

UNITED STATES COURT OF APPEALS

May 24, 2012

FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL L. RICHARDS,

Defendant-Appellant.

No. 10-3314
(D.C. No. 2:08-CR-20040-JWL-1)
(D. Kan.)

ORDER AND JUDGMENT*

Before **BRISCOE**, Chief Judge, **McKAY** and **LUCERO**, Circuit Judges.

A jury convicted Mr. Richards of two counts of distribution of marijuana, 21 U.S.C. §§ 841(a)(1), 841(b)(1)(D); one count of possession with intent to distribute marijuana, *id.*; one count of use of a firearm during and in relation to, or possession of a firearm in furtherance of, a drug trafficking crime, 18 U.S.C. § 924(c); and one count of being a felon in possession of a firearm and ammunition,

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

id. §§ 922(g)(1), 924(a)(2).¹ The district court sentenced Mr. Richards to 60 months' imprisonment on each of the marijuana counts and to 84 months' imprisonment on the felon-in-possession count, all to run concurrently to each other; and to 60 months' imprisonment on the use-of-a-firearm count, to run consecutively to the other counts, for a total sentence of imprisonment of 144 months.

In imposing the 84-month sentence on the felon-in-possession count, the district court departed upward from the recommended Guideline range of 51 to 63 months. The district court also denied Mr. Richards' motion for a downward departure.

On appeal, counsel has filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), explaining why counsel believes there to be no reasonable grounds for appeal. Mr. Richards has filed a response requesting appointment of counsel and listing a number of issues for our consideration. The government did not file a response brief.

In his *Anders* brief, counsel identifies the following potentially appealable issues in this case, none of which, according to counsel, has merit: (1) whether the government presented sufficient evidence to support each count on which Mr. Richards was convicted; (2) whether the district court committed reversible error

¹ The jury acquitted Mr. Richards of one charged count of maintaining a residence for the purpose of distributing marijuana, 21 U.S.C. § 856(a)(1) & (2). It also answered "no" to the special question on the verdict form asking whether "the defendant discharged a firearm during and in relation to or in furtherance of a drug trafficking crime." R., Vol. 1 at 223.

in its rulings on certain evidentiary issues and by failing to grant a mistrial after a specific reference was made during trial to Mr. Richards' prior convictions; (3) whether the district court's § 924(c) instruction was legally erroneous or unduly prejudicial; and (4) whether Mr. Richards' sentence was procedurally and substantively reasonable.

In his pro se response to counsel's *Anders* brief, Mr. Richards presents additional argument and citations in support of these issues. He also challenges the district court's § 924(c) instruction on grounds additional to those identified by counsel, *see* Aplt. Resp. at 6-8; contends that he received insufficient prior notice of the basis on which the district court predicated its upward departure, *see id.* at 10; and argues that "personal use" marijuana was improperly counted against him in deriving the base offense level used at sentencing, *see id.* at 11. Finally, he makes claims of ineffective assistance of trial counsel, which cannot be considered in this direct appeal. *United States v. Galloway*, 56 F.3d 1239, 1240 (10th Cir. 1995).

When defense counsel files an *Anders* brief, we are required to conduct "a full examination of all the proceedings, to decide whether the case is wholly frivolous." *Anders*, 386 U.S. at 744. After reviewing counsel's helpful and excellent brief and the additional brief filed by Mr. Richards, and having conducted the examination required by *Anders*, we agree with counsel that Mr. Richards has no non-frivolous grounds he could raise on appeal.

We therefore GRANT counsel's motion to withdraw and DISMISS the appeal. Mr. Richards' motion for appointment of counsel is DENIED. We also DENY Mr. Richards' "Motion for New Deadline," filed May 18, 2012. The panel has reviewed the trial transcript and found no colorable basis for arguments not already presented.

Entered for the Court

Monroe G. McKay
Circuit Judge