity and storage of chemicals—the court did not make any explicit finding at sentencing. However, during the government's argument, it asserted to the court that "in some of the photographs taken at the time the search warrant was executed, there were two, two or three pop bottles in varying degrees of the manufacturing process." (*Id.* at PageID 4506.) Neither the parties nor the court discussed the third factor, the duration or extent of the operation, during the court's consideration of the substantial-risk-of-harm enhancement. However, later in the sentencing hearing, the defendant said he had known his co-conspirators "for less than two weeks" when he was arrested, and the court considered the duration and extent of his participation in the conspiracy in applying a two-level reduction for his being a "minor participant" under U.S.S.G. § 3B1.2. (*Id.* at PageID 4528, 4534–35.)

2. Review of the District Court's Conclusions Regarding Factors Two and Four

The district court concluded that two of the factors described in Application Note 18(B) supported application of the enhancement. We accept the district court's factual findings unless clearly erroneous and apply de novo review to the mixed question of law and fact regarding whether factors two and four support the enhancement in Austin's case. *See United States v. Davidson*, 409 F.3d 304, 310 (6th Cir. 2005). A de novo review leads us to conclude that factors two and four both support application of the substantial-risk-of-harm enhancement.

The district court did not make specific factual findings regarding the other two factors—numbers one and three—thus preventing this court from conducting de novo review of them. *See, e.g.*, *Brown v. Marshall*, 704 F.2d 333, 334 (6th Cir. 1983) ("[T]he court of appeals is not equipped to ... function

as a fact-finder."). We will later discuss whether a remand to the district court is necessary for consideration of factors one and three, ultimately concluding it is not.

a. Factor Two: The Manner of Chemical Disposal

[2] Application Note 18(B)'s second factor concerns the manner in which chemicals were disposed of and their likelihood of release into the environment. The district court found that the "burn pit" at the Stewart house that was "within a couple feet of [the] methamphetamine production facility" was "a place where undesired chemical by-products" of meth production "[we]re disposed of, dumped on the ground and potentially leach into the environment." (Sentencing Hr'g Tr., R. 522, Page ID 4508.)

Austin argues that the "district court just noted that the chemicals could *potentially* leach into the environment" and "[s]peculation is specifically prohibited as a basis for the enhancement." (Austin Br. 35.) However, such an argument is misplaced. The district court here was presented with photograph evidence of a burn pit, which specifically showed the method of disposal. No speculation regarding the manner of disposal was necessary. *Cf.* *Davidson*, 409 F.3d at 313–14. Although the court did not conclusively find that the chemicals in fact had leached into the environment, the second factor, which asks the court to assess the "the likelihood of release into the environment," does not require ***242** such a finding. U.S.S.G. § 2D1.1 cmt. n.18(B)(i)(II). The district court found that the chemicals were likely to release into the environment, just as the application note describes. Given the photographic evidence of the burn pit, such a factual determination was not clearly erroneous. And in light of such a finding, the second factor supports application of the substantial-risk-of-harm enhancement.

b. Factor Four: The Location of the Methamphetamine Laboratory

[3] As the district court found, the methamphetamine laboratory that was maintained at the Stewart house was located in "a residential area in close proximity to where people are residing." (Sentencing Hr'g Tr., R. 522, PageID 4508–09.) Where a laboratory is located in a residential neighborhood, in contrast to a remote area, the fourth factor "strongly militates in favor of the application" of the substantial-risk-of harm enhancement. *Layne*, 324 F.3d at 471; *cf.* *Davidson*, 409 F.3d at 314. Thus, this factor strongly supports application of the enhancement.

3. The District Court's Failure to Consider Factors One and Three

Austin argues for the first time on appeal that the district court erred by failing to specifically address the two other factors dictated by Application Note 18(B): the quantity of the chemicals, and the duration and extent of the manufacturing operation. Because the district court did not plainly err by failing to expressly address these two factors, we reject Austin's argument.

a. Standard of Review

Where a defendant fails to object below, the court of appeals traditionally reviews for plain error. *United States v. Gardiner*, 463 F.3d 445, 459 (6th Cir. 2006). However, in *United States v. Bostic*, this court "exercise[d] [its] supervisory powers over the district courts and announce[d] a new procedural rule, requiring district courts, after pronouncing the defendant's sentence but before adjourning the sentencing hearing, to ask the parties whether they have any objections to the sentence just pronounced that have not previously been raised." 371 F.3d 865, 872 (6th Cir. 2004). "If the district court fails to provide the parties with this opportunity, they will not have forfeited their objections and thus will not be required to demonstrate plain error on appeal." *Id.* "A district court can satisfy the requirements of the *Bostic* rule only by clearly asking for objections to the sentence that have not been previously raised." *United States v. Clark*, 469 F.3d 568, 570 (6th Cir. 2006).

[4] After announcing Austin's sentence, the district court asked:

> Mr. Austin, are there any objections, misstatements, corrections, or anything of that nature that you need to bring to the Court's attention? You don't have to agree with the sentence,

> but if you have anything specific to say now that [the] sentence has been imposed with respect to the manner in which it was imposed, this is the time to point that out, so that if some mistake I have made in articulating the sentence, it can be corrected now instead of later. Is there anything of that sort, or any other generalized objection you may have to make?

(Sentencing Hr'g Tr., R. 522, PageID 4596.) Austin responded, "No, your honor." (*Id.*)

Austin argues that the district court's question does not satisfy *Bostic*'s requirements, but we disagree. This court has found similar questions satisfactory under *Bostic*. *See, e.g.*, *United States v. Taylor*, 800 F.3d 701, 708 (6th Cir. 2015) (holding ***243** that "any other objections as far as sentencing, or any other matters I failed to address on behalf of the defendant," qualified as the *Bostic* question).

Because the district court asked the *Bostic* question, Austin's newly-raised objection is subject to plain error review. "To establish plain error, a defendant must show that: (1) an error occurred in the district court; (2) the error was obvious or clear; (3) the error affected defendant's substantial rights; and (4) this adverse impact seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Gardiner*, 463 F.3d at 459 (citation omitted). A district court's error affects substantial rights where there is "a reasonable probability that the error affected the outcome" of the sentencing. *United States v. Marcus*, 560 U.S. 258, 262, 130 S.Ct. 2159, 176 L.Ed.2d 1012 (2010).

b. Factors One and Three

Contrary to Austin's assertion, a district court's failure to explicitly address each and every mandatory factor at sentencing does not always necessitate reversal. *See, e.g.*, *United States v. Vonner*, 516 F.3d 382, 388 (6th Cir. 2008) (en banc) (describing that the district court did not plainly err where it only mentioned the 18 U.S.C. § 3553(a) mandatory sentencing "factors that were directly relevant" to the defendant). When the Eighth Circuit was confronted with the same argument that Austin now brings—whether the district court had erred by failing to expressly address the application note's factors in applying an enhancement for substantial risk of harm—it "decline[d] to [remand for] a rote recitation of the ... factors when ... the sentencing record makes clear that their substance has been adequately considered." *United States v. Patterson*, 481 F.3d 1029, 1034 (8th Cir. 2007).

In contrast, the Ninth Circuit—in a case heavily cited by Austin—reversed the district court in *United States v. Staten*, where the district court failed to adequately consider the application note's factors in applying the substantial-risk-of-harm enhancement. 466 F.3d 708, 717 (9th Cir. 2006). In *Staten*, the lower court had improperly relied on generic factors that would be common to any methamphetamine manufacture, instead of making factual findings specific to the case. *Id.* at 716–17. Such an approach would similarly be inappropriate in this circuit, as the Sixth Circuit has said that "[n]either the language of [the enhancement] nor its commentary suggests that the" substantial-risk-of-harm enhancement "should be applied any time methamphetamine is manufactured in anything less than professional laboratory conditions." *Davidson*, 409 F.3d at 314.

[5] While it would have been prudent for the district court here to have addressed all four factors more explicitly in its sentencing, we do not conclude that the district court committed plain error by failing to do so. A court need not find that *every* factor listed in Application Note 18(B) applies in order to apply the enhancement. *See* *Layne*, 324 F.3d at 471 (affirming application of the enhancement where only three of the four factors supported its applicability). The district court here addressed the two factors that were particularly relevant to Austin's case, both of which the court concluded—correctly—strongly supported application of the enhancement.

Furthermore, plain error did not occur given that it does not appear that the district court's failure to address these two other factors affected Austin's substantial rights. To start, there is no indication that consideration of the first factor, the quantity and storage of the chemical substances ***244** found at the laboratory, would have moved the needle in favor of Austin. The government argued at sentencing "that two or three pop bottles in varying degrees of the manufacturing

process" were found when the search warrant was executed at the Stewart house. (Sentencing Hr'g Tr., R. 522, PageID 4506.) The district court did not make any express findings in relation to the government's representation. However, there was testimony presented at trial to support the government's assertion. A police officer who helped execute the search warrant testified that in the Stewart house's detached garage police found a green two-liter bottle that served as a "one-pot methamphetamine lab" and two bottles that were "active gas generators" that were full of "a very strong acid." (Off. Bradshaw Testimony, Trial Tr., R. 337, PageID 2506–09.) Moreover, while Austin's brief argues that "the government presented no information at sentencing that the offense involved a particularly large quantity" of chemicals, (Austin Br. 32), this court has held that even a "minimal amount" can support application of the enhancement under this factor, given the "inherent dangers of methamphetamine manufacturing" that the guideline provision is "designed to address," *United States v. Whited*, 473 F.3d 296, 299–300 (6th Cir. 2007) (internal citation omitted). Given the evidence presented at trial, there is no reason to believe that consideration of the first factor would have militated against application of the enhancement.

In regard to the third factor, the government mistakenly urges the court to consider the duration and extent of the operation since 2012, the year when it appears Austin's co-conspirators began cooking methamphetamine. This argument ignores the directive that "a defendant cannot be held accountable under [the relevant conduct provision] for 'the conduct of [other] members of a conspiracy *prior* to the defendant joining the conspiracy.' " *United States v. Donadeo*, 910 F.3d 886, 895 n.4 (6th Cir. 2018) (quoting U.S.S.G. § 1B1.3 cmt. n.3(B)) (emphasis added). Yet even focusing on the manufacturing operation during the period when Austin participated, this factor supports application of the enhancement.

In *Layne*, we held that the third factor supported application of the enhancement where the methamphetamine laboratory had been operating for "at least two weeks" and had "manufactured several batches of methamphetamine." 324 F.3d at 470. Here, Austin approximated at sentencing that he had known his co-conspirators for slightly less than two weeks, and the jury found that Austin had personally agreed that at least 50 grams of meth (or 500 grams of a mixture containing meth) would be involved in the drug-manufacture conspiracy. While the duration of Austin's involvement was slightly shorter than the duration in *Layne*, the extent of the operation appears larger given the sizeable drug quantity found by the jury. The third factor therefore seems to support application of the enhancement.

In short, there is no indication that consideration of factors one and three would have militated against application of the enhancement. The district court's failure to explicitly address factors one and three did not affect Austin's substantial rights, and accordingly does not constitute plain error. *See* *Marcus*, 560 U.S. at 262, 130 S.Ct. 2159.

C. The Drug-House Sentencing Enhancement

Section 2D1.1(b)(12) of the sentencing guidelines provides that "[i]f the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance, increase by **2** levels." Austin ***245** argues that the district court erred by applying the drug-house enhancement in his case because he did not personally maintain a drug house, and § 2D1.1(b)(12)'s text and accompanying commentary "require[ ] the *defendant* to maintain the premises." (Austin Br. 28.) The government appears to concede that the house was "maintained not by [the] defendant but by co-conspirators," but argues that the district court's decision to apply the enhancement was correct because Austin is held responsible for the reasonably foreseeable conduct of his co-conspirators under the relevant conduct provision of the sentencing guidelines. (Gov't Br. 1, 20.)

The sentencing guidelines' relevant conduct provision dictates:

> *Unless otherwise specified*, ... specific offense characteristics ... in Chapter Two ... shall be determined on the basis of ... all acts and omissions of others that were—
>
> (i) within the scope of the jointly undertaken criminal activity,
>
> (ii) in furtherance of that criminal activity, and
>
> (iii) reasonably foreseeable in connection with that criminal activity;
>
> that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense[.]

U.S.S.G. § 1B1.3(a)(1)(B) (emphasis added). Austin avers that the guidelines "otherwise specif[y]" an exception to the application of the relevant conduct provision in the context of the drug-house enhancement.

Austin, however, made a different objection to the district court. At the sentencing hearing, Austin's objection regarding this enhancement was on a narrow factual basis. He did not object to the application of the relevant-conduct provision to the drug-house enhancement, and thus he did not "apprise[ ]" the district court of the "basis for his objection" that he now raises on appeal. *See* *Bostic*, 371 F.3d at 871 (internal citation and quotation marks omitted). Because the district court asked the *Bostic* question, *see supra*, we review for plain error.

[6] The Sixth Circuit has not directly ruled on the appropriateness of applying the drug-house enhancement based solely on the conduct of co-conspirators, and other circuits appear to have expressed differing viewpoints. *Compare* *United States v Miller*, 698 F.3d 699, 706 (8th Cir. 2012) ("[U.S.S.G.] § 2D1.1(b)(12), like the 21 U.S.C. § 856(a)(1) offense that it parallels, requires proof that the specific defendant being sentenced maintained the premises 'for the purpose of' drug manufacture or distribution.") *with* *United States v. Holmes*, 767 F. App'x 831, 839 (11th Cir. 2019) ("Nothing in § 2D1.1(b)(12) prohibits a sentencing court from imposing the premises enhancement based on the jointly undertaken criminal activity of co-conspirators."). For an error to be "plain," it must, "at a minimum," be "clear under current law." *United States v. Al-Maliki*, 787 F.3d 784, 794 (6th Cir. 2015) (internal citation omitted). Because the district court "lack[ed] ... binding case law" from the U.S. Supreme Court or the Sixth Circuit on this question, we are "preclude[d]" from "finding of plain error." *Id.* We thus hold that the district court did not plainly err in applying the drug-house sentencing enhancement, and we decline to opine in dicta on the appropriateness of this enhancement had the objection been preserved. *See* *Cataldo v. U.S. Steel Corp.*, 676 F.3d 542, 551 (6th Cir. 2012) (describing that it is prudent for this court to "decline to opine unnecessarily").

***246 D. Acceptance of Responsibility**

Austin argues that the district court erred by denying his request at sentencing for a two-point offense level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1. Austin asserts that he accepted responsibility by "admitt[ing]" at trial to "possessing the gun and drugs at issue" and "merely challenged the applicability of the [conspiracy] statute to his conduct." (Austin Br. 37.) Austin's argument is without merit.

Section 3E1.1 provides a two-point offense level reduction "[i]f the defendant clearly demonstrates acceptance of responsibility for his offense." The defendant bears the burden of demonstrating that he accepted responsibility. *United States v. Chalkias*, 971 F.2d 1206, 1216 (6th Cir. 1992). Application Note 2 instructs that proceeding to trial "does not automatically preclude a defendant from consideration," as there are "rare situations" where a defendant "clearly demonstrate[s] acceptance of responsibility" despite proceeding to trial. U.S.S.G. § 3E1.1 cmt. n.2. By way of example, the note describes a situation "where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (*e.g.*, to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct)." *Id.*

"[A] defendant must accept responsibility for all counts before he is entitled to a reduction in sentence for acceptance of responsibility." *United States v. Chambers*, 195 F.3d 274, 278–79 (6th Cir. 1999) (affirming a district court's denial of the reduction where the defendant admitted to being a felon in possession but denied his guilt as to another offense). "Generally a question of fact, the [district] court's determination of whether a defendant has accepted responsibility normally enjoys the protection of the clearly erroneous standard." *United States v. Morrison*, 983 F.2d 730, 732 (6th Cir. 1993).

[7] The district court did not clearly err in denying Austin's request for this reduction, as he repeatedly asserted his factual innocence during trial. In his opening statement, he explained, "I did buy Sudafed, and I used it to purchase meth, but I did not join no conspiracy or sell methamphetamine to nobody." (Def. Opening, Trial Tr., R. 332, PageID 1927.) In his closing statement, he asserted, "I'm not ... connected to the overall drug distribution conspiracy itself." (Def. Closing, Trial Tr., R. 520, PageID 4460.) He continued, "So on Count 1 ... I'm guilty of it.... Now as far as Count 2 and 3 go, I'm not guilty." (*Id.*) Austin persisted in maintaining his

innocence as to the conspiracy charge through sentencing, explaining at the sentencing hearing, "I still stand by my innocence that I was not involved with the conspiracy with these people." (Sentencing Hr'g Tr., R. 522, PageID 4510.)

Austin's assertions of innocence were not simply, as appellate counsel now claims, legal arguments challenging the applicability of the conspiracy statute to the defendant's conduct. Austin emphatically denied that he had committed a key element of the conspiracy charge—that he entered into any agreement with his co-conspirators to manufacture, distribute, and possess with intent to distribute methamphetamine. The district court, "in a unique position to evaluate [the] defendant's acceptance of responsibility," U.S.S.G. § 3E1.1 cmt. n.5, observed at sentencing that Austin had "contested the facts at every turn, put[ing] the [g]overnment to its proofs," (Sentencing Hr'g Tr., R. 522, PageID 4510.)

We have repeatedly affirmed denial of this reduction where defendants attempted to minimize their role in a conspiracy or ***247** admitted to some incriminating facts but not to each factual element of the crime charged. *See, e.g.*, *Chalkias*, 971 F.2d at 1216 (affirming a district court's refusal to give the two-point reduction where the defendants "attempted to minimize their roles in the drug conspiracy"); *United States v. Sloman*, 909 F.2d 176, 182 (6th Cir. 1990) (affirming a district court's refusal to grant a two-level reduction where the defendant "never admitted [to] any fraudulent intent"). A defendant is not entitled to a reduction where he denies guilt on at least one count and does "no more than admit an offense with which he was not charged and admit conduct which he could not deny." *United States v. Head*, 927 F.2d 1361, 1374 (6th Cir. 1991). Here, Austin admitted to possessing drugs and a gun, which were facts that would have been difficult for him to deny. His admission to mere possession of methamphetamine was an admission to a crime with which he was not charged. On the other hand, he strongly contested any involvement in drug trafficking or the larger drug conspiracy, thus requiring the government to prove this at a jury trial. The district court was correct to reject Austin's request for this reduction.

III. CONCLUSION

For the foregoing reasons, we affirm.

All Citations

797 Fed.Appx. 233

Footnotes

1 After briefing in this appeal was completed, Austin filed a pro se motion to file a supplemental brief raising additional arguments. We typically deny litigants' requests to file a supplemental pro se brief when they are represented by counsel who has already filed a brief on their behalf, as Federal Rule of Appellate Procedure 31(a) allows litigants "a single brief, not two." *United States v. Fontana*, 869 F.3d 464, 472–73 (6th Cir. 2017); *see also, e.g.*, *United States v. Williams*, 641 F.3d 758, 770 (6th Cir. 2011) ("Because [the defendant] was represented by counsel on this appeal, we decline to address these pro se arguments."). We denied Austin's motion in an order on November 13, 2019. Austin then filed a pro se motion to reconsider this order, which we deny for the same reason. We therefore decline to reach Austin's additional pro se arguments.

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764 Fed.Appx. 533
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See Fed. Rule of Appellate Procedure 32.1 generally
governing citation of judicial decisions issued on or after
Jan. 1, 2007. See also U.S.Ct. of App. 6th Cir. Rule 32.1.
United States Court of Appeals, Sixth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Deunta L. FINCH, Defendant-Appellant.

No. 18-5415
|
Filed March 28, 2019

Synopsis
Background: Defendant pleaded guilty in the United States District Court for the Middle District of Tennessee to felon in possession of a firearm, Hobbs Act robbery, and brandishing or discharging a firearm during a crime of violence. Defendant appealed.

Holdings: The Court of Appeals, Griffin, J., held that:

[1] denial of acceptance-of-responsibility reduction was not clear error, and

[2] 170-month sentence on defendant's conviction for discharging a firearm during the commission of a felony was not plain error.

Affirmed.

Procedural Posture(s): Appellate Review.

West Headnotes (2)

[1] Sentencing and Punishment Acceptance of responsibility

District court's denial of acceptance-of-responsibility reduction for defendant who pleaded guilty to felon in possession of a firearm, Hobbs Act robbery, and brandishing or discharging a firearm during a crime of violence, was not clear error; a defendant who entered guilty plea was not entitled to acceptance-of-responsibility reduction as a matter of right, and court specifically considered relation of defendant's conduct in a prison beating and theft to Hobbs Act robbery conviction and determined that it was of the same type as underlying offense. 18 U.S.C.A. §§ 922(g)(1), 924(c)(1)(A)(iii), 1951; U.S.S.G. § 3E1.1.

[2] Criminal Law Sentencing and Punishment

District court's 170-month sentence on defendant's conviction for discharging a firearm during the commission of a felony was not plain error; court correctly scored Sentencing Guidelines, court considered Guidelines range, court knew that defendant faced consecutive sentence, court explicitly determined that it would sentence defendant to Guidelines sentence, and court's transposing of correct sentences from proper charges did not cause defendant to serve even one extra day in prison. 18 U.S.C.A. §§ 922(g)(1), 924(c), 924(c)(1)(A)(iii), 1951.

***534** ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

Attorneys and Law Firms

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Deunta L. Finch, Pro Se

BEFORE: McKEAGUE, GRIFFIN, and NALBANDIAN, Circuit Judges.

Opinion

GRIFFIN, Circuit Judge.

Defendant Deunta Finch appeals his sentence after a guilty plea. In particular, he claims the district court erred by failing to give him credit for acceptance of responsibility during sentencing and by sentencing him to an allegedly unsupported upward variance. Finding no errors requiring reversal, we affirm.

I.

Defendant is a member of the Athens Park Bloods Gang as well as a crack cocaine dealer and previously convicted felon. He was indicted and charged with two counts of felon in possession of a firearm, 18 U.S.C. § 922(g)(1); Hobbs Act robbery, 18 U.S.C. § 1951; and brandishing or discharging a firearm during a crime of violence, 18 U.S.C. § 924(c)(1)(A)(iii); arising out of two separate shooting incidents. The first shootout underlying the charges involved defendant and his friend Jamarius Hill, as passengers in a moving vehicle, exchanging fire with the driver of another vehicle over some driving-related disagreement. ***535** Defendant was ultimately charged with two counts of felon in possession of a firearm related to this shooting—one for the gun he possessed during the shooting, and one for a different gun that was found in his constructive possession when he was arrested.

In the second shooting, for which defendant was charged with Hobbs Act robbery and discharge of a firearm during a crime of violence, defendant and a rival drug dealer named Geoffrey Mason were siting in the same car when defendant brandished a firearm and attempted to rob Mason of cocaine, crack cocaine, and drug proceeds. The two tussled over the weapon, it discharged, the bullet grazed Mason's thigh, and both fell out of the car. They continued to wrestle for the gun, and defendant ultimately shot Mason in the left knee and pistol-whipped him in the head before taking some of Mason's cocaine and his car.

Before trial, defendant and the government came to a Rule 11(c)(1)(C) plea agreement, whereby defendant would plead guilty to all four charges in exchange for a total sentence of 180 months' imprisonment. Before sentencing, however, the government moved to withdraw from the plea agreement, citing defendant's alleged violent attack on a fellow inmate while awaiting sentencing. The government alleged that defendant beat his cellmate so badly that his cellmate's jaw was broken in two places and he suffered a broken rib. Furthermore, the government alleged that defendant stole some of his cellmate's property during or shortly after the attack. The parties appeared for a hearing on the motion, at which the government presented evidence of defendant's attack. The district court took the government's motion under advisement, but while the motion was pending, defendant elected to simply reenter a plea of guilty to the open indictment, with no agreement relating to his possible sentence.

The presentence investigation report calculated a total offense level of 29, with a corresponding advisory Sentencing Guidelines range of 151 to 188 months for Counts 1, 2, and 4, and a mandatory 120-month sentence for Count 3, the 18 U.S.C. § 924(c) charge, to be served consecutively. This gave defendant a cumulative sentencing range of 271 to 308 months on all convictions. The parties appeared for sentencing, and defendant challenged the presentence investigation report for failing to give him a two-point reduction for acceptance of responsibility. The district court denied defendant's challenge, ruling that defendant's conduct in assaulting and robbing his cellmate while incarcerated pending sentencing sufficiently paralleled his robbery conduct to preclude an acceptance of responsibility adjustment. Ultimately, the district court sentenced defendant to total of 290 months' imprisonment.

II.

[1] Defendant first challenges the district court's denial of an acceptance-of-responsibility reduction. We review a district court's denial of an acceptance-of-responsibility adjustment under USSG § 3E1.1 with "great deference on review," § 3E1.1 cmt. 5, and will reverse that decision only for clear error. *United States v. Genschow*, 645 F.3d 803, 813 (6th Cir. 2011).

Section 3E1.1(a) of the Guidelines provides that the district court should reduce a defendant's offense level by two "[i]f the defendant clearly demonstrates acceptance of

responsibility for his offense." *See also* *United States v. Calvetti*, 836 F.3d 654, 670 (6th Cir. 2016). The Application Notes to § 3E1.1 are instructive and provide that appropriate considerations for the district court in making such a determination include ***536** "truthfully admitting the conduct comprising the offense(s) of conviction" and "voluntary termination or withdrawal from criminal conduct or associations." § 3E1.1 cmt. 1(A), (B). The latter consideration, we have held, does not apply broadly to all criminal conduct, but rather means only criminal conduct related to the crime of conviction. *United States v. Morrison*, 983 F.2d 730, 735 (6th Cir. 1993) ("[W]e consider 'voluntary termination or withdrawal from criminal conduct' to refer to that conduct which is related to the underlying offense."). We held that, to be relevant for an acceptance-of-responsibility reduction, the subsequent criminal conduct "may be of the same type as the underlying offense, ... or may be the motivating force behind the underlying offense, ... or may be related to actions toward government witnesses concerning the underlying offense, ... or may involve an otherwise strong link with the underlying offense." *Id.* (emphasis omitted).

Defendant first argues that his open plea to all four charges without a plea agreement is ample evidence of his acceptance of responsibility by itself. This argument is meritless. First of all, "[a] defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right." USSG § 3E1.1 cmt. 3. Instead, "[e]ntry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction ... constitute[s] significant evidence of acceptance of responsibility," but may be outweighed by other conduct that is inconsistent with such acceptance of responsibility. *Id.* While defendant is correct that his open plea to the charges is evidence of his acceptance of responsibility, that does not end the relevant inquiry.

Second, defendant argues that the district court erred in considering his "prison fight" because it was unrelated to his offenses of conviction, and the district court failed to "review or apply the *Morrison* standard." This argument does no better. While the district court did not cite *Morrison* in its analysis, it certainly considered the relevant standard, which is whether the subsequent criminal conduct was related to the crimes of conviction. *Morrison*, 983 F.2d at 735. In denying the adjustment, the district court concluded:

> Here, ... the activity, the assault activity, the theft activity of the defendant so parallels the instant charge in terms of a mindset and in terms of the way the assault was carried out that I think it clearly is indication of not accepting responsibility. So [defendant's] objection will be overruled.

In other words, the district court specifically considered the relation of the conduct in the prison beating and theft to his Hobbs Act robbery conviction and determined that it was "of the same type as the underlying offense." *Id.* This is explicitly permissible under *Morrison*, and the district court did not err (let alone clearly so) in denying defendant an acceptance-of-responsibility reduction on these grounds.

III.

[2] Defendant next challenges the procedural reasonableness of his 170-month sentence on his § 924(c) conviction for discharging a firearm during the commission of a felony. Generally, we review sentences for procedural reasonableness "under the deferential abuse-of-discretion standard." *United States v. Lanning*, 633 F.3d 469, 473 (6th Cir. 2011). But "if a sentencing judge asks ... whether there are any objections not previously raised, in compliance with the procedural rule set forth in *United States v. Bostic*, 371 F.3d 865 ([6th Cir.] 2004)[,] and if the relevant party does not object, then plain-error review ***537** applies on appeal to those procedural-reasonableness arguments that were not preserved in the district court." *United States v. Penson*, 526 F.3d 331, 337 (6th Cir. 2008) (brackets omitted). At the end of the hearing the district court twice asked the *Bostic* question—i.e., if there were "any objections or anything else we have to determine at this time"—to which defense counsel responded "[n]one that haven't

already been previously entered, Your Honor." Defendant did not "previously enter[ ]" any challenge to the procedural reasonableness of his sentence. Therefore, defendant forfeited this challenge and may only obtain relief upon a showing of plain error that affects his substantial rights. *United States v. Vonner*, 516 F.3d 382, 385–86 (6th Cir. 2008) (en banc).

Plain-error review is a high bar. Defendant must first present an error that was not intentionally relinquished or abandoned. *United States v. Olano*, 507 U.S. 725, 732–33, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). Second, defendant must show that the error was clear or obvious. *Id.* at 734, 113 S.Ct. 1770. Third, defendant must show that the error affected his substantial rights, "which in the ordinary case means he or she must show a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Molina-Martinez v. United States*, —— U.S. ——, 136 S.Ct. 1338, 1343, 194 L.Ed.2d 444 (2016) (internal quotation marks omitted). Finally, if those three conditions are met, this court "should exercise its discretion to correct the forfeited error if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (internal quotation marks omitted).

At sentencing, the district court pronounced the sentence as follows:

> THE COURT: ... The sentencing guidelines call for a sentence of, let me get this right, 271 to 308 months. Is that correct?
>
> THE PROBATION OFFICER: Your Honor, it is a[,] technically Count Three is not considered under the guidelines. I[t] has to be imposed consecutively and separate.
>
> THE COURT: Yes, I know.
>
> THE PROBATION OFFICER: But in practicality, you are adding 120 months to bottom to top, your math is correct.
>
> THE COURT: I can go under the guidelines. I can go over them too. But I am going to give you a guideline sentence, one that I think reflects the seriousness of the crime and the reason we have to protect people from you. On Counts One, Two and Four, I am going to sentence you to 120 months each concurrent with each other. Consecutive to that sentence of 120 months, I am going to sentence you to 170 months for a total of 290 months. There will be a period of supervised release on Count One, Two and Four of three years and on Count Five [sic: "Three"] of five years all to run concurrent for a total of five years supervised release.

Defendant is correct that the district court apportioned 170 months of his total 290-month sentence to his § 924(c) conviction, which defendant characterizes as an unsupported upward variance, given that the Guidelines sentence for that conviction is 120 months. *See* 18 U.S.C. § 924(c)(1)(A)(iii); USSG § 2K2.4(b) ("[I]f the defendant, whether or not convicted of another crime, was convicted of violating [§ 924(c)], the guideline sentence is the minimum term of imprisonment required by statute."). But this immediately followed his discussion of the collective sentence defendant would serve (given the consecutive nature of his felon-in-possession ***538** and Hobbs Act robbery sentences to his § 924(c) conviction) and neither party argues that the Guidelines range was improperly scored. In other words, rather than evidence of an unsupported upward departure, the district court engaged in the verbal equivalent of scrivener's error—applying the 170-month Guidelines sentence to Count 3, the § 924(c) conviction, and the 120-month sentence (which is actually a downward departure from the Guidelines range) to defendant's convictions on Counts 1, 2, and 4.

Moreover, here, plain-error review precludes relief. Assuming arguendo that defendant has shown error and that it is clear (the first two prongs of plain error), he cannot prove prejudice. *Molina-Martinez*, 136 S.Ct. at 1343. The district judge's colloquy shows that he correctly scored the Guidelines, he considered the Guidelines range, knew that defendant faced a consecutive sentence for his § 924(c) conviction, and explicitly determined that he would sentence defendant to a Guidelines sentence. Merely transposing the correct sentences from their proper charges does not cause defendant to serve even one extra day in prison, and the total sentence—the proper consideration—was correctly within the cumulative Guidelines range. *Cf. United States v. Rodgers*, 278 F.3d 599, 604 (6th Cir. 2002) (holding that the total sentencing *term*, not the component sentences, matters when determining whether judicial vindictiveness occurred). Given the district court's thorough explanation of the sentences, and the minor nature of this misstep, defendant cannot show any probability (let alone a reasonable one) that the proceedings below would have been meaningfully different

absent the error. Furthermore, this minute mistake certainly doesn't "affect[ ] the fairness, integrity or public reputation of judicial proceedings." *Molina-Martinez*, 136 S.Ct. at 1343 (internal quotation marks omitted). Thus, defendant cannot show plain error.

Finally, it is important to note the district court's detailed consideration of the 18 U.S.C. § 3553(a) factors at sentencing. *See* *Gall v. United States*, 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007). While the court did not do so in consideration of an upward variance (because the court did not consider its sentence to be a variance), the court's meticulous reasoning in support of the cumulative sentence given to defendant also thwarts defendant's claim of error. The district court discussed, in depth, nearly all the pertinent considerations listed in § 3553(a), including defendant's criminal background and personal history, § 3553(a)(1); the sentencing goals of rehabilitation, punishment, deterrence, protecting society, and providing defendant with mental-health and drug-abuse services, § 3553(a)(2); and the Sentencing Guidelines and advisory sentence range, § 3553(a)(3), (4). The thorough nature of the district court's reasoning in deciding upon an adequate sentence further undergirds our conclusion that plain error did not occur.

IV.

We affirm the judgment of the district court.

All Citations

764 Fed.Appx. 533

835 Fed.Appx. 94
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally
governing citation of judicial decisions issued on or after
Jan. 1, 2007. See also U.S.Ct. of App. 6th Cir. Rule 32.1.
United States Court of Appeals, Sixth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Dominique Javon HARRIS, Defendant-Appellant.

Case No. 19-1968
|
FILED November 19, 2020

Synopsis

Background: Defendant pled guilty in the United States District Court for the Western District of Michigan, Gordon J. Quist, Senior District Judge, to being a felon in possession of a firearm and was sentenced to 72 months' imprisonment. Defendant appealed.

Holdings: The Court of Appeals held that:

[1] application of Guidelines cross-reference for use or possession of a firearm in connection with commission of another felony was warranted:

[2] defendant was not entitled to sentence reduction for acceptance of responsibility; and

[3] sentence of 72 months' imprisonment for being a felon in possession of a firearm was substantively reasonable.

Affirmed.

Procedural Posture(s): Appellate Review; Sentencing or Penalty Phase Motion or Objection.

West Headnotes (3)

[1] Sentencing and Punishment Weapons and explosives

Defendant's possession of firearm had potential of facilitating drug trafficking, so as to warrant application of Sentencing Guidelines cross-reference for use or possession of a firearm in connection with commission of another felony, in prosecution for being a felon in possession of a firearm, where defendant carried loaded firearm in his pocket at time of his arrest, front passenger seat window where defendant was sitting prior to arrest was only window completely open such that drugs could have been thrown through it, quantity of drugs discovered was "sell quantity," defendant possessed large amount of cash at time of arrest but lacked employment, and defendant was later arrested for possessing distribution amounts of drugs in violation of terms of his bond. 18 U.S.C.A. § 922(g); U.S.S.G. § 2K2.1(c)(1)(A).

[2] Sentencing and Punishment Acceptance of responsibility

Defendant was not entitled to sentence reduction for acceptance of responsibility, in prosecution for being a felon in possession of a firearm, where defendant's post-plea but pre-sentencing drug-related arrest and attendant breach of the terms of his release on bond demonstrated a lack of remorse for his criminal conduct. 18 U.S.C.A. § 922(g); U.S.S.G. § 3E1.1.

[3] Sentencing and Punishment Factors Related to Offender

Weapons Possession after conviction of crime

Defendant's sentence of 72 months' imprisonment for being a felon in possession of a firearm was substantively reasonable, where sentence fell below recommended guidelines range of 92 to 115 months, and sentencing court considered statutory factors in varying below recommended sentencing guidelines range, including taking into account nature of offense and defendant's characteristics, such as his age, need to deter future criminal conduct as defendant had been arrested twice for

related conduct, and defendant's social support system and desire to rehabilitate himself through educational training. 18 U.S.C.A. §§ 922(g), 3553(a).

***95** ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

Attorneys and Law Firms

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BEFORE: COLE, Chief Judge; McKEAGUE and WHITE, Circuit Judges.

OPINION

COLE, Chief Judge. Dominique Javon Harris was sentenced to 72 months' imprisonment after pleading guilty to being a felon in possession of a firearm. Harris now appeals the district court's sentencing decision on the grounds that (1) the application of U.S.S.G § 2K2.1(c)(1)(A)'s cross-reference was procedurally unreasonable, (2) the denial of a sentence reduction for acceptance of responsibility was improper, and (3) the length of his sentence was substantively unreasonable. We affirm.

I. BACKGOUND

A. Factual Background

On September 29, 2018, a two-officer patrol car observed a silver Hyundai Tucson occupied by three passengers drive through a stop sign and turn into a driveway. Harris sat in the front passenger seat. As the vehicle turned, the officers observed a hand come out of the front passenger side window, thrust quickly into the air, and discard what looked like multiple bags of narcotics.

Once the vehicle was parked in the driveway, the driver opened his door and began to exit. At the same time, an unidentified male exited the rear passenger side of the vehicle and fled on foot. One of the officers pursued the unidentified male but was unable to apprehend him; the other officer ordered the driver and Harris not to move. The driver and Harris were searched and transported to the Muskegon Police Department. That search revealed that Harris carried $1,235.00 in cash, mostly in $10.00 and $20.00 denominations, and a loaded .380 Ruger semiautomatic pistol in his pocket. Additional officers who arrived at the scene located a semiautomatic pistol with an extended magazine along the path on which the unidentified male had fled. The officers also recovered two large bags of crack cocaine, one smaller bag of crack cocaine, and one bag of heroin outside of the vehicle, which were later determined to be 47.04 grams of crack cocaine and 2.62 grams of heroin. Photographs of the scene showed the front passenger side window—where Harris had been sitting during the traffic stop—was completely open but the rear passenger side window was only partially open such that an arm could not have reached out and discarded the narcotics.

In a post-arrest interview, Harris admitted to possessing the loaded firearm but denied possessing narcotics. He declined to answer any other questions. Later in an interview with the probation officer, Harris said that the unregistered .380 Ruger firearm belonged to his girlfriend, that he had possessed the firearm for only 10 minutes, ***96** and that on September 29 he was on his way to return it when he was arrested. He again denied possessing or discarding the drugs. Finally, Harris stated he believed he could have avoided this offense had he left the firearm in the glovebox instead of having it in his pocket or by running from the police and possibly getting away, and he viewed this offense as a learning experience and wake up call.

Harris was indicted in January 2019 for being a convicted felon in possession of a weapon in violation of 18 U.S.C. § 922(g), and a warrant was issued for his arrest. The indictment also included a forfeiture allegation in connection with the firearm. He was not charged with drug possession. On January 14, 2019, Harris was released from custody on bond with pretrial supervision, and on February 28, 2019, he pleaded guilty as charged without the benefit of a plea deal. The district court accepted Harris's guilty plea on March 21 and scheduled a sentencing hearing.

While Harris was out on bond and awaiting sentencing, state police arrested him for possessing distribution amounts of drugs on April 1, 2019. When the officers stopped the vehicle in which Harris was a passenger, he immediately jumped out and fled on foot. Harris was eventually apprehended after a brief pursuit, and the police found bags of cocaine, heroin, and unidentified pills along the path of the chase. He was charged with multiple drug offenses, as well as resisting arrest.

B. Sentencing

The probation officer prepared a presentence investigation report ("PSR"), which was revised on July 24, 2019, and the district court adopted its factual findings. The probation officer recommended that the district court apply the cross-reference in U.S.S.G. § 2K2.1(c)(1)(A) because Harris possessed a firearm in connection with the commission or attempted commission of the felony offense of drug trafficking. The probation officer also refused to apply a sentence reduction for acceptance of responsibility because of Harris's related post-plea drug arrest. Based on an offense level of 26 called for by the cross-reference (instead of 18) and Harris's criminal history, the probation officer calculated a sentencing guidelines range of 92 to 115 months' imprisonment.

Harris objected to the PSR on two grounds. First, Harris asserted that he was not responsible for the drugs recovered during his initial traffic stop, and therefore, the application of the cross-reference under § 2K1.1(c) was improper. Second, Harris argued that he should have received a sentence reduction based on acceptance of responsibility because he had pleaded guilty to being a felon in possession of a firearm and cooperated in a timely manner.

At sentencing, the district court overruled Harris's two objections. First, the district court overruled the objection to the application of the cross-reference in U.S.S.G. § 2K2.1(c)(1)(A). In support of its finding that Harris possessed a firearm in connection with the commission or attempted commission of drug trafficking, the district court noted that (1) Harris carried a loaded firearm in his pocket at the time of arrest, (2) the passenger seat window was the only window completely open such that drugs could have been thrown through it, (3) the quantity of the drugs retrieved during the traffic stop was "sell quantity," (4) he lacked a credible explanation for why he carried a weapon or why it was unregistered, (5) he possessed $1,235 at the time of arrest but lacked a job, and (6) he was later arrested for possessing distribution amounts of drugs in violation of the terms of his bond.

***97** Second, the district court refused to apply a sentence reduction for acceptance of responsibility because, as the probation officer found, Harris continued to engage in similar illegal conduct while on bond, specifically, possessing distribution quantities of cocaine and heroin.

The district court varied downward from the recommended sentencing guidelines range of 92 to 115 months and concluded that a 72-month sentence "would be sufficient and not more than necessary and would satisfy the purposes of the sentencing guidelines." The district court considered the factors under 18 U.S.C. § 3553(a) and noted that Harris's young age and a policy disagreement with the guidelines justified the downward variance.

Harris appealed the district court's sentencing decision to this court. We have jurisdiction under 28 U.S.C. § 1291.

II. ANALYSIS

A. The district court did not err in applying the cross-reference in U.S.S.G. § 2K2.1(c)(1)(A)

[1] Harris contends the district court imposed a procedurally unreasonable sentence because it improperly applied the cross-reference in U.S.S.G § 2K2.1(c)(1)(A) for use or possession of a firearm in connection with the commission of another felony. Specifically, Harris challenges the district court's determination that the government proved by a preponderance of the evidence a nexus between his possession of a firearm and the felony of possession of distribution amounts of a controlled substance ("drug-trafficking") because he was not responsible for the drugs discovered during the traffic stop.

Sentences are reviewed for procedural reasonableness under an abuse-of-discretion standard. *United States v. Taylor*, 648 F.3d 417, 422 (6th Cir. 2011). The reviewing court must "ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range[.]" *Gall v. United States*, 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007). In the specific context of the cross-reference in U.S.S.G.

§ 2K2.1(c), and its identical counterpart in § 2K2.1(b)(6), we review the district court's factual findings for clear error and accord due deference to the district court's determination that the firearm was used or possessed "in connection with" another felony, warranting the application of the cross-reference. *See* *Taylor*, 648 F.3d at 431–32 (describing deference accorded to district courts in applying § 2K2.1(b)(6)); *United States v. Scheiblich*, 788 F. App'x 305, 308 (6th Cir. 2019) (describing deference accorded to the district courts in applying the § 2K2.1(c) cross-reference). A finding is clearly erroneous when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *United States v. Gort-Didonato*, 109 F.3d 318, 320 (6th Cir. 1997).

The cross-reference in § 2K2.1(c)(1) applies where the government shows by a preponderance of the evidence "the defendant used or possessed any firearm or ammunition ... in connection with the commission or attempted commission of another offense[.]" U.S.S.G. § 2K2.1(c)(1). The notes to § 2K2.1 further provide that the cross-reference in "(c)(1) [applies] if the firearm or ammunition facilitated, or had the potential of facilitating ... another offense." U.S.S.G. § 2K2.1, cmt. 14(A). "[I]n the case of a drug trafficking offense in which a firearm is found in close proximity to drugs," the sentencing guidelines note that application of (c)(1) is warranted "because the presence of the firearm has the potential of facilitating" another offense. *Id.* § 2K2.1, cmt. 14(B). At the same ***98** time, we have noted that "[p]ossession of firearms that is merely coincidental to the underlying felony offense is insufficient to support the application of § 2K2.1." *United States v. Angel*, 576 F.3d 318, 321 (6th Cir. 2009) (quoting *United States v. Ennenga*, 263 F.3d 499, 503 (6th Cir. 2001)).

Here, the government must show by a preponderance of the evidence that Harris "possessed" the specific firearm at issue—the .380 Ruger semiautomatic pistol—"in connection with the commission or attempted commission of another offense." U.S.S.G. § 2K2.1(c)(1). The government argues that the other offense here is drug trafficking. The district court found that sufficient evidence existed from which to infer that Harris had possessed distribution quantities of narcotics, which were thrown out of the window immediately prior to his arrest. Specifically, the district court indicated that Harris carried a loaded firearm in his pocket at the time of his arrest, the front passenger seat window where Harris was sitting was the only window completely open such that drugs could have been thrown through it, the quantity of the drugs discovered during the traffic stop was "sell quantity," he lacked a credible explanation for why he carried a weapon or why it was unregistered, he possessed $1,235 at the time of arrest but lacked employment, and Harris was later arrested for possessing distribution amounts of drugs in violation of the terms of his bond.

Under these circumstances, the district court did not err—much less clearly err—when it found more likely than not that Harris's possession of a firearm had the "potential of facilitating" drug trafficking. Therefore, the district court's decision to apply the cross-reference in § 2K2.1(c)(1)(A) was not procedurally unreasonable.

B. The district court did not err in denying a sentence reduction for acceptance of responsibility

[2] Harris also contends the district court erred when it refused to apply a sentence reduction on the basis that he had accepted responsibility for his firearm conviction. "A district court's decision regarding acceptance of responsibility is generally a factual question that must be affirmed unless clearly erroneous." *United States v. Banks*, 252 F.3d 801, 805 (6th Cir. 2001). The sentencing judge's determination is "entitled to great deference on review" because the judge "is in a unique position to evaluate a defendant's acceptance of responsibility." U.S.S.G. § 3E1.1, cmt. 5. Accordingly, "[e]ven when [the acceptance-of-responsibility section of the guidelines] is applied to uncontested facts, we review the lower court's decision with deference, not *de novo*." *United States v. Brown*, 367 F.3d 549, 556 (6th Cir. 2004) (citing *United States v. Webb*, 335 F.3d 534, 537-38 (6th Cir. 2003)).

Under the sentencing guidelines, a defendant who "clearly demonstrates acceptance of responsibility for his offense" qualifies for a two-point decrease in the applicable offense level and potentially another reduction for timely cooperation or entry of a guilty plea. U.S.S.G. § 3E1.1. The defendant has the burden of demonstrating by a preponderance of the evidence that a reduction for acceptance of responsibility is warranted. *United States v. Morrison*, 983 F.2d 730, 733

(6th Cir. 1993). One relevant factor is whether the defendant "had voluntarily terminated or withdrawn from criminal conduct." *United States v. Lawson*, 266 F.3d 462, 466 (6th Cir. 2001); *see also* U.S.S.G. § 3E1.1, cmt. 1(B). Criminal conduct in this context "refer[s] to that conduct which is related to the underlying offense." *Morrison*, 983 F.2d at 735. The rationale behind requiring ***99** a nexus between the underlying offense and the other criminal conduct is that "an individual may be truly repentant for one crime yet commit other unrelated crimes." *Id.*

Here, the district court found Harris's post-plea but pre-sentencing drug-related arrest did in fact demonstrate a lack of remorse for his initial firearm conviction. The nexus between his post-plea conduct and his initial conviction was the district court's factual finding that Harris's firearm possession had "embolden[ed]" him to engage in drug trafficking. (*See* Sentencing Hr'g Tr., R. 58, PageID 204, 206 ("[T]he motivation for carrying the firearm would be drug trafficking.... [A]s recognized by courts, possession of firearms by drug dealers emboldens them to spread the drugs in their communities.").) The district court also noted that Harris had "violated his word to the court" by breaching the terms of his bond, under which he had agreed to not use or possess drugs. It is uncontested that Harris was arrested for drug-related conduct after his plea but before his sentence, which requires us to review the application of the reduction with deference. *See Brown*, 367 F.3d at 556; *Webb*, 335 F.3d at 537. Recognizing the "great deference" owed to district courts, the court did not clearly err when it found that Harris's post-plea conduct and attendant breach of the terms of his release on bond, which the court concluded all involved the same motivation, demonstrated a lack of remorse for his criminal conduct. *See United States v. Benjamin*, 138 F.3d 1069, 1075 (6th Cir. 1998) (denying acceptance of responsibility reduction where defendant pleaded guilty to conspiracy to distribute cocaine but post-plea violated the terms of his pre-sentencing release by possessing a firearm while on bond, which "doesn't square with acceptance"); *Lawson*, 266 F.3d at 466 (defendant's initial "firearm charge arose from his August 1997 escape from custody" and "he attempted a similar escape in April 1999").

C. The district court's sentence was not substantively unreasonable

[3] Last, Harris challenges the substantive reasonableness of the sentence imposed by the district court, arguing that the district court "could have achieved the same goals" "with a far lesser sentence." A sentence is substantively unreasonable where the district court "select[s] the sentence arbitrarily, bas[es] the sentence on impermissible factors, fail[s] to consider pertinent § 3553(a) factors or giv[es] an unreasonable amount of weight to any pertinent factor." *United States v. Collington*, 461 F.3d 805, 808 (6th Cir. 2006) (alterations in original) (quoting *United States v. Webb*, 403 F.3d 373, 385 (6th Cir. 2005)). "As is the case with a procedural reasonableness challenge, substantive reasonableness is reviewed for abuse of discretion." *United States v. Jeter*, 721 F.3d 746, 757 (6th Cir. 2013) (citation omitted).

Here, Harris's sentence—72 months' imprisonment—falls below the recommended guidelines range of 92 to 115 months. As a result, it is accorded a presumption of reasonableness. *United States v. Curry*, 536 F.3d 571, 573 (6th Cir. 2008) ("[S]imple logic compels the conclusion that, if a [longer] sentence ... would have been presumptively reasonable in length, defendant's task of persuading us that the more lenient sentence ... is unreasonably long is even more demanding."); *United States v. Harris*, 636 F. App'x 922, 929 (6th Cir. 2016) ("A below-Guidelines sentence is presumptively reasonable.").

Harris fails to rebut this presumption. He does not present any evidence that the district court imposed an arbitrary sentence, based the sentence on impermissible ***100** factors, failed to consider pertinent § 3553(a) factors, or gave an unreasonable amount of weight to one factor. Further, the record demonstrates that the court considered the § 3553(a) factors in varying below the recommended sentencing guidelines range, including taking into account the nature of the offense and Harris's characteristics, such as his age, the need to deter future criminal conduct as Harris had been arrested twice for related conduct, and Harris's social support system and desire to rehabilitate himself through educational training. The district court concluded that "72 months would be sufficient and not more than necessary and would satisfy the purposes of the sentencing guidelines." That conclusion was not clearly erroneous.

III. CONCLUSION

Therefore, we affirm the district court's judgment.

All Citations

835 Fed.Appx. 94

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This case was not selected for
publication in the Federal Reporter.
Not for Publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
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issued on or after Jan. 1, 2007. See also
Sixth Circuit Rule 28. (Find CTA6 Rule 28)
United States Court of Appeals,
Sixth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Jason HOWARD, aka "J", Defendant–Appellant.

No. 12–5879.
|
June 25, 2014.

Synopsis

Background: Defendant pleaded guilty in the United States District Court for the Western District of Kentucky to conspiring to possess cocaine with the intent to distribute, possessing cocaine with the intent to distribute, and money laundering, and he appealed his 360–month sentence.

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

[1] district court did not abuse its discretion in applying offense level enhancement for being manager or supervisor;

[2] court did not clearly err in applying offense level enhancement for possession of firearms; and

[3] court was not permitted to deny offense level reduction for acceptance of responsibility based on unrelated criminal conduct.

Reversed and remanded.

Procedural Posture(s): On Appeal.

West Headnotes (3)

[1] **Sentencing and Punishment** Organizers, leaders, managerial role

In sentencing defendant for offenses including conspiracy to possess cocaine with intent to distribute, district court did not abuse its discretion in applying sentencing guidelines offense level enhancement for being a manager or supervisor of extensive criminal activity; defendant supplied cocaine to at least ten people below him, he and a codefendant moved the most cocaine in the conspiracy, when a codefendant who traveled to Columbus, Ohio to purchase cocaine, defendant directed him in a phone conversation to make sure everything was a go, and if so, to then go ahead and grab the money, and defendant and a codefendant also used another codefendant to lease apartment that served as a stash house, to pick up customers' money, and to make purchases. U.S.S.G. § 3B1.1, 18 U.S.C.A.

1 Case that cites this headnote

[2] **Sentencing and Punishment** Possession and carrying

In sentencing defendant for offenses including possession of cocaine with the intent to distribute and conspiracy to possess cocaine with intent to distribute, district court did not clearly err in finding that defendant failed to prove that it was clearly improbable that his possession of the two guns found in his home was connected to the drug trafficking, and in therefore applying a sentencing guidelines offense level enhancement for possession of firearms in connection with the offenses; the two loaded guns were found in defendant's house, and multiple intercepted calls showed that defendant left cocaine in his grill or his shed outside his house for cocaine customers to pick up, and the government presented evidence that ten to twelve drug transactions took place at defendant's house. U.S.S.G. § 2D1.1(b)(1), 18 U.S.C.A.

5 Cases that cite this headnote

[3] **Sentencing and Punishment** Acceptance of responsibility

In sentencing defendant for possession of cocaine with the intent to distribute, conspiracy to possess cocaine with intent to distribute, and money laundering, district court was not permitted to deny defendant a sentencing guidelines offense level reduction for acceptance of responsibility based on criminal conduct that occurred while defendant was in jail following his indictment, but that was unrelated to the offenses for which he was being sentenced. U.S.S.G. § 3E1.1(a), 18 U.S.C.A.

1 Case that cites this headnote

***479** On Appeal from the United States District Court for the Western District of Kentucky.

BEFORE: SUHRHEINRICH, MOORE and WHITE, Circuit Judges.

Opinion

SUHRHEINRICH, Circuit Judge.

This is a sentencing challenge involving an individual who committed a series of offenses related to cocaine trafficking. Defendant–Appellant Jason Howard ("Howard") pleaded guilty to conspiring to possess cocaine with the intent to distribute, possessing cocaine with the intent to distribute, and money laundering. The district court sentenced him to a term of 360 months. We VACATE the sentence, and REMAND the case for resentencing.

I. BACKGROUND

Howard was involved with the McCarthy drug ring in Louisville, Kentucky, from December 2008 until May 2010. Its leader, Michael McCarthy, Jr., imported hundreds of kilograms of cocaine, that was in turn distributed by others, including Howard, who would then distribute it to lower level cocaine dealers and cocaine users.

The Drug Enforcement Administration tapped Howard's phone from December 2009 to February 2010. On January 5, 2010, Howard told co-defendant Dwayne Martin by telephone that he bought an AR–15 assault rifle and hid it in Howard's closet. Other calls indicated that Howard left cocaine in his grill or his shed outside his house for customers to pick up.

Howard spoke with co-defendant Jason Bald over the phone several times about finding a source of cocaine other than McCarthy. Bald and Howard discussed a new source in Columbus, Ohio, deciding that Bald would take $90,000 to Columbus to buy three kilograms of cocaine.

On February 26, 2010, Bald traveled to Columbus to buy cocaine from the new source. When Bald arrived in the hotel room where he was scheduled to meet the source, Bald called Howard and told Howard he would call when the supply arrived. Bald bought two kilograms from the source for $64,000, and police arrested Bald when he left the hotel with $30,000 cash and two kilograms of cocaine.

In May 2010, Drug Enforcement Administration agents arrested Howard, executed a search warrant, and seized an AR–15 assault rifle and a handgun from Howard's house in Louisville.

On May 11, 2010, a federal grand jury returned a superseding indictment that charged Howard with three counts: Count 1, conspiring to possess cocaine with the intent to distribute, 21 U.S.C. § 846; Count 5, possessing cocaine with the intent to distribute, 18 U.S.C. § 841(a)(1); and Count 6, money laundering, 18 U.S.C. § 1956(a)(1).

In June 2011, with Howard's charges pending, jail officials confiscated a cell phone that Howard hid in his underwear. In September 2011, jail officials confiscated another cell phone and cell phone charger hidden between two pairs of Howard's underwear. Howard violated 18 U.S.C. § 1791(a)(2) when he possessed the cell phones in jail.

On August 23, 2011, Howard pleaded guilty to the three counts in the superseding indictment.

At Howard's sentencing hearing, the district court found the appropriate base offense level to be 36 under U.S.S.G.

§ 2D1.1(c)(2) because Howard trafficked ***480** at least 59 kilograms of cocaine. Next, the court enhanced Howard's base offense level by three levels under § 3B1.1 because the court found that Howard managed or supervised others in the McCarthy drug ring. The court concluded that Howard was a manager or supervisor because there were five or more participants in the crime, he had some decision-making authority as to cocaine distribution, the McCarthy drug ring was a large scale operation, and Howard dealt directly with its leader McCarthy in obtaining the cocaine and passing it down. (R. 572 at # 1979–81).

The court also enhanced Howard's offense level by two levels under § 2D.1(b)(1) because Howard possessed dangerous weapons while he committed his drug crimes. The court found that Howard possessed a handgun and an AR–15 assault rifle at his home during his tenure as a cocaine dealer.

The court found Howard ineligible for an acceptance of responsibility offense level reduction under § 3E1.1 because he committed a misdemeanor offense while in detention (violating 18 U.S.C. § 1791(a)(2) by possessing a cell phone in jail).

Together, the court found that Howard's total offense level was 43. With his criminal history category of III, Howard faced a guideline range of life imprisonment. The court varied downward to a total sentence of 360 months' custody. Howard appeals that sentence.

II. STANDARD OF REVIEW

We review sentences under a deferential abuse-of-discretion standard. *Gall v. United States,* 552 U.S. 38, 41, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007). "Appellate review of sentencing decisions is limited to determining whether they are 'reasonable.' " *Id.* at 46, 128 S.Ct. 586. The reasonableness review is split into two parts: procedural reasonableness and substantive reasonableness. *United States v. Benson,* 591 F.3d 491, 500 (6th Cir.2010).

Procedural errors include improperly calculating the Sentencing Guidelines range, considering the Sentencing Guidelines mandatory, ignoring the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence. *Gall,* 552 U.S. at 51, 128 S.Ct. 586. When reviewing individual Sentencing Guidelines determinations, we consider factual findings under the clearly erroneous standard and application and interpretation of the Sentencing Guidelines under the de novo standard of review. *Benson,* 591 F.3d at 504. If the district court's sentencing decision is procedurally sound, we then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard. *Gall,* 552 U.S. at 50, 128 S.Ct. 586.

III. ANALYSIS

A. Leadership Enhancement

[1] Howard argues that the leadership sentence enhancement should not apply because others in the conspiracy had similar roles, he did not direct other persons in the conspiracy, and he did not earn a higher share of the proceeds from the drug trafficking operation. We disagree.

Section 3B1.1(b) of the Sentencing Guidelines provides that "If the defendant was a manager or supervisor (but not an organizer or a leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels." U.S.S.G. § 3B1.1. In determining whether a defendant qualifies for this leadership enhancement, we consider:

> The exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment ***481** of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.

United States v. Hernandez, 227 F.3d 686, 699–700 (6th Cir.2000) (quoting U.S.S.G. § 3B1.1 cmt. n. 4).

A defendant can still qualify for a leadership enhancement even though he does not meet every factor. *United States v. Gates,* 461 F.3d 703, 709 (6th Cir.2006). Although a sentencing enhancement is not appropriate under § 3B1.1 where a defendant "merely exercised control over the property, assets, or activity of the enterprise," *United States v. Swanberg,* 370 F.3d 622, 629 (6th Cir.2004), to apply this enhancement, "there need only be evidence to support a finding that the defendant was a manager or supervisor of at least one other participant in the criminal activity, and that the criminal activity involved five or more participants or was otherwise extensive." *United States v. Moncivais,* 492 F.3d 652, 661 (6th Cir.2007).

The record demonstrates sufficient evidence that Howard participated in the conspiracy at a high level and managed or supervised at least one other participant in the McCarthy drug ring. Howard supplied cocaine to at least ten people below him. He and co-defendant Onrea Flynn moved the most cocaine in the conspiracy. Howard also managed or supervised co-defendants Bald and Dorsey. For example, regarding the transaction in which Bald travelled to Columbus, Ohio to purchase cocaine, Howard directed Bald in a phone conversation as follows: "All right. Then make sure everything is a go. If everything is a go, then go ahead and grab the money." R. 572 at 1943. Howard and Bald also used Dorsey to lease the apartment that served as a stash house, to pick up customer's money, and to make purchases. [1] *See Moncivais,* 492 F.3d at 661.

Finally, regarding the scope of the illegal activity, the district court correctly found that Howard was part of a large-scale operation involving millions of dollars and many kilograms of cocaine.

The district court did not abuse its discretion in applying the leadership enhancement to Howard.

B. Dangerous Weapon Enhancement

[2] Howard argues that the dangerous weapon enhancement should not apply, challenging the district court's factual finding that he possessed dangerous weapons while he dealt cocaine, and the district court's application of those factual findings to the Sentencing Guidelines. We disagree.

Before a district court can apply a sentencing enhancement under U.S.S.G. § 2D1.1(b)(1), the government must show "by a preponderance of the evidence that the defendant either actually or constructively possessed the weapon." *United States v. Darwich,* 337 F.3d 645, 665 (6th Cir.2003) (citation and internal quotation marks omitted). "Constructive possession of an item is the ownership, or dominion or control over the item itself, or dominion over the premises where the item is located." ***482** *United States v. Hill,* 79 F.3d 1477, 1485 (6th Cir.1996), *cert. denied,* 519 U.S. 858, 117 S.Ct. 158, 136 L.Ed.2d 102 (citation and internal quotation marks omitted).

Here, the district court found that Howard possessed two firearms, an AR–15 assault rifle and a handgun, at his house while dealing drugs. Drug Enforcement Administration Agents seized the guns from Howard's house, and Howard told a cocaine customer in a January 5, 2010 telephone call that he stored his AR–15 in his closet. The government thus met its burden of proving that Howard possessed dangerous weapons.

If the government establishes that the defendant possessed a weapon, a presumption arises that "the weapon was connected to the offense. The defendant must then show that it was clearly improbable that the weapon was connected with the crime." *United States v. Hough,* 276 F.3d 884, 894 (6th Cir.2002) (citation and internal quotation marks omitted). "A defendant must present evidence, not mere argument, in order to meet his or her burden." *United States v. Greeno,* 679 F.3d 510, 514 (6th Cir.2012). This Court considers the following factors, none of which is controlling, when determining whether the application of a § 2D1.1(b)(1) enhancement was appropriate:

> (1) The type of firearm involved; (2) the accessibility of the weapon to the defendant; (3) the presence of ammunition; (4) the proximity of the weapon to illicit drugs, proceeds, or paraphernalia; (5) the defendant's evidence concerning the use of the weapon; and (6) whether the defendant was actually engaged

> in drug-trafficking, rather than mere manufacturing or possession.

Id. at 515. This Court considers whether the firearm was loaded and any alternative purpose offered to explain the presence of the firearm. *United States v. Moses,* 289 F.3d 847, 850 (6th Cir.2002).

Howard fails to meet his burden of proving that it was clearly improbable that his possession of the two firearms was connected to the drug trafficking. First, the guns were found inside Howard's house and therefore close to where evidence shows Howard kept cocaine and proceeds of drug transactions. Multiple intercepted calls showed that Howard left cocaine in his grill or his shed outside his house for cocaine customers to pick up, and the Government presented evidence that ten to twelve drug transactions took place at Howard's house. Second, agents found both firearms loaded.[2] Third, Howard's ***483** only alternative explanation, that he used the guns for home defense, does not detract from the district court's finding. In sum, we cannot say that the district court's determination that Howard failed to show it was clearly improbable that his firearms were connected to his drug offense was clearly erroneous. *See Greeno,* 679 F.3d at 515 (defendant failed to show it was improbable that firearms were connected to drug offense where search took place following purchase of drugs at the property and firearms that were found throughout the property in relatively close proximity to the drugs and drug paraphernalia); *United States v. Cobbs,* 233 Fed.Appx. 524, 543 (6th Cir.2007) (upholding firearm enhancement where there was evidence of two loaded guns found in a safe at the residence where drugs were sold). We conclude that there was no error resulting from the enhancement of Howard's base offense level pursuant to § 2D1.1(b)(1).

C. Acceptance of Responsibility

[3] Howard argues that the district court erred in denying him an acceptance of responsibility reduction. He submits that the district court's conclusion was based solely on criminal conduct unrelated to the offenses for which he plead guilty, thus running afoul of this Court's decision in *United States v. Morrison,* 983 F.2d 730, 735 (6th Cir.1993) (holding that a district court may consider a defendant's subsequent criminal conduct only if it is related to the offense of conviction in deciding whether an acceptance of responsibility reduction is appropriate).

Under § 3E1.1(a), a defendant may receive a two-point reduction in his offense level if he accepts responsibility for the charged offense and acts in a manner consistent with that acceptance, such as by confessing or admitting guilt. *See* U.S.S.G. § 3E1.1(a) cmt. n. 1. The district court must consider a number of factors in determining whether to grant the credit, including the defendant's "voluntary termination or withdrawal from criminal conduct or associations." U.S.S.G. § 3E1.1(a) cmt. n. 1. Although "truthfully admitting ... relevant conduct" should be treated as "significant evidence of acceptance of responsibility," an admission "may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility," U.S.S.G. § 3E1.1(a) cmt. n. 3, including continuing criminal conduct. However, new criminal conduct which is unrelated to the offense of conviction should not be considered in determining acceptance of responsibility. *Morrison,* 983 F.2d at 733–35.

Here, the Government presented testimony from Detective Hammond of the Kentucky State Police regarding his investigation into Howard's alleged possession of contraband while detained. Hammond testified that officers found Howard in possession of two cell phones and a charger, and later intercepted a package containing marijuana mailed to Howard at the facility. Hammond also interviewed three inmates who claimed that Howard was involved in the narcotics trade at the prison.

While considering Howard's entitlement to the acceptance of responsibility reduction, the district court determined that it could not consider evidence of marijuana mailed to the jail because there was not a sufficient connection between Howard and the unknown individual who mailed the marijuana, and determined that it could not consider the allegations that Howard was involved in narcotics trafficking at the prison because the evidence was too vague. ***484** However, the district court considered the possession of a cell phone by Howard sufficient to remove credit for acceptance of responsibility.

The Government argues that the fact that Howard violated federal law by possessing a cell phone in prison demonstrates his lack of acceptance of responsibility for his drug trafficking offenses. The Government concedes that a defendant's unrelated post-plea criminal conduct is not relevant to a court's acceptance of responsibility finding under *Morrison,* but argues that Howard's criminal conduct is relevant because it occurred pre-plea. However, *Morrison* does not make a distinction between pre- and post-plea criminal conduct. *Morrison,* 983 F.2d at 735.

In *Morrison,* the defendant had been indicted for being a felon in possession of a firearm. *Id.* at 733. Following his arrest, after posting bond, the defendant failed a drug test and was indicted for attempted auto theft. *Id.* In considering whether to apply the acceptance of responsibility reduction, the district court counted the defendant's attempted theft as a factor against him, and also may have counted the positive drug test against him. This Court remanded, finding it improper for the district court to consider unrelated criminal conduct committed after indictment but before sentencing. *Morrison,* 983 F.2d at 735; *see also United States v. Banks,* 252 F.3d 801, 807 (6th Cir.2001) (holding that defendant's post-plea assault and destruction of property charges were plainly unrelated to the drug trafficking and firearm offenses for which he was being sentenced); *United States v. Ackerman,* 246 Fed.Appx. 996, 999 (6th Cir.2007) (concluding that defendant's post-plea drug screens did not undercut his guilty plea in his firearm case). The rationale in the *Morrison* decision is such that it would not permit the district court to distinguish pre- and post-plea criminal conduct.

Although the great weight of authority from other circuits is to the contrary, we are bound by *Morrison* 's holding that unrelated criminal activity cannot be the basis of refusing acceptance of responsibility. [3] We vacate the sentence and remand for resentencing so that the district court may readdress the acceptance of responsibility reduction. [4]

IV. CONCLUSION

The judgment of the district court is REVERSED and REMANDED for resentencing to readdress the acceptance of responsibility reduction in accordance with this opinion.

All Citations

570 Fed.Appx. 478

Footnotes

1 Howard asserts that his statement to Bald does not constitute direction; rather, it was a confirmation of plans between equal partners. Howard also argues that it is unclear from the record whether Dorsey worked under Howard or whether he instead worked under Bald or acted on his own initiative. However, Agent Cryan testified that Dorsey was "an individual that Howard and Bald used to pick up money from their customers as well as to purchase things, lease locations, and assist in further drug trafficking." R. 572 at # 1936.

2 Howard argues that his AR–15, stored in his garage, had only one cartridge left in the chamber with no magazine in proximity to hold more ammunition, asserting that the AR–15 was therefore not loaded in an "effective" manner because one round in the chambers negates any more "sinister" characteristics of the weapon. We see no merit in this argument. Howard further argues that the presence of weapons at his residence, without proof that he was present for the transactions or had access to the weapons was facilitating transactions, is insufficient to apply the enhancement. We disagree. *See United States v. Snyder,* 913 F.2d 300, 304 (6th Cir.1990) ("The key is always whether the placement of the gun or guns suggests they would be quickly available for use in an emergency.") (citation and quotation marks omitted). In addition to the AR–15, Howard also possessed a loaded handgun stored in a drawer in his bedroom with two magazines. R. 572 at # 1944–46. This Court's holding in *Greeno* is instructive. In that case, Greeno argued that the district court erred by applying a firearm enhancement because there was no direct evidence showing he possessed a firearm

when he sold drugs. *Greeno,* 679 F.3d at 515. This Court held that because officers conducted a search of Greeno's home only a few days after the controlled purchase of methamphetamine at Greeno's property, and found firearms throughout the property in relatively close proximity to the drugs and drug paraphernalia, Greeno had ready access to the firearms and failed to show that it was clearly improbable that the firearms were connected to his drug offense. *Id.* Similarly, the presence of loaded guns in various locations throughout Howard's property demonstrates his ready access in case of an emergency.

3 *See United States v. O'Neil,* 936 F.2d 599, 600–01 (1st Cir.1991); *United States v. Fernandez,* 127 F.3d 277, 285 (2d Cir.1997); *United States v. Ceccarani,* 98 F.3d 126, 129–30 (3d Cir.1996); *United States v. Crawford,* No. 97–4159, 125 F.3d 849, 1997 WL 636809, *1 (4th Cir.1997) (unpublished); *United States v. Pharris,* No. 93–9055, 32 F.3d 565, 1994 WL 442359, *2 (5th Cir.1994) (unpublished); *United States v. Higgins,* 86 Fed.Appx. 204, 206 (7th Cir.2004) (unpublished); *United States v. Byrd,* 76 F.3d 194, 197 (8th Cir.1996); *United States v. Mara,* 523 F.3d 1036, 1038–39 (9th Cir.2008); *US v. Prince,* 204 F.3d 1021, 1023–24 (10th Cir.2000); *United States v. Pace,* 17 F.3d 341, 343–44 (11th Cir.1994).

4 Because we vacate and remand for resentencing, we need not address Howard's claims that the district court failed to consider the 18 U.S.C. § 3553(a) factors or that his 360–month sentence is substantively unreasonable.

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518 Fed.Appx. 427
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Sixth Circuit Rule 28. (Find CTA6 Rule 28)
United States Court of Appeals,
Sixth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Victor M. LOVE, Defendant–Appellant.

No. 12–5479.
|
April 9, 2013.

Synopsis

Background: Defendant pleaded guilty in the United States District Court for the Western District of Tennessee to attempt to possess a controlled substance with intent to distribute, and he appealed his 86-month sentence.

Holdings: The Court of Appeals, Martha Craig Daughtrey, Circuit Judge, held that:

[1] defendant was not entitled to offense level reduction for acceptance of responsibility, and

[2] the sentence was not substantively unreasonable.

Affirmed.

West Headnotes (2)

[1] Sentencing and Punishment Acceptance of responsibility

Defendant convicted of attempt to possess a controlled substance with intent to distribute was not entitled to a sentencing guidelines offense level reduction for acceptance of responsibility; although defendant pleaded guilty, he had been arrested for two other drug offenses after being indicted on the charge for which he was being sentenced. U.S.S.G. § 3E1.1(a), 18 U.S.C.A.

[2] Controlled Substances Extent of punishment

Defendant's 86-month sentence for attempt to possess a controlled substance with intent to distribute, which represented a downward variance from the sentencing guidelines range of 100 to 120 months, was not substantively unreasonable. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

***427** On Appeal from the United States District Court for the Western District of Tennessee.

Before: DAUGHTREY, McKEAGUE, and GRIFFIN, Circuit Judges.

Opinion

MARTHA CRAIG DAUGHTREY, Circuit Judge.

****1** Defendant Victor Love pleaded guilty to attempt to possess a controlled substance with intent to distribute and was sentenced to a prison term of 86 months. He now challenges that sentence as procedurally and substantively unreasonable, contending that the district court erred in denying him a two-level reduction in his offense level for acceptance of responsibility under U.S.S.G. § 3E1.1. The district court denied the reduction based on a finding that Love had engaged in ongoing criminal activity that negated acceptance of responsibility. We find no error and affirm.

As part of a larger investigation into suspicious packages mailed from California to the Memphis area, the Memphis police traced a package addressed to Teresa Noel. The package contained Lortab tablets with a total gross weight of 2,255.9 grams of hydrocodone, a Schedule III controlled substance. On January 5, 2010, the police made a controlled delivery of the package to the address on the package, where they found Noel, her brother Elmon Love, and other family members. Elmon Love informed the police that Victor Love had called him that morning to ask him to place a soon-

to-arrive package in a trash can outside the house. While police were still at the residence, Victor Love drove up ***428** to the house, parked, and walked towards the trash can before suddenly returning to his car. Officers then detained Love without incident and found a mail receipt matching the information on the package addressed to Teresa Noel. He also matched security photos of the person who had shipped the package from Los Angeles. Love agreed to cooperate with the police and gave a statement detailing his actions in mailing the package. He was neither arrested nor taken into custody at that time.

In fact, Love was not formally charged with possession of hydrocodone until a federal indictment was returned on March 23, 2010, and the arrest warrant based on the indictment was not executed until June 29, 2010. By that time, however, Love had been arrested again, not once but twice. The first arrest followed a traffic stop on May 4, 2010, during which police found 461.4 grams of marijuana under the front passenger seat, 11 more grams of marijuana in the console, and 10 money-grams totally $8,800 in the glove box of the vehicle Love was driving. He was arrested again on June 23, 2010, after he and two others were found to be in possession of 220 grams of marijuana. Although the latter charge was dismissed in state court prior to sentencing in this case, the May 4 charge remained pending.

Love subsequently pleaded guilty to the federal hydrocodone charge, without the benefit of a plea agreement. The probation officer who prepared Love's presentence report recommended that he be given no credit for acceptance of responsibility, based on his "ongoing criminal activity while on pretrial release." The report also noted that Love had a lengthy criminal record and was subject to sentencing as a career offender. At sentencing, Love's attorney nevertheless renewed his client's request for a two-level reduction for acceptance of responsibility, based on Love's "truthful" admission of guilt, his efforts at post-offense rehabilitation, and his "open plea." The main thrust of his attorney's presentation at the sentencing hearing consisted of an unsuccessful argument against imposition of career-offender sentencing.

****2** Ultimately, Love was sentenced as a career offender without the benefit of a reduction for acceptance of responsibility, based on his arrest in May 2010. However, the district court did grant a 14–month variance from the low end of the applicable Guideline range of 100–120 months, after finding that Love "[wa]s making what appear[ed] to be legitimate efforts to improve his situation," and imposed a sentence of 86 months. Love now appeals his sentence, contending that it is unreasonable because the district court failed to give him credit for acceptance of responsibility.

Under U.S.S.G. § 3E1.1(a), a defendant may receive a two-point reduction in his offense level if the defendant accepts responsibility for the charged offense and acts in a manner consistent with that acceptance, such as by confessing or admitting guilt. *See* U.S.S.G. § 3E1.1(a), comment. (n. 1). A sentencing judge must consider a number of factors in determining whether to grant the credit, including the defendant's "voluntary termination or withdrawal from criminal conduct or associations." U.S.S.G. § 3E1.1(a), comment. (n. 1(B)). Although "truthfully admitting ... relevant conduct" should be treated as "significant evidence of acceptance of responsibility," an admission "may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility," U.S.S.G. § 3E1.1(a), comment. (n. 3), including continuing criminal conduct. To be relevant, however, the continuing criminal conduct must be "conduct ***429** that is related to the underlying offense, such as being of the same type or a motivating force behind the offense." *United States v. Lawson,* 266 F.3d 462, 466 (6th Cir.2001). That is, " 'illegal conduct generally' " is not relevant criminal behavior. *United States v. Banks,* 252 F.3d 801, 807 (6th Cir.2001) (quoting *United States v. Morrison,* 983 F.2d 730, 735 (6th Cir.1993)).

[1] In this case, Love's offense of conviction was for attempt to distribute hydrocodone, a Schedule III narcotic. Love's May 4 arrest was for possession with intent to distribute marijuana, a Schedule I narcotic. Both charges obviously relate to drug-trafficking, albeit for different drugs. That distinction is insignificant in this context, however, and does not render the May 4 arrest unrelated to the earlier offense. *Compare* *United States v. Bennett,* 170 F.3d 632, 640 (6th Cir.1999) (state drug offense is related conduct to federal drug charge), *with Banks,* 252 F.3d at 807 (assault charge is unrelated to drug-possession charge). Love's failure to withdraw from drug-related criminal activity thus constitutes continuing criminal activity that was properly considered by the district court.

On appeal, Love nevertheless argues that "there is more to the [acceptance of responsibility] analysis" than continuing criminal conduct. Although Love is correct that some of

the other considerations outlined in the commentary to U.S.S.G. § 3E1.1 (a) may cut in his favor, his post-indictment, pre-arrest drug activity weighs strongly against finding a clear acceptance of responsibility. Indeed, we have previously held that even "great[ ] remorse" by a defendant can be outweighed by "ongoing criminal activity up to the time of ... arrest." *United States v. Webb,* 335 F.3d 534, 538 (6th Cir.2003). In this case, we conclude that the district court did not err in denying a two-level reduction for acceptance of responsibility.

****3** Nor did the court's decision render the resulting sentence procedurally or substantively unreasonable. We evaluate the reasonableness of a sentence under an abuse-of-discretion standard of review. *See, e.g., United States v. Phinazee,* 515 F.3d 511, 514 (6th Cir.2008) (citing *Gall v. United States,* 552 U.S. 38, 46, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007)). "The reasonableness review is split into two parts: procedural reasonableness and substantive reasonableness." *United States v. Benson,* 591 F.3d 491, 500 (6th Cir.2010). The procedural reasonableness of a sentence is determined by the absence of a " 'significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence.' " *United States v. Johnson,* 640 F.3d 195, 201–02 (6th Cir.2011) (quoting *Gall,* 552 U.S. at 51, 128 S.Ct. 586). "A sentence may be substantively unreasonable if the district court select(s) the sentence arbitrarily, bas(es) the sentence on impermissible factors, fail[s] to consider pertinent § 3553(a) factors or giv(es) an unreasonable amount of weight to any pertinent factor." *United States v. Vowell,* 516 F.3d 503, 510 (6th Cir.2008) (internal quotation marks and citations omitted).

Love claims that the district judge failed to calculate the Guidelines range properly by denying the acceptance-of-responsibility credit. We have previously found no merit to this contention. Moreover, the district judge carefully considered all relevant factors in the course of his § 3553 analysis, undercutting any argument that Love's sentence was procedurally unreasonable.

***430** **[2]** Love's substantive-unreasonableness argument is fundamentally a restatement of his procedural-unreasonableness claim: Love claims that the district judge gave "an unreasonable amount of weight" to Love's May 4 arrest. We conclude, to the contrary, that the district court did not deny Love the acceptance-of-responsibility credit arbitrarily, nor did the court fail to consider relevant arguments for and against the credit. Indeed, the court took into account all Love's efforts at rehabilitation in its § 3553 analysis and ultimately granted him a below-Guidelines range of 86 months. We thus find no merit to the contention that Love's sentence is substantively unreasonable.

For the reasons set out above, we AFFIRM the district court's judgment.

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