

**NONPRECEDENTIAL DISPOSITION**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 August 1, 2023

Decided September 22, 2023

**Before**

DIANE P. WOOD, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

No. 22-2005

UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*

*v.*

JAYLIN BERTRAM,  
*Defendant-Appellant.*

Appeal from the United States District  
Court for the Southern District of  
Indiana, Indianapolis Division.

No. 1:20-CR-00093-002

Tanya Walton Pratt,  
*Chief Judge.*

**ORDER**

Jaylin Bertram appeals his criminal conviction for carrying a firearm during and in relation to a drug trafficking crime. *See* 18 U.S.C § 924(c)(1). He argues that the district court plainly erred by accepting his guilty plea when the government had not established a factual basis for the carrying charge. *See* FED. R. CRIM. P. 11(b)(3). Despite some missteps by the government, the record when the court entered judgment established a sufficient factual basis for Bertram’s plea. Bertram has not shown that the court plainly erred, nor attempted to demonstrate how such an error affected his substantial rights. Thus, we affirm the judgment.

In January 2020, Indianapolis police officers searched a residence where Bertram and another person were staying. They found firearms in Bertram's bedroom and in a car parked in the driveway; Bertram's fingerprints were on the magazine of one of the guns in the car. Officers also recovered delta-9-tetrahydrocannabinol (THC) liquid and wax, cartridges, and packaging material, as well as DVR footage of Bertram melting the THC, pouring the liquid into cartridges, and "possess[ing] a firearm while" preparing the cartridges for distribution.

In a superseding indictment, the United States charged Bertram with, among other offenses, "carrying a firearm ... during and in relation to a drug trafficking crime." 18 U.S.C. § 924(c)(1). Bertram petitioned to plead guilty to all the charges without a plea agreement. He asserted that he had read the indictment, discussed it with his attorney, and understood the charges against him. The court then ordered a PSR and scheduled a change-of-plea and sentencing hearing.

At the hearing, the district court conducted a thorough plea colloquy, during which Bertram agreed that "we have a factual basis" for the plea. The court noted that the carrying charge had as an element that Bertram "knowingly carried a firearm during and in relation to" his drug trafficking crime. Bertram admitted that the government could prove that element beyond a reasonable doubt.

The government then proffered a factual basis for Bertram's plea. It recounted the search of the residence and the guns found in Bertram's room and the car. Discussing the DVR footage that was summarized in the presentence investigation report, the government stated that Bertram "*possessed* a Glock firearm while engaged in the packaging of the THC cartridges for distribution, *possessing* the firearm during and in relation to his drug trafficking crime" (emphasis added). The court asked Bertram whether he heard the factual basis and whether it was true and accurate; Bertram agreed. The court then asked whether Bertram would like to change or correct anything about the factual basis; he declined.

After the court accepted Bertram's guilty plea and moved to sentencing, the government proffered more facts about Bertram's conduct. The government noted that the video evidence obtained during the search showed that Bertram "constantly had firearms" and was "essentially continuously in possession of firearms." The government further explained that the video showed Bertram accompanying his co-defendant "with some of the product out of the residence and also carrying firearms out of the residence ... as well as during the packaging."

The court sentenced Bertram to concurrent 55-month terms of imprisonment on his drug trafficking and felon-in-possession charges (which are not at issue on appeal), and the mandatory 60 months' imprisonment on his carrying charge, to be served consecutively. 18 U.S.C. § 924(c)(1)(A)(i). After the hearing, the court entered judgment on Bertram's guilty plea. Bertram did not raise any errors with the district court either during or after the hearing, nor did he move to withdraw his plea.

Bertram appeals, arguing that the district court plainly erred by accepting his guilty plea on the carrying charge without first establishing a factual basis for the plea. Because Bertram did not move to withdraw his guilty plea, this court reviews the conviction for plain error. *United States v. Arenal*, 500 F.3d 634, 637 (7th Cir. 2007). Under that standard, Bertram must show that the court obviously erred, and that the error had a prejudicial effect on the outcome. *United States v. Dominguez Benitez*, 542 U.S. 74, 81 (2004). Put differently, because he did not raise these issues in the district court, he must now show "a reasonable probability that, but for the error, he would not have entered the plea." *Id.* at 76; *see also Arenal*, 500 F.3d at 639. When those three requirements are met, we have discretion to grant relief if the error had "a serious effect on the fairness, integrity or public reputation of judicial proceedings." *Greer v. United States*, 141 S. Ct. 2090, 2096–97 (2021) (cleaned up).

Bertram homes in on the government's use of "possess" and "carry" interchangeably throughout the proceedings. More than "an ill-timed slip of the tongue," as the government would have it, the prosecution appears to have conflated two different ways to violate 18 U.S.C. § 924(c)(1): carrying a firearm "during and in relation to" a predicate crime, and possessing a firearm "in furtherance of" the same. *United States v. Haynes*, 582 F.3d 686, 704 (7th Cir. 2009), *abrogated on other grounds by United States v. Vizcarra*, 668 F.3d 516 (7th Cir. 2012).

But the prosecutor's error is not the court's, and it does not follow from the government's misstatements that a factual basis was lacking. Although Bertram implies confusion on whether "possessing" and "carrying" are different elements, he does not argue that his plea was not knowing. Further, although Bertram focuses on the record when the court accepted his plea, the court may look past the plea colloquy and consider any facts to which a defendant assented or did not object. *United States v. Muratovic*, 719 F.3d 809, 812 (7th Cir. 2013). The court need establish a factual basis only "before entering judgment on a guilty plea." FED. R. CRIM. P. 11(b)(3).

The record contained ample factual support for Bertram's plea before the court entered judgment. The government described, without dispute from Bertram, officers'

recovery of firearms and a magazine with Bertram's fingerprints from a car parked in the driveway of the residence where Bertram and his accomplice prepared drugs for distribution. The government also stated, again without dispute, that videos showed Bertram "handling a firearm." After this discussion of the evidence, the district court imposed its sentence, and only then was there a "judgment." *Parr v. United States*, 351 U.S. 513, 517 (1956). Therefore, when the court entered judgment, the record established a factual basis for Bertram's guilty plea.<sup>1</sup>

Even if the district court did plainly err, Bertram has not shown that the error prejudiced him or that, but for the error, he would not have pled guilty. *See Dominguez Benitez*, 542 U.S. at 83. Section 924(c) criminalizes possessing and carrying firearms in different contexts, but punishes both with the same, mandatory 60-month sentence enhancement. 18 U.S.C. § 924(c)(1)(A)(i). Any confusion between them, then, cannot result in a different sentence. Bertram has not shown that the court plainly erred, much less that it affected his substantial rights or "the fairness, integrity, or public reputation of judicial proceedings." *Arenal*, 500 F.3d at 637.

In a letter citing additional authority, FED. R. APP. P. 28(j), Bertram argues for the first time that the court erroneously ordered a PSR and reviewed it before accepting his guilty plea. *See* FED. R. CRIM. P. 32(e)(1). But Bertram waived this argument by not raising it in his opening brief; parties may not use Rule 28(j) letters "to raise wholly new

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<sup>1</sup> In the interest of ensuring a complete record, we ordered the government to supplement the record with the DVR footage underlying the government's factual basis. *See* FED. R. APP. P. 10(e)(2)(c). The government submitted nearly 2TB of footage and Bertram's counsel has asked for guidance on how to view it. In resolving this appeal, however, we rely on the facts to which Bertram assented or did not object, *Muratovic*, 719 F.3d at 812, rather than an independent review of the footage. Bertram did not object to the descriptions of the video in the PSR, so the district court was entitled to rely on it. *See United States v. Gibbs*, 26 F.4th 760, 766 (7th Cir. 2022). And by not raising it in his opening brief, Bertram has waived any argument that the court erred in relying on the video descriptions. *United States v. Webster*, 775 F.3d 897, 904 (7th Cir. 2015). Finally, to the extent Bertram's counsel implies that the government sandbagged him with the footage, we note that the PSR and hearing transcript are replete with discussions of the extensive DVR recordings, and it does not appear that counsel ever sought these videos from the district court. *See* CIR. R. 10(a)(3) (placing burden on appellant's counsel to ensure complete record). In short, we have not reviewed the video and find it unnecessary to do so to resolve this appeal.

or different arguments.” *Spielga v. Hull*, 481 F.3d 961, 965 (7th Cir. 2007). Moreover, because Bertram did not raise this issue in the district court, our review would be limited to plain error. *Arenal*, 500 F.3d at 637. And again, Bertram does not argue that the error prejudiced him, arguing instead only that this error “compels reversal.” Without any prejudice, this court would not reverse on that basis.

AFFIRMED