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ORIGINAL

SUPREME COURT
OF THE UNITED STATES

ERIC WILEY,
Petitioner,

VS. CASE NO: 17-7142

JULIE JONES, SECRETARY,
DEPARTMENT OF CORRECTIONS,
Respondent.
_______________________________/

SUPPLEMENTAL

APPELLANT'S NOTICE OF SUPPLEMENTAL AUTHORITY

COMES NOW, Eric Wiley, the Petitioner, pro se and properly submits as Supplemental Authority the decision of O'Brien V. U.S., 130 S. Ct. 2169 (2010) McEachern V. State, 388 So. 2d 244 (Fla. App. 5th Dist. 1980); Jackson V. State, 852 So. 2d 941 (Fla. App. 4th Dist. 2003).

The decisions is submitted on point of Petitioner's petition that is currently pending in the honorable Supreme Court of the United States contrast dramatically with Petitioner's situation, however, because the aggravated battery that resulted in

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the death of the deceased victim in those cases clearly occurred against that deceased victim and not a third party. Those cases are further distinguishable in that they did not involve a jury finding that failed to be specific as to the use of a "deadly weapon" in the aggravated battery conviction.

CONCLUSION

WHEREFORE, this Petitioner properly requests that the honorable Supreme Court of the United States Justices accept the official rulings of the honorable courts that ruled in O'Brien; McEachern and Jackson in which this identical point of law was addressed and reversed as this pro se Petitioner is seeking on the Petition for Certiorari.

Respectfully Submitted,

Eric Wiley

Eric Wiley # 113706

IN THE SUPREME COURT OF THE UNITED STATES

ERIC WILEY, - PETITIONER

Vs

JULIE JONES, SECRETARY DEPARTMENT OF CORRECTIONS, - RESPONDENT

PROOF OF SERVICE

I, Eric Wiley, do swear or declare that on this date, January 4, 2018, have served the enclosed Appellant's Notice of Supplemental Authority on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within three calendar days.

The names and addresses of those served are as follows:

Attorney General's Office; 1515 N. Flagler Dr, Ste 900; West Palm Beach, FL 33401 and Secretary of Corrections, Julie Jones; 501 S. Calhoun St; Tallahassee, FL 32399-2500.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 4, 2018.

Eric Wiley

Eric Wiley # 113706

SHERON JACKSON, Appellant, v. STATE OF FLORIDA, Appellee.
COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT
852 So. 2d 941; 2003 Fla. App. LEXIS 12787; 28 Fla. L. Weekly D 2006
CASE NO. 4D01-1275
August 27, 2003, Opinion Filed
Editorial Information: Subsequent History

Review denied by State v. Jackson, 2004 Fla. LEXIS 248 (Fla., Feb. 16, 2004)

Editorial Information: Prior History

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County; Cynthia Angelos and Dwight L. Geiger, Judge; L.T. Case No. 99-2439 CF. Jackson v. State, 2003 Fla. App. LEXIS 8783 (Fla. Dist. Ct. App. 4th Dist., June 11, 2003)

Disposition:
Reversed and remanded.

Counsel Carey Haughwout, Public Defender, and Susan D. Cline, Assistant Public Defender, West Palm Beach, for appellant.
Charles J. Crist, Jr., Attorney General, Tallahassee, and August A. Bonavita, Assistant Attorney General, West Palm Beach, for appellee.

Judges: POLEN, J. GUNTHER and TAYLOR, JJ., concur.

CASE SUMMARY

PROCEDURAL POSTURE: On rehearing, defendant appealed a judgment by the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County (Florida), which denied his Fla. R. Crim. P. 3.800(b)(2) motion to correct a sentencing error; defendant claimed that the crime was reclassified without amending the information.Where defendant was charged with "carrying" a weapon, but pleaded guilty to "discharging" a weapon, he was sentenced under the wrong statutory provision; therefore, the sentence could not stand.

OVERVIEW: Defendant was charged, inter alia, with "carrying" a weapon during a robbery in violation of Fla. Stat. chs. 812.13(1), (2)(a). However, he pleaded guilty and was sentenced pursuant to Fla. Stat. ch. 775.087(2)(a)3 (1999) for "discharging" a weapon during a robbery. The appellate court held that the information charged that defendant "carried" a firearm pursuant to 775.087(2)(a)1. As he was not charged with "discharging" a firearm or causing great bodily harm or death as the result of such, his sentence under section 775.087(2)(a)3 could not stand. Defendant had no obligation to point out the defect in the information.

OUTCOME: The judgment was reversed and remanded with instructions.

LexisNexis Headnotes

Criminal Law & Procedure > Criminal Offenses > Weapons > Possession > General Overview

Criminal Law & Procedure > Accusatory Instruments > Informations

Criminal Law & Procedure > Sentencing > Adjustments

Criminal Law & Procedure > Criminal Offenses > Weapons > Use > General Overview

Fla. Stat. ch. 775.087(2)(a), the "10-20-Life" statute, provides for the enhancement of a crime where a firearm is possessed or used during the commission of certain enumerated crimes. In order to reclassify a crime under 10-20-Life, the grounds for enhancement must be charged in the information.

Criminal Law & Procedure > Criminal Offenses > Weapons > Possession > General Overview

Criminal Law & Procedure > Sentencing > Ranges

Criminal Law & Procedure > Criminal Offenses > Weapons > Use > General Overview

Criminal Law & Procedure > Criminal Offenses > Weapons > Use > Commission of Another Crime > Elements

See Fla. Stat. ch. 775.087(2)(a)3 (1999).

Opinion

Opinion by: POLEN

Opinion

{852 So. 2d 942}ON APPELLEE'S MOTION FOR REHEARING, REHEARING EN BANC, OR CERTIFIED QUESTION

POLEN, J.

We withdraw our previously issued slip opinion (June 11, 2003), correct two scrivener's errors in that opinion, certify conflict, but otherwise deny rehearing, rehearing en banc, or certified question. We substitute the following opinion:

Sheron Jackson pled no contest to eight counts in connection with criminal acts committed on July 18 and 25 of 1999: grand theft of a firearm (I); grand theft of a motor vehicle (II); armed burglary of a conveyance (III); attempted first-degree murder (IV); attempted first-degree murder (V); robbery with a deadly weapon, firearm (VI); attempted felony murder (VII); and attempted felony murder (VIII). This appeal solely concerns Jackson's challenge to the sentence received on Count VI, robbery with a deadly weapon, firearm. While this appeal was pending, Jackson filed a Motion to Correct Sentencing Error pursuant to Florida Rule of Criminal Procedure 3.800(b)(2), which was denied. We agree with Jackson that reversal is mandated on his sentence for Count VI due to defects in the information.

In pertinent part, Count VI of the information alleged:

[On] July 25, 1999 Sharon [sic] Jackson did take certain property, to-wit: keys, from the person or custody of [victims], with the intent to permanently or temporarily deprive the said person or owner of the property, and in the course of the taking there was the use of force, violence, assault, or putting in fear, and in the course of committing the robbery carried a firearm, in violation of Florida Statutes 812.13(1) and 812.13(2)(a).

Trial commenced on February 19, 2001. Jackson was represented by an Assistant Public Defender. On the second day of trial, after a number of State witnesses had testified, Jackson stated he wanted to end the proceedings by withdrawing his previously entered not guilty plea and entering a plea of no contest to all of the charges. The following colloquy then ensued:

Court: Sir, are you also entering a plea of no contest to Count Six as charged in the information, robbery with a deadly weapon being a firearm?

Jackson: Yes, ma'am.

Court: Do you understand, please, that is a life felony, the statutory maximum sentence that could be imposed is life?

{852 So. 2d 943} Jackson, Yes, I understand.

Court: And the min max in that regard, please?

Prosecutor: Judge that would be the 25 to life.

Court: is - the minimum mandatory is -

Prosecutor: It's - it's written in the statute as 25 years to life, -

Court: Okay.

Prosecutor: - so, that it's at the Court's discretion.

Court: The minimum sentence that could be imposed, sir, would be 25 years with the Department of Corrections, do you understand that?

Jackson: Yes.

Defense counsel admitted there was a sufficient factual basis as contained in affidavit and the evidence at trial to support a plea of no contest to the charges, and the plea was accepted by the court. The court noted it had not anticipated the entry of a plea that day, and stated it would give the parties three weeks until sentencing in order to research the applicable minimum mandatory sentences.

The parties reconvened for sentencing on March 21, 2001. The prosecutor stated the State would not be seeking minimum mandatory sentences on any of the counts except Count VI, since none of the other counts referenced the possession or usage of a firearm as grounds for enhancement. The following colloquy regarding Count VI then ensued:

Court: . . .With regard - you're agreeing to Count VI and the min. mand. is that your - it's your position the min. mand. on that as well?

Prosecutor: Twenty five to life, Your Honor.

Court: Now on that, during the colloquy the Court specifically asked if he was entering a plea of - to that count and possessing a firearm?

Prosecutor: Yes, ma'am. And - and discuss the minimum mandatories with him as well.

Court: Good. Okay. And would you concur with that?

Defense: Yes, Your Honor.

The court then gave Jackson an oath and asked him the following:

Court: Mr. Jackson, when I took your plea on February 20th, you had pled as charged in the information, correct, sir?

Jackson: Yes, ma'am.

Court: And you and I discussed your plea to Count VI, which was charged as robbery with a deadly weapon being a firearm. I'm confirming with you, sir, that you wished to enter a plea of no contest to that charge, robbery with a deadly weapon being a firearm?

Jackson: Yes, ma'am.

Court: I'm going to have [Prosecutor] insert that in the plea petition, have you initial that please. I think that will just be cleaner in the future. I know that was a plea taken, but I noticed in the written plea petition it wasn't certain. . .

The written plea petition was subsequently amended to provide Jackson had pled no contest "As charged. Robbery with deadly weapon, firearm, min. mand. 25 - Life." Jackson was sentenced to Life on Count VI with a minimum mandatory sentence of 25 years. Jackson's Motion to Correct Sentencing Error pending appeal was denied and this matter is now before this court.

Jackson contends the crime to which he pled no contest was improperly reclassified under section 775.087(2)(a)3, Florida Statutes, even though all of the essential elements enunciated in that statute had not been pled in the information. We agree.

{852 So. 2d 944} Section 775.087(2)(a), Florida Statutes , the "10-20-Life" statute, provides for the enhancement of a crime where a firearm is possessed or used during the commission of certain enumerated crimes. In order to reclassify a crime under 10-20-Life, the grounds for enhancement must be charged in the information. *See Gibbs v. State*, 623 So. 2d 551, 554-55 (Fla. 4th DCA1993). Here, Jackson was sentenced pursuant to section 775.087(2)(a)3, Florida Statutes (1999), which provides:

Any person who is convicted of a felony or an attempt to commit a felony listed in sub-subparagraph(a)1.a.-q., regardless of whether the use of a weapon is an element of the felony, and during the course of the commission of the felony such person discharged a "firearm" or "destructive device" as define in s. 790.001 and, as the result of the discharge, death or great bodily harm was inflicted upon the person, the convicted person shall be sentenced to a minimum term of imprisonment of not less than

25 years and not more than a term of imprisonment of life in prison.

(Emphasis supplied.) Although Jackson was charged with, and pled to, robbery, an enumerated offense, he was not charged with "discharging" a firearm during the commission of said felony, or of inflicting death or great bodily harm as the result of such. Rather, the information merely charged that Jackson had "carried" a firearm. Although an allegation of "carrying" a firearm can sustain a sentence under section 775.087(2)(a)1, it cannot sustain a sentence under section 775.087(2)(a)3. Since Jackson was not charged with "discharging" a firearm or causing great bodily harm or death as the result of such, his sentence under section 775.087(2)(a)3 cannot stand. *See Gibbs*, 623 So. 2d at 554-55; *see also Fulcher v. State*, 766 So. 2d 243 (Fla. 4th DCA2000)(due process is violated where one is convicted of a crime where the indictment or information wholly omits to allege one or more of the essential elements of the crime).

Still, the State contends Jackson has waived any challenge to the sentence by way of his no contest plea. We disagree. The fact that Jackson and his counsel were under the mistaken belief that he was pleading to a charge that carried a 25 year mandatory minimum sentence does not transform the illegality of that sentence, where a crime with only a 10 year mandatory minimum sentence [775.087(2)(a)1.] had been pled in the information, and pled out to by Jackson. *See Leavitt v. State*, 810 So. 2d 1032 (Fla. 1st DCA2002) (reversing 20 year sentence on defendant's negotiated plea to a 2nd degree felony since the statutory maximum for a 2nd degree felony was 15 years; a defendant cannot agree to an illegal sentence); *Vickers v. State*, 630 So. 2d 1229 (Fla. 2d DCA1994). Moreover, the fact that the evidence presented before Jackson ended the proceedings by changing his plea established that he had in fact discharged a firearm resulting in great bodily harm during the commission of the robbery, does not transform the illegality of his sentence. He was only charged with "carrying" a firearm, not "discharging" a firearm resulting in great bodily harm, and accordingly he can be convicted only of such. *See McEachern v. State*, 388 So. 2d 244, 246-48 (Fla. 5th DCA1980) (vacating conviction for grand larceny by sheriff by way of his "official position" where the indictment failed to allege the essential elements of the offense; even though the evidence established he was guilty of said offense, the court reversed his conviction, stating, "since he was not so charged, we can only assume that the State did not intend to charge him with the higher degree of the crime, although we fail to {852 So. 2d 945} understand why it was done."). Jackson had no obligation to point out the defect in the information. Rather the State could have moved to amend the information to add the missing essential elements, a motion to which Jackson could have objected. *See generally Toussaint v. State*, 755 So. 2d 170, 171-72 (Fla. 4th DCA2000). Yet, at no time did the State move to amend the information to add the missing essential elements of "discharging" a firearm resulting in great bodily harm or death.

Jackson was charged only with, and pled no contest to, robbery while "carrying" a firearm, grounds for sentencing pursuant to section 775.087(2)(a)1. As such, we reverse Jackson's conviction under section 775.087(2)(a)3 on Count VI, and remand with instructions for the trial court to re-sentence him on that count pursuant to section 775.087(2)(a)1. To the extent our decision is in conflict with *Brlecic v. State*, 456 So. 2d 503 (Fla. 2d DCA1984) , we certify conflict.

REVERSED and REMANDED.

GUNTHER and TAYLOR, JJ., concur.

176 LED2D 979, 560 U.S. 218 UNITED STATES v. O'BRIEN

UNITED STATES, Petitioner

vs.

MARTIN O'BRIEN and ARTHUR BURGESS

560 US 218, 130 S Ct 2169, 176 L Ed 2d 979, 2010 US LEXIS 4167

[No. 08-1569]

Argued February 23, 2010.

Decided May 24, 2010.

DECISION

With respect to 18 U.S.C.S. 924(c)(1)(A)'s prohibition of use of firearm in relation to violent or drug-trafficking crime-where if firearm was machinegun, 18 U.S.C.S. 924(c)(1)(B)(ii) required 30-year minimum sentence-fact that firearm was machinegun held to be offense element, not sentencing factor.

Prior history: 542 F.3d 921, 2008 U.S. App. LEXIS 20468

SUMMARY

Procedural posture: Respondents were charged with, inter alia, using a machinegun in furtherance of a crime of violence, as proscribed by 18 U.S.C.S. 924(c)(1)(A) and (B)(ii). Petitioner Government contended that the machinegun provision was a sentencing enhancement, but the district court disagreed. The U.S. Court of Appeals for the First Circuit affirmed that 924(c) constituted an element of an offense, not a sentencing factor. Certiorari was granted.

Overview: The machinegun provision of an earlier version of 18 U.S.C.S. 924(c) had previously been found to be an element of the offense, not a sentencing factor, but 924(c) had since been amended in 1988. The Government could not claim the benefit of any shift in how the law traditionally treated firearm type from the U.S. Sentencing Guidelines, for that supposed shift would have occurred before the 1988 version of 924(c) was enacted. The Guidelines were explicitly taken into account when the court analyzed the traditions in its earlier decision. The factor of potential unfairness was unchanged by the restructuring of 924. The factor of the severity of the sentence accompanying a finding that a defendant carried a machinegun under 924, was also unaffected by the statute's restructuring. The drastic, sixfold increase strongly suggested that using a machinegun was a separate substantive crime. The immense danger posed by machineguns, the moral depravity<***pg. 980**> in choosing the weapon, and the substantial increase in the minimum sentence provided by the statute supported the conclusion that this prohibition was an element of the crime, not a sentencing factor.

Outcome: The judgment of the Court of Appeals was affirmed. 9-0 Decision; 2 concurrences.

RESEARCH REFERENCES

18 U.S.C.S. 924(c)(1)(B)(ii)

4 Criminal Defense Techniques 90.10 (Matthew Bender)

Criminal Law Deskbook 3.08, 21.01 (Matthew Bender)

L Ed Digest, Weapons and Firearms 2

L Ed Index, Weapons and Firearms

ANNOTATION REFERENCES

Rule of Apprendi v. New Jersey (2000) 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348, and its progeny, as to proof of facts necessary to support criminal sentence-Supreme Court cases. 160 L. Ed. 2d 1163.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Using or carrying - violent crime - drug trafficking

L Ed Digest: Weapons and Firearms 2

1. 18 U.S.C.S. 924(c)(1)(A) prohibits the use or carrying of a firearm in relation to a crime of violence or drug trafficking crime, or the possession f a firearm in furtherance of such crimes. A violation of the statute carries a mandatory minimum term of five years' imprisonment, 924(c)(1)(A)(i); but if the firearm is a machinegun, the statute requires a 30-year mandatory minimum sentence, 924(c)(1)(B)(ii). Whether a firearm was used, carried, or possessed is an element of the offense. (Kennedy, J., joined by Roberts, Ch. J., and Stevens, Scalia, Ginsburg, Breyer, Alito, and Sotomayor, JJ.)

Elements of offense - sentencing - proof - jury - judge

L Ed Digest: Criminal Law 9, 69; Constitutional Law 841; Evidence 980, 982; Indictments and Informations 29; Statutes 80

2. Elements of a crime must be charged in an indictment and proved to a jury beyond a reasonable doubt. Sentencing factors, on the other hand, can be proved to a judge at sentencing by a preponderance of the evidence. Though one exception has been established, it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. In other words, while sentencing factors may guide or confine a judge's discretion in sentencing an offender within the range prescribed by statute, judge-found sentencing factors cannot increase the maximum sentence a defendant might otherwise receive based purely on the facts found by the jury. Subject to this constitutional constraint, whether a given fact is an element of the crime itself or a sentencing factor is a question for Congress. When Congress is not explicit, as is often the case because it seldom directly addresses the distinction between sentencing factors and elements, courts look to the provisions and the framework of the statute to determine whether a fact is an element or a sentencing factor. (Kennedy, J., joined by Roberts, Ch. J., and Stevens, Scalia, Ginsburg, Breyer, Alito, and Sotomayor, JJ.)

Use or carrying - violent crime - drug trafficking - sentence

L Ed Digest: Weapons and Firearms 2

3. See 18 U.S.C.S. 924(c)(1), which provides in part:

``(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who<***pg. 981**> , in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime-

``(i) be sentenced to a term of imprisonment of not less than 5 years;

``(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

``(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

``(B) If the firearm possessed by a person convicted of a violation of this subsection-

``(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the

person shall be sentenced to a term of imprisonment of not less than 10 years; or

``(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years." (Kennedy, J., joined by Roberts, Ch. J., and Stevens, Scalia, Ginsburg, Breyer, Alito, and Sotomayor, JJ.)

Use or carrying - elements of offense - sentencing factors

L Ed Digest: Weapon and Firearms 2

4. Legal tradition and past congressional practice are the second Castillo factor. The factor is to be consulted when a statute's text is unclear as to whether certain facts constitute elements or sentencing factors. Sentencing factors traditionally involve characteristics of the offender-such as recidivism, cooperation with law enforcement, or acceptance of responsibility. Characteristics of the offense itself are traditionally treated as elements, and the use of a machinegun under 18 U.S.C.S. 924(c) lies closest to the heart of the crime at issue. Unsurprisingly, firearm type is treated as an element in a number of statutes, as numerous gun crimes make substantive distinctions between weapons such as pistols and machineguns. 18 U.S.C.S. 924(a)(4), (b)(4), (o)(1). (Kennedy, J., joined by Roberts, Ch. J., and Stevens, Scalia, Ginsburg, Breyer, Alito, and Sotomayor, JJ.)

Carrying machinegun - sentence

L Ed Digest: Weapons and Firearms 2

5. A finding that a defendant carried a machinegun under 18 U.S.C.S. 924, in contrast to some less dangerous firearm, vaults a defendant's mandatory minimum sentence from 5 to 30 years, or from 7 to 30 years if the firearm was brandished, 924(c)(1)(A)(ii). (Kennedy, J., joined by Roberts, Ch. J., and Stevens, Scalia, Ginsburg, Breyer, Alito, and Sotomayor, JJ.)

Continuous meaning

L Ed Digest: Statutes 208

6. When the U.S. Supreme Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law. (Kennedy, J., joined by Roberts, Ch. J., and Stevens, Scalia, Ginsburg, Breyer, Alito, and Sotomayor, JJ.)

Brandishing - sentencing enhancements

L Ed Digest: Weapons and Firearms 2

7. 18 U.S.C.S. 924(c)(1)(A)(ii), (iii) provide sentencing enhancements for brandishing or discharging a firearm, and these enhancements are sentencing factors to be found by a judge. (Kennedy, J., joined by Roberts, Ch. J., and Stevens, Scalia, Ginsburg, Breyer, Alito, and Sotomayor, JJ.)

<*pg. 982> Structure - separate subsections

L Ed Digest: Statutes 120

8. While the U.S. Supreme Court has indicated that placing factors in separate subsections is one way Congress might signal that it is treating them as sentencing factors as opposed to elements, it has rejected the view that this structural consideration predominates even when other factors point in the other direction. (Kennedy, J., joined by Roberts, Ch. J., and Stevens, Scalia, Ginsburg, Breyer, Alito, and Sotomayor, JJ.)

SYLLABUS

Respondents O'Brien and Burgess each carried a firearm during an attempted robbery. Count three of their indictment charged them with using a firearm in furtherance of a crime of violence, which carries a mandatory minimum 5-year prison term. 18 U.S.C. 924(c)(1)(A)(i). Count four alleged use of a machinegun (here, a pistol that authorities believed operated as a fully automatic firearm) in furtherance of that crime, which carries a 30-year mandatory minimum term. 924(c)(1)(B)(ii). The Government moved to dismiss the fourth count on the basis that it could not establish the count beyond a reasonable doubt, but it maintained that 924(c)(1)(B)(ii)'s machinegun provision was a sentencing enhancement to be determined by the District Court upon a conviction on count three. The court dismissed count four and rejected the Government's sentencing-enhancement position. Respondents then pleaded guilty to the remaining counts. The court sentenced O'Brien to a 102-month term and Burgess to an<***pg. 983**> 84-month term for their 924(c) convictions. In affirming the District Court's 924(c)(1)(B)(ii) ruling, the First Circuit looked primarily to Castillo v. United States, 530 U.S. 120, 120 S. Ct. 2090, 147 L. Ed. 2d 94, which held that the machinegun provision in an earlier version of 924(c) constituted an element of an offense, not a sentencing factor. The court found that Castillo was ``close to binding," absent clearer or more dramatic changes than those made by Congress' 1998 amendment of 924(c) or a clearer legislative history.

Held:

The fact that a firearm was a machinegun is an element to be proved to the jury beyond a reasonable doubt, not a sentencing factor to be proved to the judge at sentencing. Pp. ___ - ___, 176 L. Ed. 2d, at 986-993.

(a) Generally, a fact that ``increase[s] the prescribed range of penalties to which a criminal defendant is exposed" is an element of a crime, Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435, to be charged in an indictment and proved to a jury beyond a reasonable doubt, Hamling v. United States, 418 U.S. 87, 117, 94 S. Ct. 2887, 41 L. Ed. 2d 590, rather than proved to a judge at sentencing by a preponderance of the evidence, McMillan v. Pennsylvania, 477 U.S. 79, 91-92, 106 S. Ct. 2411, 91 L. Ed. 2d 67. Subject to this constitutional constraint, Congress determines whether a factor is an element or a sentencing factor. When Congress is not explicit, courts look to a statute's provisions and framework for guidance. Analysis of the current machinegun provision begins with Castillo, where the Court found the bare language of 924's prior version ``neutral," 530 U.S., at 124, 120 S. Ct. 2090, 147 L. Ed. 2d 94, but ruled that four factors-(1) language and structure, (2) tradition, (3) risk of unfairness, and (4) severity of the sentence-favored treating the machinegun provision as an element of an offense, id., at 124-131, 120 S. Ct. 2090, 147 L. Ed. 2d 94; while a fifth factor-legislative history-did not favor either side, ibid. Pp. ___ - ___, 176 L. Ed. 2d, at 986-987.

(b) As relevant here, the 1998 amendment divided what was once a lengthy principal sentence into separate subparagraphs. Thus, with regard to the first Castillo factor, the Court's observation that ``Congress placed the element 'uses or carries a firearm' and the word 'machinegun' in a single sentence, not broken up with dashes or separated into subsections," 530 U.S., at 124-125, 120 S. Ct. 2090, 147 L. Ed. 2d 94, no longer holds true. However, the amendment did not affect the second through fifth Castillo factors. Each of them, except for legislative history (which remains relatively silent), continues to favor treating the machinegun provision as an element. The amendment's effect on the language and structure factor requires closer examination. Pp. ___ - ___, 176 L. Ed. 2d, at 987-991.

(c) Given the Court's determination in Castillo that the machinegun provision in 924's prior version is an element, a substantive change in the statute should not be inferred ``[a]bsent a clear indication from Congress of a change in policy," Grogan v. Garner, 498 U.S. 279, 290, 111 S. Ct. 654, 112 L. Ed. 2d 755. Nothing in the 1998 amendment indicates such a change.

There are three principal differences between the previous and current 924(c). The first, a substantive change, shifts what were once mandatory 5-year and 30-year sentences to mandatory minimum sentences. The second<*pg. 984> , also substantive-made in direct response to the holding in Bailey v. United States, 516 U.S. 137, 116 S. Ct. 501, 133 L. Ed. 2d 472, that ``uses or carries" in 924's preamendment version connotes ``more than mere possession," id., at 143, 116 S. Ct. 501, 133 L. Ed. 2d 472-adds ``possesses" to the ``uses or carries" language in 924(c)'s principal paragraph and provides sentencing enhancements for brandishing or discharging the firearm, 924(c)(1)(A)(ii) and (iii), which do state sentencing factors, Harris v. United States, 536 U.S. 545, 552-556, 122 S. Ct. 2406, 153 L. Ed. 2d 524. Neither of these substantive changes suggests that Congress meant to transform the machinegun provision from an element into a sentencing factor. The third difference is the machinegun provision's relocation from the principal paragraph that unmistakably lists offense elements to a separate subsection, 924(c)(1)(B), but this structural or stylistic change provides no ``clear indication" that Congress meant to alter its treatment of machineguns as an offense element. A more logical explanation is that the restructuring was intended to break up a lengthy principal paragraph, which exceeded 250 words, into a more readable statute, which is in step with current legislative drafting guidelines. While this Court has recognized that placing factors in separate subsections is one way Congress might signal that it is treating them as sentencing factors rather than elements, Castillo, supra, at 124-125, 120 S. Ct. 2090, 147 L. Ed. 2d 94, it has rejected the view that such a structural consideration predominates even when other factors point in the other direction, Harris, supra, at 553, 122 S. Ct. 2406, 153 L. Ed. 2d 524. The current structure of 924(c) is more favorable to treating the machinegun provision as a sentencing factor than was true in Castillo, particularly because the machinegun provision is now positioned between the sentencing factors provided in (A)(ii) and (iii) and those in (C)(i) and (ii). This structural point is overcome by the substantial weight of the other Castillo factors and the principle that Congress would not enact so significant a change without a clear indication of its purpose to do so. Pp. ___ - ___, 176 L. Ed. 2d, at 991-993.

542 F.3d 921, affirmed.

Kennedy, J., delivered the opinion of the Court, in which Roberts, C. J., and Stevens, Scalia, Ginsburg, Breyer, Alito, and Sotomayor, JJ., joined. Stevens, J., filed a concurring opinion. Thomas, J., filed an opinion concurring in the judgment.

APPEARANCES OF COUNSEL ARGUING CASE

Benjamin Horwich argued the cause for petitioner.

Jeffrey L. Fisher argued the cause for respondents.

OPINION

Justice *Kennedy* delivered the opinion of the Court.

The Court must interpret, once again, 924(c) of Title 18 of the United States Code. **[1]**This provision prohibits the use or carrying of a firearm in relation to a crime of violence or drug trafficking crime, or the possession of a firearm in furtherance of such crimes. 924(c)(1)(A). A violation of the statute carries a mandatory minimum term of five years' imprisonment, 924(c)(1)(A)(i); but if the firearm is a machinegun, the statute requires a 30-year mandatory minimum sentence, 924(c)(1)(B)(ii). Whether a firearm was used, carried, or possessed is, as all concede, an element of the offense. At issue here is whether the fact that the firearm was a<*pg. 985> machinegun is an element to be proved to the jury beyond a reasonable doubt or a sentencing factor to be proved to the judge at sentencing.

In an earlier case the Court determined that an analogous machinegun provision in a previous version of 924 constituted an element of an offense to be proved to the jury. Castillo v. United States, 530 U.S. 120, 120 S. Ct. 2090, 147 L. Ed. 2d 94 (2000). The Castillo decision, however, addressed the statute as it existed before congressional amendments made in 1998. And in a case after Castillo, the brandishing provision in the post-1998 version of 924 was held to provide a sentencing factor, not an element of the offense. Harris v. United States, 536 U.S. 545, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002). In light of the 1998 amendments and the Harris decision, the question of how to interpret 924's machinegun provision is considered once more in the instant case.

I

On June 16, 2005, respondents Martin O'Brien and Arthur Burgess attempted to rob an armored car making a scheduled delivery of cash to a bank. Along with a third collaborator, respondents hid in a minivan and waited for the armored car to make its stop. Each of the men carried a firearm. Containing nearly $2 million and attended by two guards, the armored car arrived. A guard began to unload boxes of coins. The three men came out of the van and, while one of them brandished his weapon, they ordered the guards to get on the ground. One guard did so, but the other ran to a nearby restaurant. The respondents abandoned the robbery and fled without taking any money. No shots were fired, and no one was injured.

Authorities apprehended respondents and recovered the three firearms used during the attempted robbery. The firearms were a semi-automatic Sig-Sauer pistol, an AK-47 semiautomatic rifle, and a Cobray pistol. The Cobray pistol had been manufactured as, and had the external appearance of, a semiautomatic firearm. According to the Federal Bureau of Investigation, though, it operated as a fully automatic weapon, apparently due to some alteration of its original firing mechanism. Respondents dispute whether the Cobray in fact did operate as a fully automatic weapon.

Respondents were indicted on multiple counts. Relevant here are counts three and four, both of which charged offenses under 924(c). Count three charged respondents with using a firearm in furtherance of a crime of violence, which carries a statutory minimum of five years' imprisonment. Count four charged respondents in more specific terms, alleging use of a machinegun (the Cobray) in furtherance of a crime of violence, as proscribed by 924(c)(1)(A) and (B)(ii). The latter provision mandates a minimum sentence of 30 years' imprisonment.

The Government moved to dismiss count four on the basis that it would be unable to establish the count beyond a reasonable doubt. (The issues in the present case do not require the Court to consider any contention that a defendant who uses, carries, or possesses a firearm must be aware of the weapon's characteristics. This opinion expresses no views on the point.)

The Government then maintained that the machinegun provision in 924(c)(1)(B)(ii) was a sentencing factor, so that, if respondents were convicted<*pg. 986> of carrying a firearm under count three, the court could determine at sentencing that the particular firearm was a machinegun, thus activating the 30-year mandatory minimum. The District Court dismissed count four, as the Government requested, but rejected the Government's position that the machinegun provision was a sentencing enhancement to be determined by the court at sentencing once there was a conviction on count three. It ruled that the machinegun provision states an element of a crime. Thus, to invoke the 30-year minimum sentence, the Government was required to charge in the indictment, and then prove to the jury, that the Cobray was a machinegun.

At this point, after the District Court foreclosed the possibility of respondents' facing a 30-year minimum, respondents pleaded guilty to the remaining counts, including count three. The District Court sentenced O'Brien to a 102-month term for his 924(c) conviction, to run consecutively with his sentence on two other counts. It sentenced Burgess to an 84-month term for his 924(c) conviction, also to run consecutively to his sentence on the other charges. The Government appealed the District Court's ruling that the 924 machinegun provision constitutes an element of an offense instead of a sentencing factor.

The United States Court of Appeals for the First Circuit affirmed. It looked primarily to Castillo, 530 U.S. 120, 120 S. Ct. 2090, 147 L. Ed. 2d 94, which held that the machinegun provision in an earlier version of 924(c) constituted an element of an offense, not a sentencing factor. The court noted that the statute under consideration in Castillo had been revised by Congress, ``break[ing] what was a single run-on sentence into subparagraphs," and it acknowledged that the earlier repealed version of the statute was ``slightly more favorable to the [respondents] than the current version[,] but not markedly so." 542 F.3d 921, 925 (2008). It found ``no evidence that the breaking up of the sentence into the present subdivisions or recasting of language was anything more than a current trend-probably for ease of reading-to convert lengthy sentences in criminal statutes into subsections in the fashion of the tax code." Id., at 926. The court concluded: ``Absent a clearer or more dramatic change in language or legislative history expressing a specific intent to assign judge or jury functions, we think that Castillo is close to binding," and any reconsideration of the issue should be left to this Court. Ibid.; see also Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989) (``If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions").

We granted certiorari. 557 U.S. ___, 130 S. Ct. 49, 174 L. Ed. 2d 632 (2009).

II

[2]Elements of a crime must be charged in an indictment and proved to a jury beyond a reasonable doubt. Hamling v. United States, 418 U.S. 87, 117, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974); Jones v. United States, 526 U.S. 227, 232, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999). Sentencing factors**<*pg. 987>** , on the other hand, can be proved to a judge at sentencing by a preponderance of the evidence. See McMillan v. Pennsylvania, 477 U.S. 79, 91-92, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986). Though one exception has been established, see Almendarez-Torres v. United States, 523 U.S. 224, 228, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998), `` '[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.' " Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (quoting Jones, supra, at 252-253, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (Stevens, J., concurring)). In other words, while sentencing factors may guide or confine a judge's discretion in sentencing an offender ``within the range prescribed by statute," Apprendi, supra, at 481, 120 S. Ct. 2348, 147 L. Ed. 2d 435, judge-found sentencing factors cannot increase the maximum sentence a defendant might otherwise receive based purely on the facts found by the jury.

Subject to this constitutional constraint, whether a given fact is an element of the crime itself or a sentencing factor is a question for Congress. When Congress is not explicit, as is often the case because it seldom directly addresses the distinction between sentencing factors and elements, courts look to the provisions and the framework of the statute to determine whether a fact is an element or a sentencing factor. Almendarez-Torres, supra, at 228, 118 S. Ct. 1219, 140 L. Ed. 2d 350. In examining whether the machinegun provision in 924 is an element or a sentencing factor, the analysis must begin with this Court's previous examination of the question in Castillo.

In Castillo, the Court considered a prior version of 924, which provided:

``(c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime . . . , uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle [or a] short-barreled shotgun to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. . . ." 18 U.S.C. 924(c)(1) (1988 ed., Supp. V).

In determining whether the machinegun provision in the just-quoted version of 924 constituted an element or a sentencing factor, the Court in Castillo observed that the bare statutory language was ``neutral." 530 U.S., at 124, 120 S. Ct. 2090, 147 L. Ed. 2d 94. It examined five factors directed at determining congressional intent: (1) language and structure, (2) tradition, (3) risk of unfairness, (4) severity of the sentence, and (5) legislative history. Id., at 124-131, 120 S. Ct. 2090, 147 L. Ed. 2d 94. The Court unanimously concluded that the machinegun provision provided an element of an offense, noting that the first four factors favored treating it as such while legislative history did not significantly favor either side. Ibid.

III

A

Section 924(c) was amended to its current form in 1998. The amendment<***pg. 988**> had been enacted when the Court considered Castillo, supra, at 125, 120 S. Ct. 2090, 147 L. Ed. 2d 94, but the pre-1998 version of the statute was at issue there. The instant case concerns the post-1998 (and current) version of the statute, which provides:

[3]``(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime-

``(i) be sentenced to a term of imprisonment of not less than 5 years;

``(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

``(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

``(B) If the firearm possessed by a person convicted of a violation of this subsection-

``(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

``(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years." 18 U.S.C. 924(c)(1) (2006 ed.).

The 1998 amendment did make substantive changes to the statute, to be discussed below; but for purposes of the present case the most apparent effect of the amendment was to divide what was once a lengthy principal sentence into separate subparagraphs. This Court's observation in considering the first Castillo factor, that ``Congress placed the element 'uses or carries a firearm' and the word 'machinegun' in a single sentence, not broken up with dashes or separated into subsections," 530 U.S., at 124-125, 120 S. Ct. 2090, 147 L. Ed. 2d 94, no longer holds true. Aside from this new structure, however, the 1998 amendment of 924 did nothing to affect the second through fifth Castillo factors. Each of the factors, except for legislative history (which, assuming its relevance, remains relatively silent), continues to favor the conclusion that the machinegun provision is an element of an offense.

[4]Legal tradition and past congressional practice are the second Castillo factor. The factor is to be consulted when, as here, a statute's text is unclear as to whether certain facts constitute elements or sentencing factors. Sentencing factors traditionally involve characteristics of the offender-such as recidivism, cooperation with law enforcement, or acceptance of responsibility. Id., at 126, 120 S. Ct. 2090, 147 L. Ed. 2d 94. Characteristics of the offense itself are traditionally treated as elements, and the use of a machinegun under 924(c) lies ``closest to the heart of the crime at issue." Id., at 127, 120 S. Ct. 2090, 147 L. Ed. 2d 94. This is no less true today than it was 10 years ago in Castillo. Unsurprisingly, firearm type is treated as an element in a number of statutes, as ``numerous gun crimes make substantive distinctions between weapons such as pistols and machineguns<***pg. 989**> ." Ibid.; see, e.g., 18 U.S.C. 922(a)(4), 922(b)(4), and 922(o)(1).

The Government counters that this tradition or pattern has evolved since the version of 924(c) under review in Castillo was enacted. The Government contends that the Federal Sentencing Guidelines altered the tradition by treating the possession of a firearm as a sentencing factor. Brief for United States 23 (citing United States Sentencing Commission, Guidelines Manual 2K2.1(a)(5) (Nov. 1998) (raising base offense level ``if the offense involved a firearm")).

The argument is not persuasive. The Sentencing Reform Act of 1984, 98 Stat. 1987, establishing the Federal Sentencing Guidelines, was enacted four years before the version of 924 under review in Castillo, see Anti-Drug Abuse Act of 1988, 6460, 102 Stat. 4373. While the resulting Guidelines were not effective until 1987, this was still before the 1988 enactment of the statute at issue in Castillo, and 13 years before this Court's conclusion in Castillo that firearm type is traditionally treated as an offense element. The Government cannot claim the benefit of any shift in how the law traditionally treats firearm type from the Guidelines, for that supposed shift would have occurred before the 1988 version of 924 was enacted. The Guidelines were explicitly taken into account when this Court analyzed the traditions in Castillo. 530 U.S., at 126, 120 S. Ct. 2090, 147 L. Ed. 2d 94 (discussing Federal Sentencing Guidelines in determining what traditionally qualifies as a sentencing factor).

The third Castillo factor, potential unfairness, was unchanged by the restructuring of 924. The Court explained in Castillo that treating the machinegun provision as a sentencing factor ``might unnecessarily produce a conflict between the judge and the jury" because ``a jury may well have to decide which of several weapons" a defendant used. Id., at 128, 120 S. Ct. 2090, 147 L. Ed. 2d 94. The concern was that the judge may not know which weapon the jurors determined a defendant used, and ``a judge's later, sentencing-related decision that the defendant used the machinegun, rather than, say, the pistol, might conflict with the jury's belief that he actively used the pistol." Ibid. This same concern arises under the current version of 924, where jurors might have to determine which among several weapons a defendant used, carried, or possessed in furtherance of a crime.

The Government's response, that permitting a judge to make this finding would ``streamlin[e] guilt-stage proceedings, without interfering with the accuracy of fact-finding," Brief for United States 33, is unconvincing. It does not address the particular unfairness concern expressed in Castillo, which was not alleviated by the restructuring of 924. And the Government does not suggest that it would be subjected to any unfairness if the machinegun provision continues to be treated as an element.

The fourth Castillo factor, the severity of the sentence accompanying a finding that a defendant carried a machinegun under 924, was also unaffected by the statute's restructuring. **[5]**A finding that a defendant carried a machinegun under 924, in contrast to some less dangerous firearm, vaults a defendant's mandatory minimum sentence from 5 to 30 years, Castillo, supra, at 131, 120 S. Ct. 2090, 147 L. Ed. 2d 94, or from 7 to 30 years<***pg. 990**> if, as in this case, the firearm was brandished, 924(c)(1)(A)(ii). This is not akin to the ``incremental changes in the minimum" that one would ``expect to see in provisions meant to identify matters for the sentencing judge's consideration," Harris, 536 U.S., at 554, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (from 5 years to 7 years); it is a drastic, sixfold increase that strongly suggests a separate substantive crime.

There is one substantive difference between the old and new versions of 924 that might bear on this fourth factor. The previous version of 924 provided mandatory sentences: 5 years for using or carrying a firearm and 30 years if the firearm is a machinegun, for example. See 924(c)(1) (1988 ed., Supp. V). The current statute provides only mandatory minimums: not less than 5 years for using or possessing a firearm; not less than 7 for brandishing it; and not less than 30 if the firearm is a machinegun. 924(c)(1)(A)(i), (A)(ii), (B)(ii). The Government argues that this difference is critical because a 30-year sentence is conceivable under the statute even without a finding that the particular weapon is a machinegun. Brief for United States 25.

This is a distinction in theory, perhaps, but not in practice. Neither the Government nor any party or amicus has identified a single defendant whose conviction under 924 for possessing or brandishing a nonspecific firearm led to a sentence approaching the 30-year sentence that is required when the firearm is a machinegun. Respondents advise, without refutation, that most courts impose the mandatory minimum of 7 years' imprisonment for brandishing a nonspecific weapon and the longest sentence that has come to the litigants' or the Court's attention is 14 years. Brief for Respondent O'Brien 46, 48 (citing United States v. Batts, 317 Fed. Appx. 329 (CA4 2009) (per curiam)); see also Harris, supra, at 578, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (Thomas, J., dissenting). Indeed, in the instant case, Burgess received the statutory minimum 7-year sentence, and O'Brien received only 18 months more than that. Once the machinegun enhancement was off the table, the Government itself did not seek anything approaching 30-year terms, instead requesting 12-year terms for each respondent.

The immense danger posed by machineguns, the moral depravity in choosing the weapon, and the substantial increase in the minimum sentence provided by the statute support the conclusion that this prohibition is an element of the crime, not a sentencing factor. It is not likely that Congress intended to remove the indictment and jury trial protections when it provided for such an extreme sentencing increase. See Jones, 526 U.S., at 233, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (``It is at best questionable whether the specification of facts sufficient to increase a penalty range by two-thirds, let alone from 15 years to life, was meant to carry none of the process safeguards that elements of an offense bring with them for a defendant's benefit"). Perhaps Congress was not concerned with parsing the distinction between elements and sentencing factors, a matter more often discussed by the courts when discussing the proper allocation of functions between judge and jury. Instead, it likely was more focused on deterring the crime by creating the mandatory minimum sentences. But the severity of the increase in this case counsels in favor of finding that the prohibition<***pg. 991**> is an element, at least absent some clear congressional indication to the contrary.

The fifth factor considered in Castillo was legislative history, and the Court there found it to be of little help. 530 U.S., at 130, 120 S. Ct. 2090, 147 L. Ed. 2d 94 (``Insofar as this history may be relevant, however, it does not significantly help the Government"). The 1998 amendment has its own legislative record, discussed below, but the parties accurately observe that it is silent as to congressional consideration of the distinction between elements and sentencing factors. Brief for United States 29; Brief for Respondent O'Brien 28-29. This silence is not neutral, however, because as explained below, it tends to counsel against finding that Congress made a substantive change to this statutory provision.

Four of the five factors the Court relied upon in Castillo point in the same direction they did 10 years ago. How the 1998 amendment affects the remaining factor-the provision's language and structure-requires closer examination.

B

In Castillo, the Court interpreted 924(c) in its original version, though Congress had at that point already amended the provision. Here, the applicable principle is that Congress does not enact substantive changes sub silentio. See Director of Revenue of Mo. v. CoBank ACB, 531 U.S. 316, 323, 121 S. Ct. 941, 148 L. Ed. 2d 830 (2001). In light of Castillo's determination that the machinegun provision in the previous version of 924 is an element, a change should not be inferred ``[a]bsent a clear indication from Congress of a change in policy." Grogan v. Garner, 498 U.S. 279, 290, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991); see also Rivers v. Roadway Express, Inc., 511 U.S. 298, 313, n. 12, 114 S. Ct. 1510, 128 L. Ed. 2d 274 (1994) **[6]**(``[W]hen this Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law").

The Government argues that the 1998 amendment restructuring 924(c) demonstrates the congressional judgment to reclassify the machinegun provision as a sentencing factor, rather than as an offense element. But the better understanding, as the Government acknowledged in its submission in Castillo, is that ``there is nothing to suggest that the 1998 amendments were intended to change, rather than simply reorganize and clarify, [924]'s treatment of firearm type." Brief for United States, O. T. 1999, No. 99-658, p. 41. A closer review of the 1998 amendment confirms this.

There are three principal differences between the previous and current versions of 924(c): two substantive changes and a third regarding the stylistic structure of the statute. The first difference, as discussed above, supra, at ___, 176 L. Ed. 2d, at 990, is that the amendment changed what were once mandatory sentences into mandatory minimum sentences. A person convicted of the primary offense of using or carrying a firearm during a crime of violence was once to ``be sentenced to imprisonment for five years," but under the current version he or she is to ``be sentenced to a term of imprisonment of not less than 5 years."

The second difference is that the amended version includes the word **<*pg. 992>** ``possesses" in addition to ``uses or carries" in its principal paragraph, and then adds the substantive provisions in 924(c)(1)(A)(ii) and (iii), which provide mandatory minimums for brandishing (7 years) and discharging (10 years) the firearm. These provisions are new substantive additions to the text of the previous version, which provided a bare 5-year mandatory minimum for any offender who ``use[d] or carrie[d] a firearm," without concern for how the firearm was used.

The changes were a direct response to this Court's decision in Bailey v. United States, 516 U.S. 137, 116 S. Ct. 501, 133 L. Ed. 2d 472 (1995), which held that the word ``use" in the preamendment version of 924 ``must connote more than mere possession of a firearm by a person who commits a drug offense." Id., at 143, 116 S. Ct. 501, 133 L. Ed. 2d 472. The Court in Bailey went on to observe that, ``[h]ad Congress intended possession alone to trigger liability under 924(c)(1), it easily could have so provided" by using the word ``possess," as it had so frequently done in other statutory provisions. Ibid. Three years later, Congress made the change and added the word ``possesses" to the principal paragraph. Congress additionally provided mandatory sentences above the 5-year minimum depending on whether and how the firearm was used. **[7]**Sections 924(c)(1)(A)(ii) and (iii) provide sentencing enhancements for brandishing or discharging the firearm, and the Court has held that these enhancements are sentencing factors to be found by a judge. See Harris, 536 U.S., at 552-556, 122 S. Ct. 2406, 153 L. Ed. 2d 524; see also Dean v. United States, 556 U.S. ___, ___, 129 S. Ct. 1849, 173 L. Ed. 2d 785 (2009) (referring to the brandishing and discharge provisions as ``sentencing factors"). The 1998 amendment was colloquially known as the ``Bailey Fix Act." 144 Cong. Rec. 26608 (1998) (remarks of Sen. DeWine); see also Dean, supra, at ___, 129 S. Ct. 1849, 173 L. Ed. 2d 785 (Stevens, J., dissenting).

Aside from shifting the mandatory sentences to mandatory minimums, and this so-called Bailey fix, Congress left the substance of the statute unchanged. Neither of these substantive changes suggests that Congress meant to transform the machinegun provision from an element into a sentencing factor.

The Government stresses a third, structural, difference in the statute, pointing out that the machinegun provision now resides in a separate subsection, 924(c)(1)(B), whereas it once resided in the principal paragraph that unmistakably lists offense elements. This structural or stylistic change, though, does not provide a ``clear indication" that Congress meant to alter its treatment of machineguns as an offense element. See Grogan, 498 U.S., at 290, 111 S. Ct. 654, 112 L. Ed. 2d 755. A more logical explanation for the restructuring is that it broke up a lengthy principal paragraph, which exceeded 250 words even before adding more to it for the Bailey fix, into a more readable statute. This is in step with current legislative drafting guidelines, which advise drafters to break lengthy statutory provisions into separate subsections that can be read more easily. See House Legislative Counsel's Manual on Drafting Style, HLC No. 104.1, 312, pp. 23-25 (1995); Senate Office of the Legislative Counsel, Legislative Drafting Manual 112, pp. 10-11 (1997).

[8]While the Court has indicated that**<*pg. 993>** placing factors in separate subsections is one way Congress might signal that it is treating them as sentencing factors as opposed to elements, Castillo, 530 U.S., at 124-125, 120 S. Ct. 2090, 147 L. Ed. 2d 94, Harris, 536 U.S., at 552-553, 122 S. Ct. 2406, 153 L. Ed. 2d 524, it has rejected the view that this structural consideration predominates even when other factors point in the other direction, id., at 553, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (``[E]ven if a statute 'has a look to it suggesting that the numbered subsections are only sentencing provisions,' " the Court will not ignore ``compelling evidence to the contrary" (quoting Jones, 526 U.S., at 232, 119 S. Ct. 1215, 143 L. Ed. 2d 311)). For instance, in Jones the Court found that the federal carjacking statute set forth elements of multiple offenses despite a structure similar to the statute at issue here. Id., at 232-239, 119 S. Ct. 1215, 143 L. Ed. 2d 311. And in Harris, the Court was careful to point out that, unlike the case at bar, the other Castillo factors ``reinforce[d] the single-offense interpretation implied by the statute's structure." 536 U.S., at 553, 122 S. Ct. 2406, 153 L. Ed. 2d 524.

In examining the amended version of 924(c)'s structure, there is an additional consideration that supports interpreting the machinegun provision to be an offense element. As explained above, the brandishing and discharge provisions codified in 924(A)(ii) and (iii) do state sentencing factors. See Harris, supra, at 552-556, 122 S. Ct. 2406, 153 L. Ed. 2d 524; Dean, supra, at ___, 129 S. Ct. 1849, 173 L. Ed. 2d 785. Had Congress intended to treat firearm type as a sentencing factor, it likely would have listed firearm types as clauses (iv) and (v) of subparagraph (A), instead of as clauses (i) and (ii) of subparagraph (B). By listing firearm type in stand-alone subparagraph (B), Congress set it apart from the sentencing factors in (A)(ii) and (iii); this is consistent with preserving firearm type as an element of a separate offense.

To be sure, there are some arguments in favor of treating the machinegun provision as a sentencing factor. The current structure of 924(c) is more favorable to that interpretation than was true in Castillo, particularly because the machinegun provision is now positioned between the sentencing factors provided in (A)(ii) and (iii), see Harris, supra, at 552-556, 122 S. Ct. 2406, 153 L. Ed. 2d 524, and the recidivist provisions in (C)(i) and (ii), which are typically sentencing factors as well. See Almendarez-Torres, 523 U.S., at 230, 118 S. Ct. 1219, 140 L. Ed. 2d 350. These points are overcome, however, by the substantial weight of the other Castillo factors and the principle that Congress would not enact so significant a change without a clear indication of its purpose to do so. The evident congressional purpose was to amend the statute to counteract Bailey and to make the statute more readable but not otherwise to alter the substance of the statute. The analysis and holding of Castillo control this case. The machinegun provision in 924(c)(1)(B)(ii) is an element of an offense.

LEIGH O. McEACHERN, III, Appellant, v. STATE OF FLORIDA, Appellee
Court of Appeal of Florida, Fifth District
388 So. 2d 244; 1980 Fla. App. LEXIS 16982
No. 78-2074/T4-218
August 20, 1980
Editorial Information: Subsequent History

Rehearing Denied September 29, 1980.

Editorial Information: Prior History

Appeal from the Circuit Court for Orange County, Frederick T. Pfeiffer, Judge.

Counsel Richard L. Wilson, Orlando, for appellant. Jim Smith, Atty. Gen., Tallahassee, C. Michael Barnette, Asst. Atty. Gen., Daytona Beach, for appellee.

Judges: Before ORFINGER, J. DAUKSCH, CJ., and COBB, J., concur.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant sought review of a judgment from the Circuit Court for Orange County (Florida) that convicted him of two counts of grand larceny in the second-degree, Fla. Stat. ch. 812.021(2)(b) (1975), for his theft of funds from the sheriff's department. Appellant assigned as error the admission of business records under Fla. Stat. ch. 92.36(2) (1975), and insufficiency of the indictment.Sheriff's department's investigative fund records were properly authenticated; on an indictment alleging grand larceny in the third-degree, a sheriff's deputy could not be convicted of the second-degree despite proof of that crime at trial.

OVERVIEW: Finding no error in the admission of evidence, but finding that the indictment did not allege grand larceny in the second-degree, the court affirmed the conviction in part, reversed it in part, and remanded for resentencing. Appellant was convicted of stealing money from the sheriff's department's investigative fund. The court held that records of the fund were properly admitted pursuant to the Uniform Business Records as Evidence Act, Fla. Stat. ch. 92.36(2) (1975). The court held that it was not necessary for the persons who made the entries in the records to testify, but that all that was required was for someone to properly authenticate the records. The court next held that the indictment did not allege that appellant was a public servant who stole public monies, and thus did not make out a second-degree felony under Fla. Stat. ch. 812.021(2)(b) (1975). It did not matter that the evidence established this degree of the crime; a defendant could not be convicted of a greater crime, or greater degree of crime, than that charged in the indictment.

OUTCOME: The court affirmed the judgment of conviction, but reversed as to the degree of the offense and remanded for resentencing. The court held that although the evidence was sufficient to convict appellant for grand larceny in the second-degree, the indictment had alleged only the third-degree of the offense, and appellant could not be convicted of a greater crime than that charged.

LexisNexis Headnotes

Evidence > Hearsay > Exceptions > Business Records > Admissibility in Criminal Trials

Evidence > Hearsay > Exceptions > Business Records > Normal Course of Business

The Uniform Business Records as Evidence Act, Fla. Stat. ch. 92.36(2) (1975), is an extension of the shopbook rule and is intended to liberalize the rules pertaining to the admissibility of shopbook memoranda. The justification for this exception to the hearsay rule is the probability of trustworthiness which is incident to a record kept in the regular course of business and made at or near the time of the act, condition or event of which it purports to be a record. There is nothing in the statute which suggests that its application is limited to civil cases.

Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor

Evidence > Hearsay > Exceptions > Business Records > Admissibility in Criminal Trials

Evidence > Authentication > General Overview

The trial court has broad discretion in determining if the evidence adduced lays the proper foundation for reception of business records under the Uniform Business Records as Evidence Act, Fla. Stat. ch. 92.36(2) (1975).

Criminal Law & Procedure > Criminal Offenses > Property Crimes > Larceny & Theft > General Overview

See Fla. Stat. ch. 812.021(2) (1975).

Criminal Law & Procedure > Accusatory Instruments > Indictments

Criminal Law & Procedure > Accusatory Instruments > Informations

In an indictment or information for an offense divided into degrees it is sufficient to charge that the defendant committed the offense without specifying the degree. When an accusatory instrument charges an offense that embraces a lesser offense or one of a lower degree of the same general class it may support a conviction of the lesser offense only, though the proof shows the defendant to be guilty of the greater offense. This may occur where he is indicted for only the lesser offense and the proof shows commission of a greater crime inclusive of the lesser one charged.

Criminal Law & Procedure > Accusatory Instruments > Indictments

Criminal Law & Procedure > Accusatory Instruments > Informations

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It is the state's obligation to frame the allegations of its information, not the defendant's.

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The law is clear that any judicially imposed penalty which needlessly discourages assertion of the U.S. Const. amend. V right not to plead guilty and deters the exercise of the U.S. Const. amend. VI right to demand a jury trial is patently unconstitutional.

Opinion

Opinion by: ORFINGER

Opinion

{388 So. 2d 245} ORFINGER, J.

This is a timely appeal from the judgment and sentence of the Circuit Court, Orange County, adjudging appellant guilty of two counts of grand larceny after jury trial, and imposing sentence of fifteen years for each count, to run consecutively. We affirm the conviction, but set aside the sentences and remand this cause for resentencing.

Appellant was Chief Deputy Sheriff of Orange County, Florida, during the fiscal years beginning October 1, 1975 to September 30, 1976, and October 1, 1976 to September 30, 1977. Appellant was responsible, inter alia, for the administration of an "investigative fund". Most of the investigative fund expenditures can be attributed to the "Special Investigations Division" of the Sheriff's Office, which carries out most under-cover assignments such as narcotics and vice. Money from the fund is used to pay informants, to purchase drugs, to demonstrate an agent's ability to pay for drugs in proposed purchases, and for other similar under-cover purposes. Internal records were kept of the expenditures, but because of the necessity to keep the investigations secret, the funds are not audited. Checks drawn on the account are initially issued only upon written requisition from either the Sheriff, the Sheriff's designate, or Appellant McEachern.

The record shows that in fiscal year 1975-76, a sum in excess of $ 263,000 was drawn on the account. Of this sum, more than $ 236,000 was issued directly to appellant upon his requisition. Slightly more than $ 143,000 was redeposited to the account, so approximately $ 120,000 was consumed. During fiscal year 1976-77, more than $ 187,000 was paid out, $ 140,000 of it directly to appellant. After crediting redeposits, slightly more than $ 105,000 was consumed. Evidence was presented at trial in the form of records of the Special Investigations Division showing its use of the investigative funds, and records were also produced of the Criminal Investigation Division which also made some use of these funds, although in very small amounts. The unaccounted for portion of the funds drawn in these two fiscal years far exceeded the amounts which could be accounted for.

Evidence was presented establishing appellant's salary during his employment with the Sheriff's Department. Evidence was also presented of the combined income of appellant and his wife during the two fiscal years in question, and also the recorded expenditures made by appellant and his wife during those periods. There was evidence presented that appellant paid large amounts of money in cash at various times. In short, the evidence tended to show expenditures both by cash and by check of sums far greater than the known income of appellant and his wife.

Explanations by appellant as to the sources of his income other than his salary, and explanations given by his wife were disputed and contradicted by other testimony. Appellant's wife testified that she had received approximately $ 75,000 in cash from her former husband, but the former husband denied giving her any money. The jury obviously did not believe appellant's explanation, and it had a right to reject it.

Appellant raises five points on appeal, but only two require discussion. He first contends that the court erred in allowing certain records to be considered as evidence, referring specifically to various books and records of the Sheriff's Department offered in evidence by the State and admitted into evidence over objection. We find no error in the admission of the records {388 So. 2d 246} under the Uniform Business as Evidence Act, section 92.36(2), Florida Statutes (1975). In each case, there was testimony of the custodian or other qualified supervisor of the records testifying as to the identity and mode of preparation and that it was made in the regular course of business at or near the time of the act, condition or event.

The Uniform Business Records as Evidence Act is an extension of the shopbook rule and is intended to liberalize the rules pertaining to the admissibility of shopbook memoranda. *Exchange National Bank of Tampa v. Hospital and Welfare Board of Hillsborough County*, Fla.App.2d, 1965, 181 So.2d 9. The justification for this exception to the hearsay rule is the probability of trustworthiness which is incident to a record kept in the regular course of business and made at or near the time of the act, condition or event of which it purports to be a record. *National Car Rental System, Inc. v. Holland*, Fla.App. 4th, 1972, 269 So.2d 407. There is nothing in the statute which suggests that its application is limited to civil cases. *Holley v. State*, 328 So.2d 224, at 225.

The argument by appellant that the persons making the entries could not be identified does not require a contrary ruling. The statute was passed to avoid the necessity of bringing to court every person who played a part in the preparation of a particular business record. *Holley v. State, supra*. Appellant relies on *Mastan Company, Inc. v. American Custom Homes, Inc.*, 214 So.2d 103 (Fla. 2d DCA1968), as support for his position that these records should have been excluded. In that case, the trial court excluded the evidence after determining that the proffered records did not comply with the statute. The appellate court concluded that the trial court was correct in ruling that the business records were not properly authenticated for introduction. The court noted, however, that the records could have been properly authenticated by the supervisor of the records, who was not offered as a witness. It noted that the trial court has broad discretion in determining if the evidence adduced lays the proper foundation for reception of business records under the statute. Here, the trial court determined that there was a proper predicate and foundation, and we cannot say that he abused his discretion.

Appellant next contends that the indictment failed to charge him with a crime under the laws of the state. We do not agree. The indictment was sufficient to charge him with larceny under section 812.021(1)(a) and to designate the crime as grand larceny under section 812.021(2)(b), Florida Statutes (1975). The indictment alleges that appellant

did, while deputy sheriff of Orange County, Florida, between the 1st day of October, 1975, and the 30th day of September, 1976, in Orange County, Florida, in violation of Florida Statute 812.021, take, steal, and carry away from the lawful possession of the custodian and owner thereof, Melvin G. Colman, Sheriff of Orange County, Florida, within a twelve-month period preceding the 1st day of October, 1976, as part of a common scheme or design to defraud, certain property, to-wit: money, of the aggregate value of $ 200.00 or more, lawful money of the United States of America, with the intent to permanently deprive the said Melvin G. Colman, Sheriff of Orange County, Florida, of the said property or the use and benefit thereof while the said LEIGH O. McEACHERN, III, was an agent, servant, or employee of the said Melvin G. Colman, Sheriff of Orange County, Florida.

Count II was in identical language, except that it referred to the next succeeding fiscal year.

But appellant then contends that if the indictment does charge a crime, it only charges him with grand larceny as a third degree felony, and does not charge him with those elements of the statute which raise the crime to a second degree felony. In pertinent part, section 812.021(2) says:

(2) If the property stolen is:

{388 So. 2d 247} (b) Of the aggregate value of $ 200 or more, taken in any 12-consecutive month period, by an agent, servant, or employee from his principal or employer by a series or combination of any of the acts denounced in this section, as part of a common scheme or design to defraud;

the offender shall be deemed guilty of grand larceny, which constitutes a felony of the third degree, . . . unless the offender is a public servant who used his official position to commit the offense or, in the course of committing the offense, stole public property or property which the duty of his office required him to receive and hold, in which case the offender shall be guilty of a felony of the second degree . . ."

As can be seen from the complete recitation of the indictment, nowhere does it charge that appellant either was a public servant who used his official position to commit the offense, or that appellant stole public property, or that he stole property which the duty of his office required him to receive and hold. In order to convict appellant of the second degree felony, he must be charged with those elements of the crime that comprise the felony. Without those allegations, he is charged only with grand larceny, a third degree felony and can only be sentenced for that crime when found guilty.

"In an indictment or information for an offense divided into degrees it is sufficient to charge that the defendant committed the offense without specifying the degree . . . . When an accusatory instrument charges an offense that embraces a lesser offense or one of a lower degree of the same general class *it may support a conviction of the lesser offense only, though the proof shows the defendant to be guilty of the greater offense. This may occur where he is indicted for only the lesser offense and the* *proof shows commission of a greater crime* inclusive of the lesser one charged." 15 Fla.Jur.2d, *Criminal Law* 687, pp. 288-289. (emphasis added).

At the sentencing hearing, when appellant's counsel objected to the sentence under the higher crime portion of the statute, the State obviously recognized the need to properly charge appellant when, in responding to the objection, the prosecutor said that the indictment contained allegations that "Mr. McEachern was a public servant and the fact that the money he had was entrusted to him and the fact that the money that was entrusted to him was in the custody and control of the Sheriff of Orange County." However, it is obvious from the indictment which we have earlier set out in full, that no such language appears. If the State had intended to charge appellant with the higher degree of the crime, it would have been a simple matter to allege one of the three required elements.

"An information must allege each of the essential elements of a crime to be valid. . . . No essential element should be left to inference." *State v. Dye*, 346 So.2d 538 (Fla.1977).

Since he was not so charged, we can only assume that the State did not intend to charge him with the higher degree of the crime, although we fail to understand why it was not done. The jury found appellant guilty as charged in the indictment, so he could only be sentenced for the crime for which he was charged and found guilty.

Following the same principle, this court has recently held that a defendant indicted for robbery could not be sentenced for armed robbery, although the proof indicated that he was armed. *Michael Alan Sanders v. State*, 386 So. 2d 256 (Fla. 5th DCA1980). A similar result was reached in *Chapola v. State*, 347 So.2d 762 (Fla. 1st DCA1977), where a defendant was charged with robbery, there being no allegation in the information that a weapon was used. The court said:

The Court erred in sentencing *Chapola* to life imprisonment because he was merely charged with robbery; the jury found him guilty as charged; and the Court adjudicated him guilty of this charge. Under Section 812.13(2)(c), which is applicable to this case, the Court could sentence {388 So. 2d 248} *Chapola* to no more than 15 years imprisonment.

The State argues that *Chapola* knew prior to trial that the State would adduce evidence at trial that he was carrying a knife at the commission of the robbery but he did not attack the sufficiency of the information. This argument is without merit. It is the State's obligation to frame the allegations of its information, not the defendant.

Chapola went to trial on the allegations in the information and the Court properly charged the jury on the allegations and proof thereof at trial. 347 So.2d at 763-64.

See also, *Scott v. State*, 379 So.2d 1021 (Fla. 2d DCA1980).

We understand and appreciate the trial judge's concern expressed in his sentencing judgment that the citizens of this State will not and should not tolerate stealing of public money by officers and employees who are placed in positions of trust and responsibility. Had the State charged appellant properly, the trial judge would have had jurisdiction to sentence appellant for conviction of a second degree felony, but in this case he could not do so.

Since we must remand this case for resentencing, one additional observation is warranted. In pronouncing the sentence, the trial court alluded to the cost of investigation and trial and the difficulty involved in proving the State's case. While it is not clear that the court placed great emphasis on this factor in determining the length of sentence, it is clear that this cannot be considered in imposing a sentence for one convicted of a crime. The law is clear that any judicially imposed penalty which needlessly discourages assertion of the Fifth Amendment right not to plead guilty and deters the exercise of the Sixth Amendment right to demand a jury trial is patently unconstitutional. *Gillman v. State*, 373 So.2d 935 (Fla. 2d DCA1979). We suggest the court omit any consideration of the cost or expense or difficulty of a jury trial in resentencing the appellant.

We have considered appellant's other points on appeal and find no merit in them.

Accordingly, the judgment of conviction is affirmed. The sentence is set aside and the cause is remanded to the trial court for resentencing on two counts of grand larceny, each a third degree felony. Defendant shall be present for resentencing.

AFFIRMED in part, REVERSED in part and REMANDED