FILED
United States Court of Appeals
Tenth Circuit

October 28, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DANIEL RAY DACE,

Defendant - Appellant.

No. 20-1343
(D.C. No. 1:16-CR-00383-RBJ-1)
(D. Colo.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, Chief Judge, **KELLY**, and **HOLMES**, Circuit Judges.

Daniel Ray Dace pleaded guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Two years later, the Supreme Court held in *Rehaif v. United States*, 139 S. Ct. 2191, 2199-2200 (2019), that an element of a § 922(g) offense requires that the defendant knew his prohibited status—here, that Mr. Dace was a felon—at the time he possessed the firearm. Based on *Rehaif*, Mr. Dace moved to vacate his conviction and sentence under 28 U.S.C. § 2255,

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

claiming his guilty plea was invalid because he was not advised that knowledge of his status is an element of the offense. The district court initially granted the motion but then denied it on reconsideration, ruling the claim was procedurally defaulted. Nonetheless, the court granted a certificate of appealability (COA), and Mr. Dace appealed. Exercising jurisdiction under 28 U.S.C §§ 1291 and 2255(d), we affirm.

I

Mr. Dace was arrested on an outstanding warrant during a traffic stop. He was a passenger in the vehicle, had over $1,800 on his person, and initially gave police a fictitious name. A consensual search of the vehicle turned up two firearms, a digital scale, hundreds of plastic baggies, and 331 grams of methamphetamine. Mr. Dace later called his mother from jail and during a recorded conversation told her to "go get my guns," which he intended to sell. R., vol. 1 at 17 (internal quotation marks omitted). Based on that call, police obtained a warrant for his mother's home, where they recovered seven additional firearms, all of which Mr. Dace admitted were his. He also admitted that the drugs and guns recovered during the traffic stop were his and that he sold the drugs for "pure profit." *Id.* (internal quotation marks omitted). At the time of his arrest, Mr. Dace had been previously convicted of a felony for which he received a deferred sentence and served no prison time.

Based on these circumstances, Mr. Dace pleaded guilty to two counts of possession of a firearm by a previously convicted felon in violation of §§ 922(g)(1) and 924(a)(2), one count of possession of a controlled substance with intent to distribute in violation of 21 U.S.C. § 841(a)(1), (b)(1)(B)(viii), and one count of

possession of a firearm during and in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A). The plea agreement stated the elements of a § 922(g)(1) violation as follows:

> *First*: the Defendant knowingly possessed a firearm.
>
> *Second*: the Defendant was convicted of a felony, that is, a crime punishable by imprisonment for a term exceeding one year, before he possessed the firearm; and
>
> *Third*: before the Defendant possessed the firearm, the firearm had moved at some time from one state to another.

R., vol. 1 at 12-13.

At the change of plea hearing, the district court advised Mr. Dace that the elements of § 922(g)(1) required: "first . . . that you knowingly possessed a firearm; second, that you were convicted of a felony before you possessed the firearm; and, third, that th[e] firearm had moved at some point in interstate commerce." R., vol. 3 at 9. Mr. Dace did not object to the advisement, and he admitted he was guilty of a crime with these elements. The district court accepted his guilty plea and sentenced him to 108 months in prison on the trafficking count, concurrent with 108 months each on the two § 922(g) counts, and consecutive to a mandatory minimum term of 60 months on the § 924(c) count, for an aggregate sentence of 168 months in prison. Mr. Dace unsuccessfully challenged the substantive reasonableness of his sentence on direct appeal, but he did not challenge the validity of his plea. *See United States v. Dace*, 720 F. App'x 961, 962, 964 (10th Cir. 2018).

When the district court advised Mr. Dace on the elements of a § 922(g) violation, the law did not require the government to prove he knew his status as a felon to obtain a conviction. *See, e.g.*, *United States v. Silva*, 889 F.3d 704, 711 (10th Cir. 2018). Two years later, however, the Supreme Court held in *Rehaif* that a defendant's knowledge of his prohibited status is an element of § 922(g). 139 S. Ct. 2199-2200. Thus, based on *Rehaif*, Mr. Dace filed his § 2255 motion, claiming his guilty plea should be vacated because the district court failed to accurately advise him on the nature of the offense.[1]

The district court initially granted the motion but then denied relief on the government's request for reconsideration. The court determined that Mr. Dace's *Rehaif* claim was procedurally defaulted because he failed to raise it on direct appeal, and although he had cause for failing to raise the claim, he could not show prejudice to excuse the default. The court acknowledged that his previous felony conviction resulted in a deferred sentence and no prison time, but the court also recognized that he did not dispute that he was informed under Colorado Rule of Criminal Procedure 11(b)(4) of the potential penalty he faced when he pleaded guilty to his prior felony.[2] Given this advisement under Colorado law, the court determined the government would have faced only "slight evidentiary difficulties" proving the *Rehaif* element.

[1] We assume without deciding that *Rehaif* applies retroactively in an initial § 2255 motion.

[2] The court noted, however, that the record does not conclusively establish that he received the advisement.

R., vol. 1 at 90. Moreover, the court noted that Mr. Dace agreed that his "primary concern" in negotiating his plea agreement "was limiting his eventual sentence, which was driven entirely by the drug charge and the § 924(c) charge." *Id.* (internal quotation marks omitted). Indeed, "[he] admit[ted] that the § 922(g) convictions did not affect the sentencing range," and thus the court was unconvinced that "he would have fought including those charges in his plea agreement." *Id.* (brackets and internal quotation marks omitted). Consequently, the court concluded that Mr. Dace failed to show a reasonable probability that he would have gone to trial on the § 922(g) charges but for the *Rehaif* error and, therefore, he could not establish prejudice to excuse the procedural default. Nonetheless, the court issued a COA, and Mr. Dace appealed.

II

"In a § 2255 appeal, we review the district court's findings of fact for clear error and its conclusions of law de novo." *United States v. Lewis*, 904 F.3d 867, 870 (10th Cir. 2018) (internal quotation marks omitted). "A plea of guilty is constitutionally valid only to the extent it is voluntary and intelligent." *Bousley v. United States*, 523 U.S. 614, 618 (1998) (internal quotation marks omitted). "[A] plea does not qualify as intelligent unless a criminal defendant first receives real notice of the true nature of the charge against him." *Id.* (internal quotation marks omitted). Nonetheless, the "intelligence of a guilty plea can be attacked on collateral review only if first challenged on direct review." *Id.* at 621. Failure to raise a claim on direct appeal results in procedural default, which precludes relief on habeas

review unless "the defendant can first demonstrate [both] cause and actual prejudice." *Id.* at 621-22 (internal quotation marks omitted).[3]

We need not decide whether Mr. Dace can show cause because he cannot establish he was prejudiced by the district court's failure to advise him under *Rehaif*. *See United States v. Frady*, 456 U.S. 152, 168 (1982) (declining to consider cause because petitioner could not show prejudice). Prejudice requires "an error of constitutional dimensions that worked to his actual and substantial disadvantage." *United States v. Snyder*, 871 F.3d 1122, 1128 (10th Cir. 2017) (internal quotation marks omitted). The mere "possibility of prejudice" is not enough to excuse a procedural default. *Frady*, 456 U.S. at 170 (italics omitted). A movant must show "there is a reasonable probability that, but for [the error], he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). A movant may establish prejudice with "evidence tending to show that had he been advised [properly], he would have elected to proceed to trial." *United States v. Harms*, 371 F.3d 1208, 1212 (10th Cir. 2004).

Mr. Dace fails to meet his burden. *See Frady*, 456 U.S. at 170 (recognizing it is the movant's burden to show prejudice). He does not contend that he would have presented evidence that he did not know he was a felon. *See Greer v. United States*, 141 S. Ct. 2090, 2097 (2021) (holding that on plain-error review, if a defendant does not argue that he would have presented evidence that he did not know he was a felon,

[3] A movant may also assert his actual innocence, *see United States v. Hisey*, 12 F.4th 1231, 1235 (10th Cir. 2021), but Mr. Dace asserts no such theory.

"the appellate court will have no reason to believe that the defendant would have presented such evidence to a jury, and thus no basis to conclude that there is a 'reasonable probability' that the outcome would have been different absent the *Rehaif* error"). Instead, Mr. Dace first contends that we may infer he would not have pleaded guilty but for the *Rehaif* error because the government's evidence was "extremely weak." Aplt. Br. at 11. He points out that he received only a deferred sentence for his prior felony and never went to jail, so the government might have had difficulty proving he knew he had been previously convicted of a crime punishable by more than a year in prison. There are at least two problems with this argument.

First, by relying on what Mr. Dace says is the government's "extremely weak" evidence, *see id.*, Mr. Dace attempts to improperly shift the burden to the government to show he would *not* have gone to trial but for the *Rehaif* error. But on collateral review, it is his burden—not the government's—to show a reasonable probability that he would have gone to trial but for the *Rehaif* error. *See Hill*, 474 U.S. at 59; *Frady*, 456 U.S. at 170. Thus, even if the government may have had some difficulty proving he knew he was a felon, that alone does not establish a reasonable probability that he would have gone to trial.

Second, contrary to Mr. Dace's assertion, the government's evidence on the *Rehaif* element was not weak. The district court determined the government would have faced only "slight evidentiary difficulties" proving he knew he was a felon because Colorado Rule of Criminal Procedure 11(b)(4) conditioned the state court's

acceptance of his guilty plea to his prior felony on the state court's advisement of the potential penalties he faced and his confirmation that he understood those penalties. R., vol. 1 at 90. Mr. Dace does not deny that the state court complied with this rule. Instead, he asserts the district court overemphasized the probative weight of the advisement, which he may not have remembered two years later when he was arrested with the guns during the traffic stop. But the Supreme Court recently explained, in evaluating a pair of *Rehaif* claims under the plain-error standard governing unpreserved claims raised on direct appeal, that a felon's faulty memory is usually insufficient to establish he did not know he was a felon:

> In a felon-in-possession case where the defendant was in fact a felon when he possessed firearms, the defendant faces an uphill climb in trying to satisfy the substantial-rights prong of the plain-error test based on an argument that he did not know he was a felon. The reason is simple: If a person is a felon, he ordinarily knows he is a felon. Felony status is simply not the kind of thing that one forgets. That simple truth is not lost upon juries. Thus, absent a reason to conclude otherwise, a jury will usually find that a defendant *knew* he was a felon based on the fact that he *was* a felon.

Greer, 141 S. Ct. at 2097 (internal quotation marks and citation omitted).

Mr. Dace does not deny that he was properly advised under Colorado law that his predicate conviction was a felony. He admitted he had been convicted of a felony when he pleaded guilty to the § 922(g) violation. He has offered no evidence indicating he did not know he was a felon when he possessed the guns. *See id.* at 2098 (noting defendants did not argue or represent "that they would have presented evidence at trial that they did not in fact know they were felons when they possessed firearms"). And his burden on collateral review is even more onerous than the

"difficult" plain-error standard that governed in *Greer*, 141 S. Ct. at 2097 (internal quotation marks omitted). *See United States v. Bailey*, 286 F.3d 1219, 1222-23 (10th Cir. 2002) (concluding that appellant could not show actual prejudice for purposes of obtaining collateral relief where he failed to satisfy the less onerous standard of plain-error review). Thus, his unsupported assertion that he may not have remembered he was a felon is insufficient to show a reasonable probability he would have gone to trial but for the *Rehaif* error.

Even still, Mr. Dace contends he might have negotiated a more favorable plea agreement if he had been advised the government was required to prove he knew he was a felon. He says the § 922(g) counts did not affect his guideline range and thus the *Rehaif* element would have given him additional leverage to negotiate a plea that excluded those counts. But whatever leverage he might have had based on the *Rehaif* element would have been undermined by the advisement he should have received regarding the potential penalties he faced when he pleaded guilty to his prior felony in state court. And in any event, the record indicates he was not concerned with negotiating a plea agreement that excluded the § 922(g) counts. Rather, the district court determined that "his primary concern was limiting his eventual sentence, which was driven entirely by the drug charge and the § 924(c) charge." R., vol. 1 at 90 (internal quotation marks omitted). Indeed, Mr. Dace acknowledges that his sentencing range was "driven by the drug charge . . . and the § 924(c) count," Aplt. Br. at 13, and the evidence on those counts was overwhelming. Mr. Dace admitted the guns and drugs recovered during the traffic stop were his and that he was selling

the methamphetamine for profit. He also "admit[ted] that the § 922(g) convictions did not affect the sentencing range at all." R., vol. 1 at 90 (brackets and internal quotation marks omitted). Given these circumstances, the district court questioned why he would have sought to exclude the § 922 counts from his plea agreement. Mr. Dace cites no evidence suggesting a reasonable probability that he would have. At the same time, by accepting the plea agreement with the § 922(g) counts, Mr. Dace realized a substantial benefit because the government agreed to a three-level reduction in his offense level and to recommend a sentence no greater than fifteen years. This reduced his overall exposure from 151-188 months in prison (plus the mandatory consecutive 60-month term for the § 924(c) count) to 108-135 months (plus the 60 months). And the fact that he accepted the plea agreement with the § 922(g) counts believing they did not affect his guideline range confirms that his principal motivation was to reduce his overall sentence, which he admits was driven by the drug charge and the § 924(c) count.

Nonetheless, Mr. Dace contends the district court improperly discounted his interests in trying to exclude the § 922(g) counts from his plea. He says they were likely aggravating factors in the district court's sentencing analysis under 18 U.S.C. § 3553(a) and he faced the possibility of consecutive terms if convicted. But he also must have considered the three-point reduction in his offense level that he obtained by pleading guilty, which substantially lowered his sentencing range. The district court would have specifically accounted for this lower guideline range in its § 3553(a) analysis. *See* 18 U.S.C. § 3553(a)(4). The district court also would have

considered the government's concession not to recommend a sentence greater than fifteen years in prison. Nothing about these sentencing considerations suggests the *Rehaif* error altered Mr. Dace's motivation for pleading guilty. Thus, he fails to show a reasonable probability that, but for the error, he would not have pleaded guilty. It follows, then, that Mr. Dace cannot establish prejudice to excuse his procedural default.[4]

III

Accordingly, the judgment of the district court is affirmed.[5]

Entered for the Court

Jerome A. Holmes
Circuit Judge

[4] Mr. Dace seeks to preserve an argument that failure to advise a defendant under *Rehaif* is structural error warranting automatic reversal. However, this argument is foreclosed by *Greer*, which held that "*Rehaif* errors fit comfortably within the general rule that a constitutional error does not automatically require reversal of a conviction," 141 S. Ct. at 2100 (internal quotation marks omitted).

[5] In light of our disposition, we need not consider the parties' harmless-error arguments.