The decision of the United States Court of Appeals for the Sixth Circuit.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
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Filed: September 01, 2017

Mr. Donald Wayne Taylor
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Robert Velez
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Re: Case No. 17-5369, *Robert Velez v. USA*
Originating Case No. : 2:13-cv-00179 : 2:08-cr-00068-1

Dear Sirs,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Jill Colyer
Case Manager
Direct Dial No. 513-564-7024

cc: Ms. Debra Poplin

Enclosure

No mandate to issue

No. 17-5369

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Sep 01, 2017
DEBORAH S. HUNT, Clerk

ROBERT VELEZ,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Robert Velez, a pro se federal prisoner, appeals the judgment of the district court denying his motion to vacate, set aside, or correct sentence filed pursuant to 28 U.S.C. § 2255. Velez has filed an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b)(1). He also moves to proceed in forma pauperis on appeal, *see* Fed. R. App. P. 24(a)(5), and for a transcript to be prepared at the government's expense.

In 2008, a second superseding indictment charged Velez with conspiracy to distribute and to possess with the intent to distribute oxycodone in violation of 21 U.S.C. § 846 (Count 1); aiding and abetting the use, carrying and discharge of a firearm during and in relation to a drug offense in violation of 18 U.S.C. §§ 924(c)(1)(A)(iii) and 2 (Count 4); use of a communications facility in violation of 21 U.S.C. § 843(b) (Counts 5-8 and 10); and being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) (Counts 14-15). A jury found Velez guilty on all counts, with the exception of a not-guilty verdict on Count 15. A presentence report calculated Velez's guidelines range of imprisonment as 444 to 525 months, and determined that he was a career offender under the Sentencing Guidelines. The district court imposed a term of imprisonment of 444 months, to be followed by five years of supervised release. Velez appealed, and this court affirmed. *United States v. Velez*, 485 F. App'x 793 (6th Cir. 2012). The Supreme Court denied a petition for a writ of certiorari. *Velez v. United States*, 133 S. Ct. 557 (2012) (Mem.).

Velez timely filed his § 2255 motion to vacate. His initial motion raised nine claims for relief: (1) actual innocence of Count 4; (2) prosecutor vindictiveness; (3) prosecutor misconduct/abuse of discretion; (4) ineffective assistance of counsel; (5) variance; (6) indictment violation; (7) mitigating factors; (8) selective prosecution; and (9) Sixth Amendment violation. In subsequent amendments to his motion, he raised claims that (10) the trial court lacked subject matter jurisdiction; (11) he is actually innocent of Count 4 based on *Rosemond v. United States*, 134 S. Ct. 1240 (2014); (12) that jury instructions were improper; and (13) that he was improperly sentenced pursuant to *Johnson v. United States*, 135 S. Ct. 2551 (2015). The United States filed responsive pleadings to Velez's original and his amended motions. Velez filed a reply.

The district court determined that the majority of the claims raised were either procedurally defaulted or lacked merit, and denied them. The district court concluded that Velez's claim that counsel was ineffective with respect to plea negotiations required an evidentiary hearing, and his *Johnson* claims required supplemental briefing, and allowed those claims to proceed.

Velez's appointed counsel filed a supplemental brief in support of the *Johnson* claims, and the district court held an evidentiary hearing on the claims that counsel was ineffective by withdrawing a plea agreement without Velez's consent and for providing him with an inaccurate estimate of the sentence he would receive if he were convicted. Following the hearing, the district court denied Velez's ineffective-assistance-of-counsel claim and stayed the proceedings on the *Johnson* claim pending the Supreme Court's decision in *Beckles v. United States*, 137 S. Ct. 886 (2017). Following the *Beckles* decision in March 2017, the district court lifted the stay and denied Velez's *Johnson* claims on the basis that *Beckles* held that *Johnson* did not apply to offenders who were not sentenced under the Armed Career Criminal Act. The district court therefore denied Velez's § 2255 motion and declined to issue a COA.

In his application to this court, Velez requests that only the following five issues be certified for appeal: (1) whether the government's evidence against the defendant on Count 4 was legally sufficient to sustain a conviction; (2) whether the aiding and abetting theory as charged to the jury for Count 4 was constitutionally sufficient; (3) whether trial counsel was constitutionally ineffective during the plea negotiation process; (4) whether the district court committed a clear error of law by allowing counsel to withdraw his plea agreement; and (5) whether defendant's prior convictions for career offender purposes categorically qualify as crimes of violence in light of *Mathis v. United States*, 136 S. Ct. 2243 (2016).

To obtain a COA, a petitioner must show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). "[A] COA does not require a showing that the appeal will succeed," *id.* at 337; it is sufficient for a petitioner to demonstrate that "the issues presented are adequate to deserve encouragement to proceed further." *Id.* at 327 (citing *Slack*, 529 U.S. at 484).

Velez first requests certification of his claim that the government's evidence against him on Count 4 was legally sufficient to sustain a conviction, in light of the intervening change of law in *Rosemond* and *Mathis*. He argues that he did not have the requisite knowledge that his accomplices to the underlying drug offense would use or carry firearms during the commission of the crime. He also asserts that he did not have specific intent to aid and abet his co-conspirators' use of firearms.

Reasonable jurists would not debate the district court's denial of this claim. Velez raised this issue on direct appeal and may not use his § 2255 motion "to relitigate an issue that was raised and considered on direct appeal absent highly exceptional circumstances, such as an intervening change in the law." *Jones v. United States*, 178 F.3d 790, 796 (6th Cir. 1999).

Neither *Rosemond* nor *Mathis* qualifies as such a change. The Supreme Court has not made *Rosemond* retroactive on collateral review. *See Tyler v. Cain*, 533 U.S. 656, 663 (2001) ("[A] new rule is not 'made retroactive to cases on collateral review' unless the Supreme Court holds it to be retroactive"). And because Velez did not argue *Mathis*'s applicability in the district court, it will not be considered for the first time on appeal. *See Overstreet v. Lexington-Fayette Urban Cty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002) (explaining the well-settled rule that the "court will not consider arguments raised for the first time on appeal" in the absence of a plain miscarriage of justice). Velez's first claim does not deserve encouragement to proceed further.

The second claim for which Velez seeks certification is closely related to his first claim. In this claim, he asserts that the district court erred in affirming his conviction for Count 4, in light of *Rosemond* and *Mathis*, because the elements that the government had to prove were broader than the elements of the generic crime of aiding and abetting. The government's evidence, Velez argues, cannot therefore support his § 924(c) conviction. For the same reasons that his first claim does not deserve encouragement to proceed further—the non-retroactivity of *Rosemond* and Velez's failure to raise an argument based on *Mathis* in the district court—his second claim also fails.

Velez next seeks certification of his claim that trial counsel was constitutionally ineffective during the plea negotiation process. Specifically, Velez claimed that counsel was ineffective for withdrawing Velez's plea agreement without his consent and for failing to adequately advise him of the maximum possible sentence. To establish ineffective assistance of trial counsel, a petitioner must show that (1) his counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Additionally, in reviewing the denial of a § 2255 petition, this court will 'uphold the factual findings of the district court unless they are clearly erroneous." *Hilliard v. United States*, 157 F.3d 444, 447 (6th Cir. 1998) (citing *Gall v. United States*, 21 F.3d 107, 109 (6th Cir. 1994)).

The district court held an evidentiary hearing on Velez's ineffective-assistance claims, where both trial counsel and Velez testified. Based on the testimony and supporting documents, the district court determined that Velez asked counsel to withdraw the plea after learning that he faced the career-offender sentencing enhancement and that he made that decision despite being advised against doing so by counsel, and denied the claims.

Reasonable jurists would not debate the district court's decision. This court is required to give "great weight" to the factfinder, who had the opportunity to see the witnesses, weigh the evidence, view the demeanor of those who testified, and determine credibility. *Ramsey v. United Mine Workers of Am.*, 481 F.2d 742, 747 (6th Cir. 1973) (citing Fed. R. Civ. P. 52(a)). The record in this case does not demonstrate that the district court's factual determinations were clearly erroneous. The court based the determinations on the witnesses' testimony, as well as a complaint to the Tennessee Bar that Velez filed against counsel and a letter Velez sent to an FBI investigator after withdrawing his plea, neither of which mentioned the unauthorized withdrawal of the plea agreement. The court also considered a copy of the letter counsel sent to Velez about his possible sentence, and an email between counsel and the United States, in which counsel requested certain alterations to the original agreement, both of which corroborated counsel's version of events.

Velez next requests that this court certify his claim that the trial court committed a clear error of law by allowing counsel to withdraw his plea agreement. Not only was this claim not raised before the district court, but also it would fail for the reason that the record establishes that Velez instructed counsel to withdraw the agreement. This claim does not deserve encouragement to proceed further.

Finally, Velez argues that the predicate offenses used to sentence him as a career offender no longer qualify as crimes of violence in light of *Mathis*. *Mathis* was decided on June 23, 2016, and the district court did not enter final judgment in this case until March 15, 2017. Nevertheless, Velez did not argue that *Mathis* was applicable to his case in the district court, and this court will not consider the claim for the first time. If Velez wishes to raise a claim under

Mathis, he may do so by filing an application for leave to file a second or successive § 2255 motion to vacate. *See* 28 U.S.C. §§ 2244(b), 2255(h).

For the foregoing reasons, Velez's application for a COA is **DENIED**. His motions to proceed in forma pauperis on appeal and for a transcript at government expense are also **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

The decision of the United States District Court for the Eastern District of Tennessee (Greeneville Division).

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

ROBERT VELEZ, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	)))))))))	Nos. 2:08-CR-68-JRG-MCLC-1 2:13-CV-179-JRG

MEMORANDUM OPINION

Before the Court is the sole remaining ground for collateral relief in Petitioner's supplemented motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 [Docs. 470, 476, 487, 504]. In previously-entered Memorandum Opinions, the Court denied all grounds except for Petitioner's claim based on *Johnson v. United States*, 135 S.Ct. 2551 (2015), and stayed resolution of that final *Johnson*-based ground pending the Supreme Court's decision in *Beckles v. United States*, No. 15-8544, 2017 WL 855781, at *7 (U.S. March 6, 2017) [Docs. 515, 542].[1] For the reasons discussed below, the stay will be **LIFTED** and the supplemented petition [Docs. 470, 476, 487, 504] will be **DENIED** and **DISMISSED WITH PREJUDICE**.

I. BACKGROUND

On August 12, 2008, a federal grand jury returned a ten-count multi-defendant indictment charging Petitioner with one count of conspiracy to distribute and possess with intent to distribute Roxicodone, in violation of 21 U.S.C. §§ 846 (Count One), one count of possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A) (Count Four), and four counts of using a telephone in committing or facilitating the drug

[1] CJA counsel submitted a supplement in support of the *Johnson*-based relief [Doc. 531].

conspiracy, in violation of 21 U.S.C. § 843(b) (Counts Five, Six, Seven, and Eight) [Doc. 3]. On November 14, 2008, the grand jury returned a sixteen-count superseding indictment charging Petitioner with each of the counts from his original indictment, one additional count of using a telephone in committing or facilitating the drug conspiracy, in violation of 21 U.S.C. § 843(b) (Count Ten), two counts of possessing a firearm as a felon, in violation of 18 U.S.C. § 922(g), and one count of possessing ammunition as a felon, in violation of 18 U.S.C. § 922(g) (Counts Fourteen, Fifteen, and Sixteen) [Doc. 65]. A second superseding indictment returned by the grand jury did not include any additional charges against defendant [Doc. 142].

On March 6, 2009, Petitioner signed a plea agreement with the United States in which he agreed to plead guilty to Count One—conspiracy to distribute and possess with intention to distribute oxycodone—in exchange for the United States dropping Counts Four, Five, Six, Seven, Eight, Ten, Fourteen, Fifteen, and Sixteen [Doc. 229 ¶¶ 1, 3]. A change of plea hearing was scheduled for March 23, 2009, but counsel filed a motion to "cancel [the] change of plea hearing" and continue to trial on March 18, 2009 [Doc. 231]. This Court allowed Petitioner to withdraw from the plea agreement and set a date for trial [Doc. 232].

On June 19, 2009, a jury convicted Petitioner on Counts One, Four, Five, Six, Seven, Eight, Ten, and Fourteen [Doc. 266]; he was acquitted of Count Fifteen and Count Sixteen was dismissed at request of the United States [Docs. 262, 266]. Based on prior Florida convictions for armed burglary of a dwelling [*Id.* ¶ 67], and felony battery resulting in great bodily harm, permanent disability, or disfigurement [*Id.* ¶ 70], the United States Probation Office deemed Petitioner to be a career offender under Section 4B1.1 of the United States Sentencing Guidelines [*Id.* ¶ 52]. Petitioner received a total offense level of thirty-six, criminal history category of VI, and resulting advisory Guideline range of 444 to 525 months' incarceration [Doc. 441]. The Court sentenced Petitioner to 444 months' imprisonment [Doc. 443].

Petitioner appealed, but the Sixth Circuit affirmed his conviction, sentence, and career offender designation. *See generally United States v. Velez*, 485 F. App'x 793 (6th Cir. 2012). The Supreme Court denied Petitioner's request for a writ of certiorari on October 29, 2012. *Velez v. United States*, 133 S. Ct. 556 (2012). Less than one year later—on July 3, 2013, Petitioner filed a § 2255 motion articulating nine grounds for relief [Doc. 470]. He amended the motion three times [Docs. 476, 487, 504]. This Court dismissed all but two of Petitioner's grounds for relief—ineffective assistance of counsel during the plea process [Doc. 470 pp. 34–38, 55–56], and entitlement to relief based on the *Johnson* decision [Doc. 504]—in a Memorandum Opinion entered on September 6, 2016 [Doc. 515]. The Court scheduled an evidentiary hearing on the ineffective assistance issue [Doc. 516], and appointed counsel to provide additional briefing related to the *Johnson*-based request for relief [Doc. 522].

II. STANDARD OF REVIEW

The relief authorized by 28 U.S.C. § 2255 "does not encompass all claimed errors in conviction and sentencing." *United States v. Addonizio*, 442 U.S. 178, 185 (1979). Rather, a petitioner must demonstrate "(1) an error of constitutional magnitude; (2) a sentence imposed outside the statutory limits; or (3) an error of fact or law . . . so fundamental as to render the entire proceeding invalid." *Short v. United States*, 471 F.3d 686, 691 (6th Cir. 2006) (quoting *Mallett v. United States*, 334 F.3d 491, 496–97 (6th Cir. 2003)). He "must clear a significantly higher hurdle than would exist on direct appeal" and establish a "fundamental defect in the proceedings which necessarily results in a complete miscarriage of justice or an egregious error violative of due process." *Fair v. United States*, 157 F.3d 427, 430 (6th Cir. 1998).

III. ANALYSIS

Only a single ground for relief remains: the *Johnson* decision removed Florida burglary and Florida battery from Section 4B1.2's definition of "crime of violence" and that, without that conviction, Petitioner lacks sufficient predicate offenses for enhancement [Doc. 504 pp. 1–2; Doc. 531]].[2] On March 6, 2016, the Supreme Court held that the United States Sentencing Guidelines are "not amendable to vagueness challenges." *Beckles v. United States*, No. 15-8544, 2017 WL 855781, at *7 (U.S. March 6, 2017). As a result of the *Beckles* decision, the *Johnson* decision does not provide a basis for vacating, setting aside, or correcting Petitioner's sentence.

IV. CONCLUSION

For the reasons discussed above, the supplemented § 2255 motion [Docs. 470, 476, 487, 504] will be **DENIED** and **DISMISSED WITH PREJUDICE**. The Court will **CERTIFY** any appeal from this action would not be taken in good faith and would be totally frivolous. Therefore, this Court will **DENY** Petitioner leave to proceed *in forma pauperis* on appeal. *See*

---

2 The ACCA mandates a fifteen-year sentence for any felon who unlawfully possesses a firearm after having sustained three prior convictions "for a violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. § 924(e)(1). The statute defines "violent felony" as "any crime punishable by imprisonment for a term exceeding one year" that (1) "has as an element the use, attempted use, or threatened use of physical force against the person of another" (the "use-of-physical-force clause"); (2) "is burglary, arson, or extortion, involves the use of explosives" (the "enumerated-offense clause"); or (3) "otherwise involves conduct that presents a serious potential risk of physical injury to another" (the "residual clause"). 18 U.S.C. § 924(e)(2)(B). It was this third clause—the residual clause—that the Supreme Court deemed unconstitutional in *Johnson*. 135 S. Ct. at 2563.

Section 4B1.1 enhances a defendant's offense level if he or she qualifies as a "career offender," i.e., adult defendant whose offense of conviction is a "crime of violence or controlled substance offense" and who has "at least two prior felony convictions of either a crime of violence or a controlled substance offense." U.S. Sentencing Manual § 4B1.1(a). "Crime of violence" under the Guidelines is defined in an almost identical manner as "violent felony" under the ACCA. *See* U.S. Sentencing Manual § 4B1.2(a) (adopting identical use-of-force and residual clauses as well as a nearly identical enumerated-offense clause).

Rule 24 of the Federal Rules of Appellate Procedure. Petitioner having failed to make a substantial showing of the denial of a constitutional right, a certificate of appealability **SHALL NOT ISSUE**. 28 U.S.C. § 2253; Rule 22(b) of the Federal Rules of Appellate Procedure.

ORDER ACCORDINGLY.

s/J. RONNIE GREER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

ROBERT VELEZ, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	)))))))))	Nos. 2:08-CR-68-JRG-MCLC-1 2:16-CV-179-JRG

JUDGMENT ORDER

For the reasons expressed in the accompanying memorandum opinion, it is **ORDERED** and **ADJUDGED** that the civil action [E.D. Tenn. Case No. 2:16-CV-179] is **UNSTAYED** and Petitioner's supplemented § 2255 motion [Docs. 470, 476, 487, 504] is **DENIED** and **DISMISSED WITH PREJUDICE**. If Petitioner files a notice of appeal from this judgment, such notice of appeal will be treated as an application for a certificate of appealability, which is **DENIED** pursuant to 28 U.S.C. § 2253(c)(2) and Fed. R. App. P. 22(b) because he has failed to make a substantial showing of the denial of a federal constitutional right. The Court **CERTIFIES** pursuant to 28 U.S.C. § 1915(a)(3) and Fed. R. App. P. 24 that any such appeal from this judgment would be frivolous and not taken in good faith.

ENTER:

s/J. RONNIE GREER
UNITED STATES DISTRICT JUDGE

s/Debra C. Poplin
CLERK OF COURT

ROBERT VELEZ, Petitioner, v. UNITED STATES OF AMERICA, Respondent.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE
2017 U.S. Dist. LEXIS 36949
Nos. 2:08-CR-68-JRG-MCLC-1,2:13-CV-179-JRG
March 15, 2017, Filed

Editorial Information: Prior History

United States v. Velez, 485 Fed. Appx. 793, 2012 U.S. App. LEXIS 12957 (6th Cir.), 2012 FED App. 673N (6th Cir.) (6th Cir. Tenn., 2012)

Counsel For USA, Plaintiff (2:08-cr-00068-JRG-MCLC): Donald W Taylor, LEAD ATTORNEY, U S Department of Justice (USAO Greene), Office of U S Attorney, Greeneville, TN.

Robert Velez, Petitioner (2:13cv179), Pro se, Pollock, LA USA.

Judges: J. RONNIE GREER, UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: J. RONNIE GREER

Opinion

MEMORANDUM OPINION

Before the Court is the sole remaining ground for collateral relief in Petitioner's supplemented motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 [Docs. 470, 476, 487, 504]. In previously-entered Memorandum Opinions, the Court denied all grounds except for Petitioner's claim based on *Johnson v. United States*, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015), and stayed resolution of that final *Johnson*-based ground pending the Supreme Court's decision in *Beckles v. United States*, No. 15-8544, 137 S. Ct. 886, 197 L. Ed. 2d 145, 2017 U.S. LEXIS 1572, 2017 WL 855781, at *7 (U.S. March 6, 2017) [Docs. 515, 542].1 For the reasons discussed below, the stay will be **LIFTED** and the supplemented petition [Docs. 470, 476, 487, 504] will be **DENIED** and **DISMISSED WITH PREJUDICE**.

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II. STANDARD OF REVIEW

The relief authorized by 28 U.S.C. § 2255 "does not encompass all claimed errors in conviction and sentencing." *United States v. Addonizio*, 442 U.S. 178, 185, 99 S. Ct. 2235, 60 L. Ed. 2d 805 (1979). Rather, a petitioner must demonstrate "(1) an error of constitutional magnitude; (2) a sentence imposed outside the statutory limits; or (3) an error of fact or law . . . so fundamental as to render the entire proceeding invalid." *Short v. United States*, 471 F.3d 686, 691 (6th Cir. 2006) (quoting *Mallett v. United States*, 334 F.3d 491, 496-97 (6th Cir. 2003)). He "must clear a significantly higher hurdle than would exist on direct appeal" and establish a "fundamental defect in the proceedings which necessarily results in a complete miscarriage of justice or an egregious error violative of due process." *Fair v. United States*, 157 F.3d 427, 430 (6th Cir. 1998).

III. ANALYSIS

Only a single ground for relief remains: the *Johnson* decision removed Florida burglary and Florida battery from Section 4B1.2's definition of "crime of violence" and that, without that conviction, Petitioner lacks sufficient predicate offenses for enhancement [Doc. 504 pp. 1-2; Doc. 531]].2 On March 6, 2016, the Supreme Court held that the United States Sentencing Guidelines are "not amendable to vagueness challenges." *Beckles v. United States*, No. 15-8544, 137 S. Ct. 886, 197 L.

Ed. 2d 145, 2017 U.S. LEXIS 1572, 2017 WL 855781, at *7 (U.S. March 6, 2017). As a result of the *Beckles* decision, the *Johnson* decision does not provide a basis for vacating, setting aside, or correcting Petitioner's sentence.

IV. CONCLUSION

For the reasons discussed above, the supplemented § 2255 motion [Docs. 470, 476, 487, 504] will be **DENIED** and **DISMISSED WITH PREJUDICE**. The Court will **CERTIFY** any appeal from this action would not be taken in good faith and would be totally frivolous. Therefore, this Court will **DENY** Petitioner leave to proceed *in forma pauperis* on appeal. *See* Rule 24 of the Federal Rules of Appellate Procedure. Petitioner having failed to make a substantial showing of the denial of a constitutional right, a certificate of appealability **SHALL NOT ISSUE**. 28 U.S.C. § 2253; Rule 22(b) of the Federal Rules of Appellate Procedure.

ORDER ACCORDINGLY.

/s/ J. RONNIE GREER

UNITED STATES DISTRICT JUDGE

JUDGMENT ORDER

For the reasons expressed in the accompanying memorandum opinion, it is **ORDERED** and **ADJUDGED** that the civil action [E.D. Tenn. Case No. 2:16-CV-179] is **UNSTAYED** and Petitioner's supplemented § 2255 motion [Docs. 470, 476, 487, 504] is **DENIED** and **DISMISSED WITH PREJUDICE**. If Petitioner files a notice of appeal from this judgment, such notice of appeal will be treated as an application for a certificate of appealability, which is **DENIED** pursuant to 28 U.S.C. § 2253(c)(2) and Fed. R. App. P. 22(b) because he has failed to make a substantial showing of the denial of a federal constitutional right. The Court **CERTIFIES** pursuant to 28 U.S.C. § 1915(a)(3) and Fed. R. App. P. 24 that any such appeal from this judgment would be frivolous and not taken in good faith.

ENTER:

/s/ J. RONNIE GREER

UNITED STATES DISTRICT JUDGE

Footnotes

1

CJA counsel submitted a supplement in support of the *Johnson*-based relief [Doc. 531].

2

The ACCA mandates a fifteen-year sentence for any felon who unlawfully possesses a firearm after having sustained three prior convictions "for a violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. § 924(e)(1). The statute defines "violent felony" as "any crime punishable by imprisonment for a term exceeding one year" that (1) "has as an element the use, attempted use, or threatened use of physical force against the person of another" (the "use-of-physical-force clause"); (2) "is burglary, arson, or extortion, involves the use of explosives" (the "enumerated-offense clause"); or (3) "otherwise involves conduct that presents a serious potential risk of physical injury to another" (the "residual clause"). 18 U.S.C. § 924(e)(2)(B). It

The Order Denying Rehearing by the United States Court of Appeals.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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Filed: December 13, 2017

Robert Velez
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Re: Case No. 17-5369, *Robert Velez v. USA*
Originating Case No. : 2:13-cv-00179 : 2:08-cr-00068-1

Dear Mr. Velez,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Mr. Donald Wayne Taylor

Enclosure

No. 17-5369

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 13, 2017
DEBORAH S. HUNT, Clerk

ROBERT VELEZ,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: SILER, GRIFFIN, and STRANCH, Circuit Judges.

Robert Velez petitions for rehearing *en banc* of this court's order entered on September 1, 2017, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

ROBERT VELEZ, Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee.
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
2017 U.S. App. LEXIS 25269
No. 17-5369
December 13, 2017, Filed

Editorial Information: Prior History

Velez v. United States, 2017 U.S. Dist. LEXIS 36949 (E.D. Tenn., Mar. 15, 2017)

Counsel ROBERT VELEZ, Petitioner - Appellant, Pro se, Pollock, LA. For UNITED STATES OF AMERICA, Respondent - Appellee: Donald Wayne Taylor, Assistant U.S. Attorney, Office of the U.S. Attorney, Greeneville, TN.

Judges: Before: SILER, GRIFFIN, and STRANCH, Circuit Judges.

Opinion

ORDER

Robert Velez petitions for rehearing en banc of this court's order entered on September 1, 2017, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

was this third clause-the residual clause-that the Supreme Court deemed unconstitutional in *Johnson*. 135 S. Ct. at 2563.

Section 4B1.1 enhances a defendant's offense level if he or she qualifies as a "career offender," i.e., adult defendant whose offense of conviction is a "crime of violence or controlled substance offense" and who has "at least two prior felony convictions of either a crime of violence or a controlled substance offense." U.S. Sentencing Manual § 4B1.1(a). "Crime of violence" under the Guidelines is defined in an almost identical manner as "violent felony" under the ACCA. *See* U.S. Sentencing Manual § 4B1.2(a) (adopting identical use-of-force and residual clauses as well as a nearly identical enumerated-offense clause).

The Decision of the Sixth Circuit Court of Appeals, Denying Petitioner's Direct Appeal.

APPENDIX D

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ROBERT VELEZ, Defendant-Appellant.
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
485 Fed. Appx. 793; 2012 U.S. App. LEXIS 12957; 2012 FED App. 0673N (6th Cir.)
12a0673n.06No. 11-5433
June 22, 2012, Filed

Notice:

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

Editorial Information: Subsequent History

US Supreme Court certiorari denied by Velez v. United States, 133 S. Ct. 557, 184 L. Ed. 2d 362, 2012 U.S. LEXIS 8356 (U.S., 2012)Post-conviction relief denied at, Dismissed by, Certificate of appealability denied Velez v. United States, 2017 U.S. Dist. LEXIS 36949 (E.D. Tenn., Mar. 15, 2017)

Editorial Information: Prior History

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE.

Counsel For UNITED STATES OF AMERICA, Plaintiff - Appellee: Donald Wayne Taylor, Assistant U.S. Attorney, U.S. Attorney's Office, Greeneville, TN; Luke A. McLaurin, U.S. Attorney's Office, Knoxville, TN.
For ROBERT VELEZ, Defendant - Appellant: James J. Lonon, Law Office of James J. Lonon, Johnson City, TN.

Judges: BEFORE: SILER and KETHLEDGE, Circuit Judges; GRAHAM, * District Judge.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant was convicted in the United States District Court for the Eastern District of Tennessee of drug and firearms charges. The district court imposed a sentence which effectively added up to 444 months of incarceration, to be followed by five years of supervised release. Defendant appealed.Defendant's conviction and sentence were affirmed. There was ample circumstantial evidence from which jury could reasonably find defendant knew that two accomplices would use and discharge firearms during and in relation to the conspiracy while attempting to collect the drug debt owed to defendant and that defendant aided and abetted the offense.

OVERVIEW: Defendant argued that the evidence was insufficient to support his conviction because there was no direct evidence that he told two accomplices to use firearms, or that he knew that they were going to use firearms in attempting to collect money from an individual. However, there was ample circumstantial evidence from which the jury could reasonably find that defendant knew that the accomplices would use and discharge firearms during and in relation to the conspiracy while attempting to collect the drug debt owed to defendant and that defendant aided and abetted the offense. The district court correctly found by a preponderance of the evidence that defendant should have been accountable for at least 8,400 oxycodone tablets. Although defendant argued he was simply the middleman in the oxycodone distribution chain and that the evidence was insufficient to show he exercised organizational or leadership control or direction over another culpable participant in the offense, the district court did not err in applying the U.S. Sentencing Guidelines Manual § 3B1.1(a) leadership role enhancement.

OUTCOME: The judgment entered and sentence imposed by the district court were affirmed.

LexisNexis Headnotes

Criminal Law & Procedure > Trials > Motions for Acquittal
Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > General Overview

An appellate court reviews de novo a district court's denial of a motion for judgment of acquittal pursuant to Fed. R. Crim. P. 29 and assesses the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > Sufficiency of Evidence to Convict
Evidence > Procedural Considerations > Circumstantial & Direct Evidence

A defendant bears a heavy burden when asserting insufficiency of the evidence arguments. An appellate court must view all evidence and resolve all reasonable inferences in favor of the government. A reviewing court does not reweigh the evidence, reevaluate the credibility of witnesses, or substitute its judgment for that of the jury. Circumstantial evidence alone is sufficient to sustain a conviction and such evidence need not remove every reasonable hypotheses except that of guilt.

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

To sustain a conviction on aiding and abetting the use, carrying and discharge of a firearm during and in relation to a drug offense, the government has to prove that a defendant offered assistance or encouragement to his principal in the commission of a substantive offense. Aiding and abetting involves an act by a defendant which contributes to the execution of a crime, and the intent to aid in its commission.

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

A defendant may be convicted for aiding and abetting an offense under 18 U.S.C.S. § 924(c). A conviction under § 924(c) may be upheld under an aiding and abetting theory even in a case in which the defendant never had actual possession of a firearm during the commission of the crime, or never personally used or carried any weapon during the offense. The government is not required to prove that the defendant performed some act that directly facilitated or encouraged the use of a firearm. Rather, to establish that the defendant acted as an aider and abettor, the government must prove that the defendant, as the accomplice, associated and participated in the use of the firearm in connection with the underlying crime. Thus, the government is required to prove that the defendant knew one of his accomplices possessed a gun in furtherance of a drug trafficking offense and that he acted with the intent to assist or influence the commission of the underlying drug trafficking crime.

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > General Overview
Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review > General Overview

A district court's drug quantity calculations are reviewed for clear error.

Criminal Law & Procedure > Sentencing > Guidelines

Questions involving the interpretation of the U.S. Sentencing Guidelines Manual are legal questions that an appellate court reviews de novo. A factual finding is clearly erroneous when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Delivery, Distribution & Sale > Conspiracy > General Overview
Evidence > Procedural Considerations > Burdens of Proof > Preponderance of Evidence

A defendant involved in a drug conspiracy is generally responsible for the drug quantities for which he is directly involved and any quantity that is a reasonably foreseeable consequence of the conspiracy. A drug quantity need only be established by a preponderance of the evidence, and an estimate will suffice so long as it errs on the side of caution and likely underestimates the quantity of drugs actually attributable to the defendant. The government must prove the amount to be attributed to a defendant.

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Delivery, Distribution & Sale > Conspiracy > General Overview

Testimonial evidence from a coconspirator may be sufficient to determine the amount of drugs for which another coconspirator should be held accountable.

Under U.S. Sentencing Guidelines Manual § 3B1.1(a), a defendant's offense level is increased by four levels if the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive U.S. Sentencing Guidelines Manual § 3B1.1(a). A defendant qualifies for the enhancement upon a finding by the district court that the defendant has exercised decisionmaking authority, recruited accomplices, received a larger share of the profits, was instrumental in the planning phase of the criminal venture, or exercised control or authority over at least one accomplice. More than one person involved in an offense may be a leader or organizer.

Opinion

Opinion by: GRAHAM

Opinion

{485 Fed. Appx. 794} GRAHAM, District Judge. Defendant-appellant, Robert Velez, was charged by a second superseding indictment filed on December 9, 2008, in the United States District Court for the Eastern District of Tennessee, with conspiracy to distribute and to possess with the intent to distribute oxycodone in violation of 21 U.S.C. § 846 (Count 1); aiding and abetting the use, carrying and discharge of a firearm during and in relation to a drug offense in violation of 18 U.S.C. §§ 924(c)(1)(A)(iii) and 2 (Count 4); use of a communications facility in violation of 21 U.S.C. § 843(b) (Counts 5-8 and 10); and being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) (Counts 14-16). Count 16 was dismissed on motion of the government prior to trial.

{485 Fed. Appx. 795} I. Factual Background

The case was tried before a jury. The evidence at trial revealed that Travis Ray Mombrun began supplying Velez with 30-mg Roxycodone pills in South Florida in late 2007. Roxycodone is the trade name for a quick-release oxycodone tablet. During the course of the conspiracy, Mombrun supplied Velez with between 10,000 and 20,000 pills.

Justin Horton began purchasing Roxycodone pills from Velez in February of 2008. Horton testified that he traveled to Florida to get pills from Velez on three occasions, and also obtained pills from Velez when he started bringing pills to Tennessee. Horton also testified concerning the robbery of his apartment on June 2, 2008. When notified of the robbery while at Velez's motel room, Horton and Velez attempted to drive to Hortons' apartment in Velez's rental truck, taking with them a Yugoslavian-made SKS assault rifle with a bayonet which Velez obtained from under the mattress at his motel room. After the truck broke down, they headed toward Horton's apartment on foot. Horton had three guns in his apartment, including another SKS assault rifle, a shotgun, and a handgun. Horton loaded his guns, intending to pursue and find the person who committed the robbery, but he abandoned that plan when the police, responding to a neighbor's call, arrived at the apartment.

The government also presented the testimony of other co-conspirators who purchased pills from Velez, including Jordan Pierce (Horton's brother), Michael Cline, Joel Rickard, Chris Cortless, and Brandon Smallman. Jennifer Green, Smallman's girlfriend, counted 30-mg Roxycodone tablets for Velez when he came to Tennessee, and wired money to him in Florida. Brian Still made three trips to Florida at Velez's request to purchase 30-mg Roxycodone pills through Louis Ezyaguirre, as associate of Velez in Florida.

Smallman was arrested in his motel room on an outstanding bench warrant on July 18, 2008, and his drug money was seized. He agreed to cooperate with law enforcement. When Velez concluded that Smallman intended to keep the money owed to Velez for the pills, he sent Horton and Pierce to look for Smallman and to collect the debt. Horton found Smallman at the residence of Dustin Patterson, pointed a shotgun at Smallman and fired the gun to scare him. Horton called Velez on the phone to tell him that Smallman did not have the money with him. Smallman told Velez that he had the money at his house, and that Horton could ride with him to get it. However, Smallman drove off before Horton could get in the car. Horton fired two shots at the moving car using a handgun. Horton then called Velez to report that he had fired at Smallman's vehicle and that he was pursuing Smallman. Velez told him to get rid of the guns and go the opposite way. Velez was arrested on September 29, 2008, and denied any involvement in the sale of Roxycodone.

The district court denied the motions for judgment of acquittal made at the close of the government's case and at the close of all evidence. On July 19, 2009, the jury returned a verdict of guilty on all counts with the exception of a not guilty verdict on Count 15, one of the felon in possession charges. On January 29, 2010, the district court denied Velez's motion for a new trial on Count 4.

At the sentencing hearing held on March 21 and 28, 2011, the district court found that Velez was responsible for at least 8,400 30-mg oxycodone pills, resulting in a base offense level 32 under §

2D1.1(a)(3)(c)(4) of the United States Sentencing Guidelines ("U.S.S.G."). The district court also found that Velez warranted a four-level enhancement under U.S.S.G. § 3B1.1(a) for being an organizer **{485 Fed. Appx. 796}**or leader of criminal activity involving five or more participants. Velez's total offense level was 36, with a range under the advisory Sentencing Guidelines of 324 to 405 months. When combined with the mandatory ten-year consecutive sentence on the § 924(c) count, this resulted in a final range of 444 to 525 months. The district court imposed a sentence which effectively added up to 444 months of incarceration, to be followed by five years of supervised release. Velez now pursues the instant appeal.

II. Sufficiency of the Evidence

The first issue raised by Velez is whether the evidence was sufficient to support his conviction on Count 4, the § 924(c) charge. "We review de novo the district court's denial of a motion for judgment of acquittal pursuant to Fed.R.Crim.P. 29 and assess the evidence 'in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Wettstain*, 618 F.3d 577, 583 (6th Cir. 2010)(quoting *United States v. Campbell*, 549 F.3d 364, 374 (6th Cir. 2008)).

A defendant bears "a heavy burden when asserting insufficiency of the evidence arguments." *Id.* "The appellate court must view all evidence and resolve all reasonable inferences in favor of the government." *United States v. Hughes*, 505 F.3d 578, 592 (6th Cir. 2007). As the reviewing court, we do "not reweigh the evidence, re-evaluate the credibility of witnesses, or substitute our judgment for that of the jury." *Brown v. Konteh*, 567 F.3d 191, 205 (6th Cir. 2009). "Circumstantial evidence alone is sufficient to sustain a conviction and such evidence need not remove every reasonable hypotheses except that of guilt." *United States v. Spearman*, 186 F.3d 743, 746 (6th Cir. 1999).

To sustain a conviction on Count 4, the government had to prove that Velez "offered assistance or encouragement to his principal in the commission of a substantive offense." *United States v. Davis*, 306 F.3d 398, 409 (6th Cir. 2002)(quoting *United States v. Webber*, 208 F.3d 545, 553 (6th Cir. 2000))(internal quotes and citations omitted). Aiding and abetting involves an act by a defendant which contributes to the execution of a crime, and the intent to aid in its commission. *United States v. Lowery*, 60 F.3d 1199, 1202 (6th Cir. 1995).

A defendant may be convicted for aiding and abetting an offense under § 924(c). *United States v. Franklin*, 415 F.3d 537, 554 (6th Cir. 2005). A conviction under § 924(c) may be upheld under an aiding and abetting theory even in a case in which the defendant never had actual possession of a firearm during the commission of the crime, *see Rattigan v. United States*, 151 F.3d 551, 557 ((6th Cir. 1998), or never personally used or carried any weapon during the offense, *see United States v. Wright*, 182 F.3d 458, 464 (6th Cir. 1999). The government is not required to prove that the defendant performed some act that directly facilitated or encouraged the use of a firearm. *United States v. Hopson*, 134 F.App'x 781, 793 (6th Cir. 2004). Rather, to establish that the defendant acted as an aider and abettor, the government must prove "that the defendant, as the accomplice, associated and participated in the use of the firearm in connection with the underlying ... crime." *Franklin*, 415 F.3d at 554-55. Thus, the government was required to prove that Velez "knew one of his accomplices possessed a gun in furtherance of a drug trafficking offense and that [he] acted with the intent to assist or influence the commission of the underlying drug trafficking crime." *United States v. Gardner*, 488 F.3d 700, 712 (6th Cir. 2007).

{485 Fed. Appx. 797} Velez argues that the evidence is insufficient to support his conviction because there was no direct evidence that he told Horton and Pierce to use firearms, or that he knew that they were going to use firearms in attempting to collect money from Smallman. However, as noted above, circumstantial evidence alone is sufficient to sustain a conviction, *Spearman*, 186 F.3d at 746, and previous Sixth Circuit cases indicate that no exception to this general rule has been applied in § 924(c) cases.

In *United States v. Robinson*, 389 F.3d 582, 591 (6th Cir. 2004), the defendant argued that his § 924(c) conviction was invalid because there was no evidence that the use of guns was discussed in his presence prior to the bank robbery, or that his co-defendants had displayed their weapons to him. In affirming the conviction, the court noted that "[a]lthough there might not be any direct evidence that the use of firearms was discussed in Robinson's presence, the district court did not err in finding that Robinson aided and abetted his co-conspirators in using weapons during the court of the first bank robbery." *Id.* Robinson drove his co-defendants to the bank, the co-defendants brandished firearms during the robbery, Robinson permitted them to use his car as the getaway vehicle, one of the co-defendants left the guns in Robinson's vehicle after the robbery, and Robinson benefitted from the use of the firearms by sharing in the proceeds of the robbery. The court concluded that each of these facts could lead a rational trier of fact to infer that Robinson knew that his co-defendants intended to brandish firearms in the first robbery. *Id.*

In *United States v. Warner*, 10 F.3d 1236, 1239 (6th Cir. 1993), the court rejected the defendant's argument that he could not be convicted under § 924(c) for using or carrying a firearm in relation to a drug offense because he did not know of the existence of the .30 caliber revolver possessed by his accomplice during his drug-dealing activities. There was evidence that the defendant possessed a firearm within a month of his arrest which could have been the same firearm used by his co-defendant, that defendant and his accomplice worked closely together to distribute drugs, and that it was understood between them that the accomplice would guard the drugs while defendant was out of town meeting a buyer. The court concluded that a rational juror could determine from this evidence that the defendant knew of the existence of the revolver and knew that the accomplice would have the gun at hand while protecting the drugs. *Id.*

In *Wright*, the court upheld the district court's conclusion that the evidence was sufficient to support defendant's conviction for aiding and abetting a § 924(c) offense. 182 F.3d at 466. Based on evidence of a "shoot out" and the presence of armed guards at the location where defendant was involved in the drug operation, the court concluded that a jury could infer that the defendant knew that his co-conspirators were armed and that he had accepted the protection offered by the guns, even though the defendant claimed that he primarily "cut" cocaine in the back room, and the government's witness testified that he never saw the defendant with a weapon. *Id.* at 465-66.

In the instant case, evidence was presented that Velez was present at Horton's apartment on June 2, 2008, and that he saw that Horton had three guns, including an SKS assault rifle, a shotgun, and a handgun. Velez and Horton had fired the guns behind Horton's apartment earlier that day, so Velez knew the guns were operable. Horton believed the robbery occurred because someone thought he had pills in the residence. The people in the apartment started loading the guns, as it {485 Fed. Appx. 798}was Horton's intent to pursue the person who had committed the robbery at the apartment. Velez was supplying Horton with pills and knew that he was a drug dealer. Velez himself had an SKS assault rifle and a .22 Derringer handgun on the day of the robbery, which he attempted to bring to Horton's apartment. Velez was also seen carrying a handgun in his waistband while selling pills to Rickard.

The jury could reasonably find that Velez knew that Horton had firearms at his residence, and that Horton could be expected to use those firearms to protect his drug supply and to commit violent acts in furtherance of the drug operation. *See United States v. Hardin*, 248 F.3d 489, 499 (6th Cir. 2001)("This Court has held many times that guns are 'tools of the trade' in drug transactions."); *United States v. Williams*, 31 F.3d 522, 526 (7th Cir. 1994)("Because the drug industry is, by nature, a violent business, the presence of firearms in transactions involving sizeable quantities of drugs is reasonably foreseeable."). The jury could also reasonably infer that Velez knew that Horton and Pierce would be armed when they went to collect money from Smallman, because Velez, Horton, and Pierce would have had every reason to believe that Smallman, a drug dealer, would also be armed (in fact, a handgun was seized from Smallman on the date of his arrest).

There was additional testimony from which the jury could reasonably find that Velez knew that Horton and Pierce would use and discharge firearms to collect money from Smallman. Velez told Horton to collect the money from Smallman, and further told Horton that if he "ever got ahold of him, beat him up or take it or whatnot." According to Horton, Velez told him to find Smallman, as "[h]e wanted me to whoop his ass and get his money back." Horton understood this to mean that "he wanted his money by any means possible." Horton and Velez did not specifically discuss using firearms, but Horton testified that he "took it [Velez] wanted his money any way, so I figured that would scare him [Smallman]." Velez stood to benefit from Horton's use of a firearm in attempting to scare Smallman into paying the debt owed to Velez.

After Horton fired two shots at Smallman's car using a handgun, he called Velez to report that he had fired at the fleeing vehicle and that he was following Smallman. At that point, Horton and Pierce were still attempting to catch Smallman to continue the confrontation. Velez told Horton to hide the guns and to go the other way. Thus, the jury could reasonably find that even after Velez was specifically informed of the use of firearms by Horton, he continued to participate in this incident during and in relation to the conspiracy by advising Horton to hide the guns and to escape, thereby attempting to conceal from law enforcement the acts of his co-conspirators, as well as his own involvement in instigating the collection of the drug debt. *See United States v. Hicks*, 79 F.App'x 749, 751 (6th Cir. 2003)(finding a sufficient factual basis for § 924(c) plea, despite defendant's claim that he did not know co-defendant was carrying a firearm until they entered the bank, where defendant continued to participate in the robbery after he saw co-defendant brandishing a gun); *United States v. Taylor*, 226 F.3d 593, 596-97 (7th Cir. 2000)(defendant's continued participation in the offense after learning of accomplice's use of firearms by facilitating accomplice's escape was sufficient to satisfy the requirements for aiding and abetting a § 924(c) offense).

Evidence was also presented that Velez later admitted to Smallman that he sent Horton and Pierce to collect the debt. He urged Smallman not to testify against Horton {485 Fed. Appx. 799}and Pierce, continued to attempt to collect the debt from Smallman, left a threatening voice mail message for Smallman, stating "game over, I'm finished fooling with you," and stated that he had put up additional money for a bounty to encourage people to find out where Smallman was hiding.

The cases relied on by Velez are readily distinguishable. In *United States v. Thomas*, 987 F.2d 697, 700 (11th Cir. 1993), the court held that the evidence was insufficient to support the defendant's conviction under § 924(c) where there was no evidence that he knew about the firearm found tucked into the co-defendant's pants and one co-conspirator testified that the participants in the attempted drug transaction had agreed not to bring weapons. In *United States v. Medina*, 32 F.3d 40, 45-46 (2d Cir. 1994), the court reversed a § 924(c) conviction where there was no evidence that the defendant acted in any way to facilitate or encourage the co-defendant's use of a firearm during robbery. In the instant case, there is ample circumstantial evidence from which the jury could reasonably find that Velez knew that Horton and Pierce would use and discharge firearms during and in relation to the conspiracy while attempting to collect the drug debt owed to Velez, and that Velez aided and abetted the offense. The district court did not err in denying defendant's motions for a judgment of acquittal on Count 4.

III. Drug Quantity as Relevant Conduct

Velez also argues that the district court erred in determining the quantity of drugs to be used as relevant conduct for purposes of calculating his offense level under the advisory Guidelines. The district court's drug quantity calculations are reviewed for clear error. *United States v. Olsen*, 537 F.3d 660, 663 (6th Cir. 2008). "Questions involving the interpretation of the guidelines are legal questions that this Court reviews *de novo*." *United States v. Murphy*, 241 F.3d 447, 458 (6th Cir. 2001). "A factual finding is clearly erroneous 'when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *United States v. McGee*, 494 F.3d 551, 554 (6th Cir. 2007)(quoting *Tran v. Gonzales*, 447 F.3d 937, 943 (6th Cir. 2006)).

A defendant involved in a drug conspiracy is generally responsible for the drug quantities for which he is directly involved and any quantity that is a reasonably foreseeable consequence of the conspiracy. *United States v. Caver*, 470 F.3d 220, 246 (6th Cir. 2006). "A drug quantity need only be established by a preponderance of the evidence, and an estimate will suffice so long as it errs on the side of caution and likely underestimates the quantity of drugs actually attributable to the defendant." *United States v. Anderson*, 526 F.3d 319, 326 (6th Cir. 2008). The government must prove the amount to be attributed to a defendant. *United States v. Swanberg*, 370 F.3d 622, 625 (6th Cir. 2004).

In the Presentence Investigation Report ("PSR"), the probation officer determined that the amount of oxycodone attributable to Velez as relevant conduct was 8,400 30-mg oxycodone tablets. Converted to 1,688.4 kilograms of marijuana, *see* U.S.S.G. § 2D1.1 cmt. n.10(*E*), which specifies that one gram of oxycodone equals 6,700 grams of marijuana, this yielded a base offense level of 32 (applicable to 1,000 to 3,000 kilograms of marijuana) under U.S.S.G. § 2D1.1(a)(3)(c)(4). The probation officer arrived at this amount by considering the testimony of Mombrun, who stated that he delivered 200 to 1,000 tablets to Velez every week or every other week from early 2008 to August 2008, an average of 600 tablets on 14 occasions. Velez objected to the calculations of the probation officer. He noted {485 Fed. Appx. 800}that no drugs were seized from him, and argued that a more reasonable estimate would be to hold him accountable for 200 tablets delivered every other weekend from March 1, 2008, through August 2, 2008, in other words, for eleven weekends, for a total of 2,200 tablets.

The district court found that Velez should be accountable for at least 8,400 oxycodone tablets. This was a conservative estimate. Mombrun testified that he supplied Velez with a total of 10,000 to 20,000 pills. Although this testimony alone would be sufficient to support the district court's quantity finding, the record includes additional evidence that Velez supplied these oxycodone tablets to other conspirators. Even accepting Horton's lower quantity estimates, there is testimony that Horton obtained at least 9,000 pills from Velez. Smallman testified that he obtained 3,000 pills from Velez. Eyzaguirre testified at his plea hearing that he obtained 700 pills from Velez. Jordan Pierce testified that Velez supplied him with at least 1,500 pills. Michael Cline purchased at least 2,500 pills from Velez beginning in March of 2008, and Joel Rickard purchased at least 150 pills from Velez. Velez also supplied Chris Cortless with at least 900 pills starting in May 2008. These quantities are more than sufficient to support the district court's findings. Further, as the district court noted, only 4,975.1 oxycodone tablets would be required to meet the threshold amount of 1,000 kilograms of marijuana necessary to qualify for a base offense level 32. *See* § 2D1.1(a)(3)(c)(4) and cmt. n.10(*E*).

Velez argues that Mombrun's testimony was not credible and that the probation officer's quantity determination was based on the allegedly unreliable testimony of accomplices who were cooperating with the government and who were drug users testifying about events which occurred two years in the past. However, "[t]estimonial evidence from a coconspirator may be sufficient to determine the amount of drugs for which another coconspirator should be held accountable." *United States v.*

Hernandez, 227 F.3d 686, 697 (6th Cir. 2000). In many instances, the conspirators in this case corroborated each other's testimony.

In regard to the use of drugs by witnesses, Velez presented the testimony of Dr. Jonathan Lipman, a neuropharmacologist, regarding the effects of Roxycodone, a pain reliever, and Xanax (alprazolam), a tranquilizer/sedative, on memory. However, Dr. Lipman was unable to offer an opinion to a reasonable degree of scientific certainty that any witnesses in the case gave unreliable testimony due to their use of oxycodone or alprazolam because he was not aware of any relationship between the period of their drug use and the events about which they testified. Thus, the district court properly concluded that his testimony was not relevant to the issues before the court. In addition, Dr. Lipman testified that the users of these drugs could build up a tolerance for them and still function. Smallman testified that the pills did not bother his memory, as he had a high tolerance for them.

The district court correctly found by a preponderance of the evidence that Velez should be accountable for at least 8,400 oxycodone tablets.

IV. Enhancement for Role in Offense

The standard of review applicable to the application of an enhancement under U.S.S.G. § 3B1.1(a) is undecided. *United States v. Walls*, 546 F.3d 728, 734 (6th Cir. 2008). In the past, this court "reviewed the district court's factual findings for clear error and its legal conclusions de novo." *United States v. McDaniel*, 398 F.3d 540, 551 n. 10 (6th Cir. 2005). However, in *Buford v. United States*, 532 U.S. 59, 66, 121 S. Ct. 1276, 149 L. Ed. 2d 197 (2001), the Supreme Court held that a {485 Fed. Appx. 801}district court's application of the Guidelines should be reviewed deferentially rather than de novo. *See United States v. Vasquez*, 560 F.3d 461, 473 (6th Cir. 2009). This issue need not be resolved in this case, because the leadership adjustment was appropriate under either standard of review.

Under § 3B1.1(a), a defendant's offense level is increased by four levels "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive[.]" U.S.S.G. § 3B1.1(a). A defendant qualifies for the enhancement upon a finding by the district court that the defendant has exercised decisionmaking authority, recruited accomplices, received a larger share of the profits, was instrumental in the planning phase of the criminal venture, or exercised control or authority over at least one accomplice. *Vasquez*, 560 F.3d at 473. More than one person involved in an offense may be a leader or organizer. *Id.* (citing U.S.S.G. § 3B1.1, cmt. n. 4).

The probation officer determined that Velez merited a four-level enhancement under § 3B1.1(a) for his role in the offense as the organizer or leader of a conspiracy involving five or more participants. Velez objected to this finding, arguing that he was simply the middleman in the oxycodone distribution chain and that the evidence was insufficient to show that he exercised organizational or leadership control or direction over another culpable participant in the offense.

The probation officer relied on testimony that Velez directed Horton and Pierce regarding the collection of the drug debt from Smallman on July 21, 2008, that he directed Still and Eyzaguirre to travel to Florida in September of 2008 to obtain oxycodone, that he told Smallman how to wire drug proceeds to him, and that he directed Green to obtain hotel rooms for him in her name. The probation officer also concluded that the conspiracy included at least eleven participants.

The district court, noting the comments of the probation officer, found that the participants in the conspiracy included Velez, Horton, Pierce, Smallman, Green, Eyzaguirre, Still, Cortless, Joshua Cody (who accompanied Smallman on his last trip to obtain pills from Velez in Florida and obtained 100 pills from Smallman), and Cody's mother. The district court found by a preponderance of the evidence that Velez directed Horton and Pierce to collect the drug debt owed by Smallman, that he directed Eyzaguirre to travel from Florida to Tennessee to transport oxycodone, that he directed Still to deliver money to Eyzaguirre in Florida and to obtain oxycodone from Eyzaguirre, that he instructed Green to obtain motel rooms for him, and that he directed Smallman to wire the payment for drug debts to Velez in Florida. The record also includes evidence that Velez recruited Smallman as an accomplice after a falling-out with Horton, and that he told Smallman to come to Florida to deliver money which Smallman owed to Velez. The district court further found that Velez was making a large part of the profit from the sale of the pills in Tennessee, and that he exercised decision-making authority over participants in the conspiracy, gave directions and orders, planned the activities of the conspiracy and supervised the participants.

The district court did not err in applying the § 3B1.1(a) leadership role enhancement.

V. Conclusion

In accordance with the foregoing, the judgment entered and sentence imposed by the district court are affirmed.

Footnotes