

APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-13555
Non-Argument Calendar

D.C. Docket No. 3:17-cr-00014-RV-1

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

JUAN DEMETRIUS ALLEN,

Defendant - Appellant.

Appeal from the United States District Court
for the Northern District of Florida

(March 9, 2018)

Before TJOFLAT, JILL PRYOR and MARTIN, Circuit Judges.

PER CURIAM:

Juan Allen appeals his total 117-month sentence after pleading guilty to two counts of possession of a firearm and ammunition by a convicted felon, 18 U.S.C. §§ 922(g)(1) and 924(a)(2), possession of a controlled substance with intent to distribute, 21 U.S.C. §§ 841(a)(1), (b)(1)(C), and (b)(1)(D), and possession of a firearm in furtherance of a drug trafficking crime, 18 U.S.C. § 924(c)(1)(A)(i). He argues his sentence was procedurally unreasonable because the District Court assessed a two-level enhancement for possessing between three and seven firearms when the evidence used to support this enhancement was inconclusive. He also argues that his base offense level was incorrect because a conviction under Fla. Stat. § 893.13, is not a “controlled substance offense” according to U.S.S.G. § 4B1.2(b), an argument he concedes is foreclosed by Circuit precedent.

I.

We use a two-step process to review a sentence’s reasonableness. *Gall v. United States*, 552 U.S. 38, 51 (2007). First, we must confirm that the district court committed no significant procedural error. *Id.* A sentence is procedurally erroneous if a district court commits an error “such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence. . . .” *Id.* After reviewing for procedural reasonableness, we consider the substantive

reasonableness of a sentence under the deferential abuse-of-discretion standard. *Id.* We review a district court's factual findings for clear error. *United States v. Tejas*, 868 F.3d 1242, 1244 (11th Cir. 2017). "For factual findings to be clearly erroneous, we must be left with a definite and firm conviction that the court made a mistake." *Id.* A defendant receives a two-level increase if the offense involved between three and seven firearms. § 2K2.1(b)(1)(A). Where a defendant challenges the factual basis of his sentence as set forth in the presentence investigation report, the Government has the burden of establishing the disputed fact by a preponderance of the evidence. *United States v. Bradley*, 644 F.3d 1213, 1283 (11th Cir. 2011).

Here, the District Court did not clearly err in finding by a preponderance of the evidence that Allen possessed between three and seven firearms; thus, the Court thus did not err in applying the § 2K2.1(b)(1)(A) enhancement. The Court concluded that Allen at one time possessed at least three different guns (in addition to the two guns seized after Allen's arrest) featured in images on Allen's phone. A reasonable factfinder had considerable evidence upon which to rest this inference. An ATF agent testified that all of the images were taken using the same phone model as Allen's. The background in one image showed a "4Runner" car mat, and the agent testified that Allen rented a Toyota 4Runner on the same day the image was taken. The agent further testified that the fabric covering the seats in several

other photos matched the distinct design pattern of the seat fabric in the car Allen possessed at the time he was arrested. And at least two of the guns were photographed alongside one of the guns seized from Allen after his arrest. While none of this evidence established conclusively that Allen took the photos, they support the reasonable inference that he did, and that he possessed the firearms in the photos. Hence, the District Court did not clearly err.

On this record, the District Court's conclusion that Allen possessed between three and seven firearms does not elicit "a definite and firm conviction" that the Court rested its factual findings on insufficient evidence. Therefore, the Court did not clearly err.

II.

The definition of a controlled substance offense under U.S.S.G. § 2K2.1 is found in U.S.S.G. § 4B1.2, which states

The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution or dispensing of a controlled substance...or the possession of a controlled substance...with intent to manufacture, import, export, distribute, or dispense.

U.S.S.G. § 2K2.1, comment. (n.1), U.S.S.G. § 4B1.2(b). In relevant part, Fla. Stat. § 893.13(1)(a) states "a person may not sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance." Fla. Stat. §893.13(1)(a). Knowledge of the illicit nature of the substance is not an element of

the offense. Fla. Stat. § 893.101. Allen correctly concedes that our precedent clearly holds that a conviction under Fla. Stat. § 893.13 is a controlled substance offense. *United States v. Pridgeon*, 853 F.3d 1192, 1198 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 215 (2017); *United States v. Smith*, 775 F.3d 1262, 1268 (11th Cir. 2014). In *Pridgeon* and *Smith*, we held, for purposes of the career offender increase, U.S.S.G. § 4B1.1, that a conviction under Fla. Stat. § 893.13 qualifies as a “controlled substance offense.” *Id.* Allen preserved this objection pending resolution of the *certiorari* petition to the Supreme Court in *Pridgeon*, which has since been denied. Accordingly, our precedent forecloses this objection.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
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Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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March 09, 2018

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 17-13555-DD
Case Style: USA v. Juan Allen
District Court Docket No: 3:17-cr-00014-RV-1

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Sandra Brasselmon, DD at (404) 335-6181.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Jeff R. Patch
Phone #: 404-335-6161

OPIN-1 Ntc of Issuance of Opinion