NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued November 18, 2022
Decided December 23, 2022

Before

MICHAEL B. BRENNAN, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

JOHN Z. LEE, *Circuit Judge*

No. 21-2544

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FRANCISCO RODRIGUEZ
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 1:17-CR-00802(1)

Ronald A. Guzman,
Judge.

O R D E R

After Francisco Rodriguez pleaded guilty to possessing a firearm as a felon, the district court sentenced him to 15 years in prison, finding that Rodriguez had committed at least three prior violent felonies on different occasions, thereby triggering the Armed Career Criminal Act ("ACCA"). 18 U.S.C. § 924(e)(1). On appeal, Rodriguez argues that the district court's application of the ACCA violates his Sixth Amendment rights, because (1) the indictment did not allege the three prior violent felonies, and (2) whether he had committed these felonies on different occasions was something that a jury needed to decide. Because Rodriguez waived any objection to the indictment and

he conceded at sentencing that he had committed three different violent felonies on separate occasions, we affirm.

The government charged Rodriguez in 2018 with possessing a firearm after being convicted of a crime punishable by imprisonment for a term exceeding one year in violation of 18 U.S.C. § 922(g)(1) and for violating the ACCA. The ACCA imposes a 15-year minimum sentence for violations of § 922(g) if the offender previously committed three or more serious drug offenses or violent felonies on "different" occasions. 18 U.S.C. § 924(e)(1).

Rodriguez pleaded guilty to the violation of 18 U.S.C. § 922(g)(1) for unlawful possession. During the plea colloquy, the government restated its position from the indictment that Rodriguez "is subject to an enhanced penalty under 18 U.S.C. § 924(e)." The district court then discussed with Rodriguez the impact that the ACCA could have on his sentence. It explained that, while the maximum custodial penalty under 18 U.S.C. § 922(g)(1) was ten years, if the court found that Rodriguez qualified for a sentencing enhancement under the ACCA, the minimum period of imprisonment would be 15 years. After acknowledging that he understood this, Rodriguez pleaded guilty to the unlawful possession charge.

The probation office then prepared a presentence investigation report in anticipation of sentencing. The report asserted that Rodriguez qualified for the enhancement under the ACCA because he had four prior convictions for violent felonies committed on different occasions. Those prior felonies were aggravated robbery in 2004, aggravated battery in 2007 and 2010, and aggravated unlawful restraint in 2014. For each crime, the victims and locations varied.

In his sentencing memorandum, Rodriguez argued that imposing the ACCA's enhancement would violate his Sixth Amendment rights in two ways. First, according to Rodriguez, the Sixth Amendment requires the government to specifically allege his prior violent crimes in the indictment, which it did not do. Second, as he sees it, the Sixth Amendment leaves it up to the jury (not the judge) to determine whether he had committed those prior crimes on different occasions.

That said, at the sentencing hearing, the district court asked Rodriguez whether he disagreed with the assertion in the presentence report that he had committed his offenses on different occasions. His counsel replied "[n]o, we do not object to the facts," and agreed that "the offenses were separate offenses." Based on those concessions, the

court found that Rodriguez had committed violent felonies on at least three different occasions and concluded that the ACCA applied. The court then sentenced Rodriguez to 15 years in prison and five years of supervised release.

On appeal, Rodriguez again asserts that the Sixth Amendment requires that the government specifically allege the prior convictions in the indictment. He also reprises his argument that a jury must find that those offenses were committed on at least three different occasions.

We first address the government's contention that Rodriguez waived these Sixth Amendment challenges. Waiver occurs when a defendant intentionally relinquishes a known right. *United States v. Robinson*, 964 F.3d 632, 639–40 (7th Cir. 2020). By pleading guilty, Rodriguez waived his challenge to factual deficiencies in the indictment. *See United States v. Dowthard*, 948 F.3d 814, 817 (7th Cir. 2020); *United States v. Covelli*, 738 F.2d 847, 862 (7th Cir. 1984). Rodriguez counters that he had no occasion to object to the indictment as to the applicability of the ACCA, because he pleaded guilty only to violating 18 U.S.C. § 922(g)(1). But this is incorrect.

At the plea hearing, the government reiterated its position that the ACCA applied to Rodriguez. And the district court warned him that, by pleading guilty, he could receive an enhanced sentence under the ACCA. Despite this, Rodriguez pleaded guilty without raising any objection to any factual defects in the indictment. Thus the objection is waived.

The government also believes that Rodriguez waived his argument that a jury needed to decide whether he had committed his past felonies on separate occasions. But, even assuming Rodriguez had preserved this argument, it is unavailing.

The lack of a jury finding for a sentencing enhancement is harmless if it is clear beyond a reasonable doubt that a jury would have found the facts anyway. *See, e.g.*, *United States v. Hollingsworth*, 495 F.3d 795, 800, 806 (7th Cir. 2007) (applying harmless-error standard to judge-made findings that violated the Sixth Amendment right set out in *Apprendi v. New Jersey*, 530 U.S. 466 (2000)). Here, the record would necessarily convince a reasonable jury that Rodriguez had committed his prior offenses on different occasions.

First, Rodriguez conceded as much. When the district court asked Rodriguez if he disagreed with the assertion that he committed his prior offenses on different

occasions, his counsel stated that the defense did not. Defense counsel also acknowledged that "the offenses were separate offenses." These concessions remove the issue from reasonable dispute. *See Robinson*, 964 F.3d at 638–39; FED. R. CRIM. P. 32(i)(3)(A).

Second, the prior crimes noted in the presentence report involved unrelated conduct (robbery, battery, unlawful restraint) and targeted different victims at different locations. On this record, such material differences in timing, proximity, and character render the offenses separate. *Wooden v. United States*, 142 S. Ct. 1063, 1070–71 (2022).

Rodriguez replies that, even if the district court's error (assuming an error was committed) was harmless, the Sixth Amendment requires resentencing. But he cites no cases suggesting that a judge must resentence a defendant for a harmless Sixth Amendment rights violation arising from the lack of a jury's findings on otherwise uncontested facts. Nor are we aware of any. Thus, because any Sixth Amendment rights violation was harmless, Rodriguez is not entitled to relief.

AFFIRMED