

ADDENDUM

705 Fed.Appx. 649 (Mem)

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. 9th Cir. Rule 36-3.

United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Kurtis Lee WORTLEY, Defendant-Appellant.
No. 16-30273

Submitted December 5, 2017, Seattle, Washington

Filed December 8, 2017

Appeal from the United States District Court for the District of Montana, [Susan P. Watters](#), District Judge, Presiding, D.C. No. 1:16-cr-00048-SPW-1

Attorneys and Law Firms

Zeno Benjamin Baucus, [Leif Johnson](#), Assistant U.S. Attorney, Office of the US Attorney, Billings, MT, for Plaintiff-Appellee

Joslyn Michelle Hunt, FDMT-Federal Defenders of Montana (Helena), Helena, MT, for Defendant-Appellant
Before: [HAWKINS](#), [McKEOWN](#), and [CHRISTEN](#), Circuit Judges.

Opinion

MEMORANDUM

Kurtis Lee Wortley ("Wortley") challenges the 48-month sentence imposed following his guilty plea to being a felon in possession of a firearm, in violation of [18 U.S.C. § 922\(g\)\(1\)](#). We have jurisdiction under [28 U.S.C. § 1291](#), and we affirm.

*650 Wortley argues error in the application of a four-level enhancement under [U.S.S.G. § 2K2.1\(b\)\(6\)\(B\)](#) based on his

use of a firearm in connection with another felony offense. Because this issue involves a straightforward application of the Guidelines and accompanying commentary to the facts, we review the district court's application of the enhancement for abuse of discretion. See [United States v. Gasca-Ruiz](#), 852 F.3d 1167, 1170 (9th Cir. 2017) (en banc).

Here, Wortley pled guilty to being a felon in possession of a rifle during a several-week period in January 2016. Wortley admitted placing firearms in his vehicle in early January. Approximately one week later, Wortley fired a pistol through the window of a home where an individual was sleeping. Several days later, law enforcement discovered the rifle in Wortley's vehicle.

Wortley's pistol firing, which he concedes constituted the separate felony offenses of criminal endangerment and criminal mischief, constituted the use of a firearm in another felony offense. See [United States v. Polanco](#), 93 F.3d 555, 565 (9th Cir. 1996). Therefore, application of the enhancement under [U.S.S.G. § 2K2.1\(b\)\(6\)\(B\)](#) was proper if his use of the pistol was part of the "same course of conduct, common scheme, or plan" as his possession of the rifle. *Id.* app. n. 14(E)(ii).

There was no abuse of discretion in determining that the offenses were part of the "same course of conduct, common scheme, or plan," given their timing and nature. See [U.S.S.G. § 1B1.3](#) cmt. n.5(B) (appropriate factors include: the nature of the offenses, "the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses").

AFFIRMED.

All Citations

705 Fed.Appx. 649 (Mem)

Footnotes

* The panel unanimously concludes this case is suitable for decision without oral argument. See [Fed. R. App. P. 34\(a\)\(2\)](#).

** This disposition is not appropriate for publication and is not precedent except as provided by [Ninth Circuit Rule 36-3](#).

End of Document

© 2018 Thomson Reuters. No claim to original U.S. Government Works.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

-vs-

KURTIS LEE WORTLEY,
Defendant.

Criminal Docket
No. 16-48-BLG-SPW
Court of Appeals
No. 16-30273

TRANSCRIPT OF SENTENCING PROCEEDINGS

Heard in Snowy Mountains Courtroom
James F. Battin United States Courthouse
2601 Second Avenue North
Billings, Montana
November 9, 2016
10:37 a.m.

BEFORE THE HONORABLE SUSAN P. WATTERS

UNITED STATES DISTRICT JUDGE

TINA C. BRILZ, RPR, FCRR
Official Court Reporter
United States District Court
James F. Battin United States Courthouse
2601 Second Avenue North, Room 4209
Billings, Montana 59101

Proceedings recorded by mechanical stenography, transcript
produced by computer.

1 Ms. Gosch, did you receive and review the presentence
2 report?

3 MS. GOSCH: Yes, Your Honor.

4 THE COURT: Have you had an opportunity to go through
5 the report in its entirety with Mr. Wortley?

6 MS. GOSCH: Yes, Your Honor.

7 THE COURT: And you have an objection to the
8 four-level enhancement that is set forth on page 4, paragraph
9 13; correct?

10 MS. GOSCH: Yes, Your Honor.

11 THE COURT: Okay.

12 Well, I've looked into the objection, and I've read your
13 -- the defendant's sentencing memorandum, and then the
14 government's response to that memorandum. And for the record,
15 we're talking about United States Sentencing Guideline
16 2K2.1(b)(6)(B).

17 And that guideline says that "if the defendant used or
18 possessed any firearm or ammunition in connection with another
19 felony offense, or possessed or transferred any firearm or
20 ammunition with knowledge, intent, or reason to believe that it
21 would be used or possessed in connection with another felony
22 offense, that the base offense level is to be increased by four
23 levels."

24 And what we have here is a circumstance where the
25 defendant has been charged with being a felon in possession of

1 a firearm, and the firearm that he is being charged with
2 possessing is a .22 caliber rifle.

3 And he possessed that, the charging document, the
4 indictment, says, sometime between January 1st to January 19th
5 of 2016.

6 And the presentence report, page 4, paragraph 7, talks
7 about him being in possession of that rifle.

8 But the presentence report in the preceding page on
9 paragraph 6, talks about an incident that occurred on January
10 13th, 2016, in Red Lodge, where the defendant allegedly
11 vandalized a vehicle and fired ammunition into a residence.
12 And there were some witnesses that law enforcement interviewed
13 to corroborate that fact scenario, and then the scenario is
14 further detailed in the presentence report on -- let's see --
15 page 12, paragraph 45, which says that "officers responded to a
16 vandalism call from the defendant's ex-wife." That would be
17 Natalie. And that the defendant had allegedly shot a gun
18 through a window into her home into the room where a gentleman
19 named Clinton Porter was sleeping. And did other things to
20 vandalize the home and vehicles and whatnot.

21 And then a witness had stated that the defendant had told
22 her that he threw the pistol he used in that incident into the
23 river.

24 He was charged with criminal endangerment, felony, and
25 criminal mischief, felony, by the Carbon County Attorney, but

1 then that case was dismissed because of these pending federal
2 charges.

3 But the issue here is the fact that in the felon in
4 possession case, the case for which Mr. Wortley is being
5 sentenced today, the firearm is a .22 caliber rifle. And the
6 firearm used in the predicate offenses of criminal endangerment
7 and criminal mischief, felonies, was a pistol. And so does the
8 enhancement apply?

9 As I said, the government argues that the plain language
10 of the guideline says if he used or possessed any firearm or
11 ammunition in connection with another felony offense, that the
12 enhancement applies, and therefore, the objection should be
13 overruled.

14 The defendant's arguing that it had to be the same
15 firearm.

16 Well, in looking at the application notes for that
17 sentencing guideline, the application notes do actually discuss
18 the situation where we have the same firearm being used in both
19 offenses, or different firearms being used.

20 And I'm looking specifically at Application Note 14. And
21 if you look at 14E little (i), or (ii), it talks about the
22 situation where the firearm used in the other offense, the
23 predicate offense, is not cited in the offense of conviction.
24 And it gives an example.

25 And so, given that circumstance, which is the circumstance

1 that we have here, the analysis then becomes whether or not the
2 two unlawful possession offenses were part of the same course
3 of conduct, common scheme, or plan.

4 And if they were, then the handgun possession offense is
5 relevant conduct to the shotgun possession offense. They're
6 talking about two different -- the scenarios they've set forth,
7 where they have an example of the defendant possessing a
8 shotgun on October 15th and possessing a handgun on February
9 10th, which was used in a robbery.

10 So, if the court determines that those two offenses are
11 part of the same course of conduct or common scheme or plan,
12 then the handgun possession on February 10th becomes relevant
13 conduct to the shotgun possession in October. And then the
14 enhancement would apply.

15 So, that's what I need a little help from counsel with, is
16 that analysis of whether or not the possession of this rifle
17 sometime between January 1st and January 19th, and then the
18 possession by the defendant of the handgun that he allegedly
19 used to fire into his ex-wife's house, are all part of the same
20 course of conduct, common scheme, or plan.

21 And the factors that figure into that determination are,
22 one, the degree of similarity of the offenses; two, the
23 regularity or repetitions of the offenses; and three, the time
24 interval between the offenses.

25 And given the example in the application notes, where an

1 incident on February 10th, another incident on October 15th,
2 are within a short enough period of time to perhaps qualify. I
3 think that we've certainly got -- there isn't any issue with
4 regard to the time interval between the offenses, because both
5 offenses happened within the period of time covered in the
6 indictment.

7 So, the issue really is the degree of similarity of the
8 offenses and the regularity of the offenses.

9 So, it being your objection, I'll ask you, Ms. Gosch, what
10 your thoughts are with regard to those factors?

11 MS. GOSCH: My understanding, Judge, is that in
12 regards to the offense that Mr. Wortley stands before Your
13 Honor to be sentenced for today, is that that rifle was found
14 in the back of the vehicle. I don't think that there's any
15 similarity between what is alleged to have occurred on January
16 13th, where he's alleged to have fired a weapon into a
17 residence and done some vandalism to some personal property in
18 a vehicle.

19 I'm not really sure how the repetition would apply at this
20 point, just because it's more of a strict liability offense.
21 He wasn't supposed to have the gun, and he had it in his
22 possession, and has so admitted that it was in the back of his
23 vehicle. I don't think that there's any comparison between the
24 two offenses. It's not like, you know, this alleged conduct
25 then created him to additionally possess this rifle. There's

1 no evidence that this rifle was used or seen on scene at this
2 -- at this alleged firing into this -- Mr. Porter's house.

3 So, I don't think that the factors that the court has just
4 asked me to address, I don't think that they apply here. Or I
5 shouldn't say they don't apply, but that they aren't met. So
6 we would ask Your Honor to sustain our objection.

7 THE COURT: Mr. Baucus, what do you think about the
8 factors?

9 MR. BAUCUS: I agree with the court that the time
10 sequence very much favors the government's position. And as to
11 the regularity and similarity, it's a bit of a mixed bag, but
12 as the court noted, the indictment period is an 18-day period
13 in early January of this year. The count of conviction is a
14 firearm named in the indictment that was found by law
15 enforcement, I believe, on the 19th. And the issue involves
16 the defendant firing a firearm, another firearm, grant you, on
17 the evening or early morning of January 13th.

18 We could have rested on the evidence involving that
19 firearm on January 13th. It would have been a circumstantial
20 case, I grant you. But it would have been a felon in
21 possession evidence involving the defendant admitting he fired
22 a firearm; admitting he possessed the firearm. Evidence from
23 the scene connecting the defendant to the firearm, and would
24 not have the gun to present at trial. So there may be an
25 interstate nexus element issue involved. But we could make the

1 argument that a pistol was not made in Montana.

2 The reason I'm saying this is, there is a felon in
3 possession fact scenario on the 13th, there is a felon in
4 possession fact scenario on the 19th, I believe, is
5 substantially similar and regular, and, I believe, as the court
6 acknowledged, the time sequence is met. And I think we're
7 there for purposes of a common scheme, Your Honor.

8 Thank you.

9 THE COURT: Okay.

10 So, with regard to the degree of similarity of the
11 offenses, in both circumstances, we have the defendant being a
12 felon in possession of a firearm, the different firearms.

13 Again, this is -- whether it's part of a course of
14 conduct, common scheme, or plan.

15 And I think also, what seems somewhat persuasive to me
16 that the enhancement may very well apply is just the whole
17 circumstance of how this came about, in that, law enforcement
18 went to Mr. Wortley's residence for the purpose of serving him
19 with an order of protection that his ex-wife, Natalie, had
20 taken out.

21 So, obviously, there's some conflict between Mr. Wortley
22 and Natalie to the extent that she felt she needed an order of
23 protection, and, in fact, the court gave her an order of
24 protection.

25 And it was when law enforcement was serving Mr. Wortley

1 with the order of protection on January 4th, 2016, that he
2 offers up to them that he had moved the firearms from his house
3 to a friend's house in anticipation of possibly receiving this
4 restraining order.

5 So we've got this conflict between Wortley and his ex-wife
6 going on.

7 And then, on the 13th of January, he goes to Red Lodge,
8 allegedly, to her home, his ex-wife, Natalie's home, and fires
9 a pistol into the residence along with other vandalism, and so
10 forth.

11 And he -- he has already told law enforcement that when he
12 got rid of the firearms from his house, he put them in his
13 vehicle. And then, that is where, on January 19th, they
14 actually find the rifle is in the defendant's vehicle. They
15 get a call from Natalie, because she's gone back to the
16 residence in Red Lodge and finds, in the back seat of the car,
17 the rifle for which he has now been charged with being a felon
18 in possession.

19 So, we've got -- I think, arguably, the offenses are
20 similar in that they both, obviously, involve Mr. Wortley being
21 a felon in possession of a firearm.

22 And really, by his own admission, on both occasions, first
23 his admission to law enforcement on January 4th that he had
24 firearms in his house that he got rid of, and he got rid of
25 them by putting them in the vehicle. And second, his admission

1 to this witness that he had a pistol on January 13th and then
2 threw it in the river and got rid of it.

3 The regularity of the offenses, if we're looking at the
4 regularity, then, of possession -- felon in possession, we can,
5 I think, logically conclude, that for some period of time prior
6 to January 4th, law enforcement came to Mr. Wortley's residence
7 and served him with the order of protection.

8 He was a felon in possession of firearms, again, by his
9 own admission.

10 And then he continued to be a felon in possession on
11 January 13th, when he went to Red Lodge with the pistol and
12 committed the vandalism and the criminal endangerment that was
13 charged and then dismissed.

14 So, I think that those circumstances would satisfy the
15 Application Notes 14(b), Sub (2) there with regard to a course
16 of conduct or common scheme or plan.

17 And therefore, the objection's overruled, and the
18 enhancement will be applied.

19 And they don't have to be the same firearms, obviously,
20 based upon the application notes.

21 So, with that, I will rely on the presentence
22 investigation report for purposes of calculating the advisory
23 guidelines.

24 There is not a plea agreement in this case. I will
25 summarize the applicable punishments under both the advisory

1 sentencing guidelines and the applicable statute.

2 With regard to the guidelines, the adjusted offense level
3 is 24, and we arrive at that by beginning with a base offense
4 level of 20 and adding the four levels that we've just been
5 discussing, then subtracting three levels for acceptance of
6 responsibility and timely notification of plea, we arrive at a
7 total offense level of 21.

8 Mr. Wortley has six criminal history points, so his
9 criminal history category is III.

10 The resulting advisory guideline range is 46 to 57 months'
11 imprisonment.

12 Mr. Wortley is not eligible for probation. He is subject
13 to one to three years of supervised release, a fine of 15,000
14 to \$150,000, and a special assessment of \$100.

15 Restitution is not applicable under the guidelines.

16 For the charge of felon in possession of a firearm, in
17 violation of 18 United States Code Section 922 (g)(1), the
18 maximum punishment is ten years' imprisonment. He faces a
19 maximum fine of \$250,000, no more than three years of
20 supervised release, and the \$100 special assessment.

21 Under the statute, Mr. Wortley is eligible for probation
22 for a period of one to five years. And again, restitution is
23 not applicable.

24 Mr. Baucus, do you agree that's an accurate statement of
25 the statutory and guideline provisions?