

October 27, 2021

UNITED STATES COURT OF APPEALS  
TENTH CIRCUIT

Christopher M. Wolpert  
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JAMES KEITH RUSSEY,

Defendant - Appellant.

No. 20-6036  
(D.C. No. 5:19-CR-00264-PRW-1)  
(W.D. Okla.)

ORDER AND JUDGMENT\*

Before **HARTZ, SEYMOUR,** and **MURPHY,** Circuit Judges.

**I. Introduction**

Defendant, James Keith Russey, appeals the sentence he received after pleading guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). He raises two challenges in this appeal. First, he argues the district court plainly erred when it calculated his base offense level by counting a prior state drug conviction as a controlled substance offense. *See* USSG § 2K2.1(a). Second, he alleges the district court erroneously declined to make

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\*This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

necessary factual findings before adding four levels to his base offense level pursuant to USSG § 2K2.1(b)(6)(B).

Exercising jurisdiction under 28 U.S.C. § 1291, we **affirm** Russey's sentence.

## **II. Background**

On July 17, 2019, Russey was involved in a domestic disturbance with Rachel Alvey. The incident report prepared by the Oklahoma City Police Department is based on interviews with Alvey and states that the altercation began when Alvey asked Russey to remove his belongings from her residence. According to Alvey, Russey's possessions, including a box containing a black pistol, were on the bed when he arrived. By Alvey's account, Russey removed the firearm from the box and the two struggled over it. A shot was discharged from the firearm during the struggle and the bullet entered the bedframe and wall. Alvey told police Russey attempted to gain control of the pistol by biting her on the left forearm and striking her on the left side of her head. Alvey relinquished the firearm to Russey, and he left the residence with it.

Officers pursued Russey who attempted to evade them, first in his vehicle and then on foot. He was eventually apprehended and officers located the handgun in the front seat of his vehicle when they searched it. Based on the incidents of July 17, Russey was charged in a one-count federal indictment with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). He

was also charged in Oklahoma state court with (1) domestic assault with a dangerous weapon, (2) aggravated attempting to elude a peace officer, (3) felon in possession of a firearm, (4) possession of an offensive weapon while committing a felony, and (5) domestic abuse (assault and battery).

In the federal prosecution, Russey pleaded guilty to the felon-in-possession charge. The United States Probation Office prepared a presentence investigation report (PSR), recommending application of a base offense level of twenty-six on the grounds (1) the offense involved a semiautomatic firearm “capable of accepting a large capacity magazine” and (2) Russey committed the offense “subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense.” USSG § 2K2.1(a)(1). The PSR recommended a two-level enhancement under § 2K2.1(b)(4)(A) because the firearm was stolen and a four-level enhancement under § 2K2.1(b)(6)(B) because the offense of conviction was committed during the commission of another felony offense, i.e., assault and battery with a dangerous weapon. After reducing Russey’s offense level by three levels pursuant to §§ 3E1.1(a) & (b) for acceptance of responsibility, the PSR arrived at a total offense level of twenty-nine.

Russey objected to portions of the PSR. Relevant to the issue raised in this appeal, he challenged the application of the four-level enhancement pursuant to § 2K2.1(b)(6)(B), asserting he did not possess the firearm in connection with

another felony offense. According to Russey, Alvey was the aggressor in the altercation and shot him when he attempted to take the firearm from her. He further alleged he never pointed the firearm at Alvey or threatened her in any way. In its response, the government advocated for application of the four-level enhancement, arguing as follows:

Moreover, the application of § 2K2.1(b)(6)(B) does not hinge on whether the defendant is the one who shot the gun. It applies if the firearm facilitated or had the potential to facilitate another felony offense. This includes Domestic Assault with a Dangerous Weapon, Aggravated Attempting to Elude a Police Officer, Possession of an Offensive Weapon While Committing a Felony, and Domestic Abuse (Assault and Battery) After a Felony Conviction. Clearly, the evidence in this case supports the application of the four level enhancement in § 2K2.1(b)(6)(B) because the United States has proven by a preponderance of the evidence that the defendant's possession of a firearm facilitated, or at the very least had the potential of facilitating, any number of other felony offenses.

The government took the position any sentence less than the ten-year statutory maximum would be insufficient to meet the sentencing goals embodied in 18 U.S.C. § 3553(a).

At sentencing, the district court overruled Russey's objection to the four-level enhancement, concluding his possession of the firearm met the requirements of § 2K2.1(b)(6)(B) because it "facilitated, or had the potential of facilitating, another felony offense or another offense." *U.S. Sent'g Guidelines Manual* § 2K2.1(b)(6)(B) cmt. n.14(A). The district court stated its decision was primarily based on an information filed in Oklahoma state court charging Russey

with domestic assault with a dangerous weapon as a result of the altercation with Alvey. Russey disputed the account in the information, arguing his defense in the Oklahoma state proceeding “would be that the victim in this case is actually the person that had the gun. And [he] . . . had no idea where the gun was when he went into the residence.” Before overruling Russey’s objection, the district court stated:

I do think that we have a perfectly adequate factual basis for the application of this particular four-level increase. Everything I’ve seen in this case, regardless of exactly the timing of the possession of the firearm and regardless of who may or may not have been the initial aggressor in this altercation, we do have a factual basis that establishes that your client, I think, satisfies the elements of domestic assault with a dangerous weapon under state law and certainly even as we’ve characterized it in the presentence investigation report, you know, there was, it appears, an assault and battery here and a gun was involved.

After considering the parties’ other arguments and the extensive information in the PSR, the district court arrived at an offense level of twenty-nine and a criminal history category of III. The court sentenced Russey to 108 months’ incarceration, the low end of the advisory guidelines range of 108 to 135 months.<sup>1</sup>

In this appeal, Russey challenges application of the four-level enhancement and argues, for the first time, that the district court erred by using a prior state

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<sup>1</sup>Because the statutory maximum penalty for the offense of conviction is ten years, the applicable range was actually 108 to 120 months. *See* 18 U.S.C. § 924(a)(2).

felony conviction to calculate his base offense level.

### **III. Discussion**

#### *A. Base Offense Level Calculation*

Russey challenges the calculation of his base offense level, arguing the district court erroneously counted an Oklahoma drug conviction as a controlled substance offense. *See* USSG § 2K2.1(a). He acknowledges he failed to raise this argument below and, thus, it is reviewed for plain error. *See United States v. Faulkner*, 950 F.3d 670, 672 (10th Cir. 2019). To prevail under the plain error standard, Russey must establish “(1) an error occurred; (2) the error was plain; (3) the error affected his substantial rights; and (4) the error seriously affected the fairness, integrity, or public reputation of a judicial proceeding.” *Id.* (quotation and alteration omitted).

Russey’s base offense level was calculated pursuant to USSG § 2K2.1(a)(1), which sets out a base offense level of twenty-six for a defendant who possesses a gun with a large capacity magazine if he has at least two prior felony convictions for either crimes of violence or controlled substance offenses. At sentencing, Russey did not dispute the information in the PSR showing he was convicted of a prior crime of violence and, relevant to this appeal, an Oklahoma state controlled substance offense. Specifically, on January 31, 2018, Russey was convicted of possessing a controlled dangerous substance with intent to distribute

it, in violation of Okla. Stat. Ann. tit. 63, § 2-401(A)(1). Although Russey does not dispute the fact of this conviction, he argues it does not qualify as a controlled substance offense under § 2K2.1(a)(1).

According to Russey the definition of a “controlled substance offense” in § 4B1.2(b)<sup>2</sup> requires the substance possessed to be federally controlled under the Controlled Substances Act (“CSA”). He further argues that at the time of his drug conviction, Oklahoma law criminalized the possession of at least three substances that are not controlled by the CSA. Thus, he asserts, Okla. Stat. Ann. tit. 63, § 2-401 is overbroad and, because it is also indivisible under the categorical approach, this court must assume his prior Oklahoma drug conviction was for a substance not federally controlled. It is for this reason, he argues, the conviction fails to qualify as a “controlled substance offense” for purposes of § 2K2.1(a)(1).

Russey’s claim for relief fails at the first part of the plain error test. This court has recently rejected the argument that a prior state drug offense only qualifies as a controlled substance offense under § 4B1.2(b) if the state

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<sup>2</sup> The term “controlled substance offense” in § 2K2.1 “has the meaning given that term in § 4B1.2(b).” *U.S. Sent’g Guidelines Manual* § 2K2.1 cmt. n.1. A “controlled substance offense” is defined by the relevant Guideline as: “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 a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.” USSG § 4B1.2(b).

criminalizes the same controlled substances identified in the CSA. *United States v. Jones*, No. 20-6112, 2021 WL 4851812 (10th Cir. 2021). Accordingly, the district court did not err when it calculated Russey’s base offense level by treating his prior Oklahoma drug conviction as a predicate offense under § 2K2.1(a)(3).<sup>3</sup>

*B. Four-Level Enhancement*

Russey also argues the district court erred by applying the four-level enhancement set out in § 2K2.1(b)(B). The parties disagree over the nature of the alleged error. According to Russey, the district court erred by declining to make required factual findings before concluding the enhancement applied. It is unclear whether he advocates for de novo or clear error review of the issue. The government characterizes Russey’s challenge as procedural in nature. It argues the issue is reviewed only for plain error because Russey never raised a separate objection to the district court’s alleged failure to resolve the disputed facts. Russey counters that the plain-error cases on which the government relies are inapposite because the district court did not wholly fail to rule but, instead, reached the erroneous conclusion that the factual dispute was inconsequential and, thus, need not be resolved. *See* Fed. R. Crim. P. 32(i)(3)(B) (stating a sentencing court “must” rule on “any disputed portion of the presentence report

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<sup>3</sup>An error is plain if it is “clear or obvious at the time of the appeal.” *United States v. Salas*, 889 F.3d 681, 686-87 (10th Cir. 2018) (quotation omitted).



or other controverted matter . . . or determine that a ruling is unnecessary . . . because the matter will not affect sentencing”). It is unnecessary to resolve this disagreement over the standard of review because there was no error in the application of the four-level enhancement even under the do novo standard.

At the sentencing hearing, the parties discussed one of the pending charges against Russey in Oklahoma state court: domestic assault with a dangerous weapon. Russey told the district court his defense in that matter would be that Alvey was the person who first possessed the firearm. Russey also told the court he did not know the gun was underneath a pile of clothes in the bedroom when he arrived at the residence. Russey summed up his argument as follows: “[I]t’s all in how the gun first appeared in the residence, which is the crux of the four-point enhancement that the Court has before it today.” The district court disagreed with that synopsis, concluding the four-level enhancement applied “regardless of exactly the timing of the possession of the firearm and regardless of who may or may not have been the initial aggressor.”

On appeal, Russey asserts the district court was required to determine who first possessed the firearm and who was the initial aggressor because both issues are crucial to the question of whether his subsequent possession of the firearm facilitated the commission of the felony offense of domestic assault with a dangerous weapon. His appellate argument is similar to the one he made to the

district court:

[C]ritical to any determination of whether Mr. Russey committed the Oklahoma crime of domestic assault with a deadly weapon is the question of when Mr. Russey came to possess the firearm. If he took the firearm out of its box and started to point it at Ms. Alvey, as she claimed, then he was guilty of domestic assault with a dangerous weapon. But if she took the gun out of its box, and he merely took it from her and then from the house without ever threatening her with it or pointing it at her, as he claimed, then he was not guilty.

Russey’s appellate argument unwittingly highlights the actual “crux of the four-point enhancement.” And, as the district court concluded, it is not whether Russey or Alvey first possessed the firearm or whether Russey knew the firearm was on the bed when he entered the residence. It is whether Russey, while in possession of the firearm, assaulted Alvey. *See* Okla. Stat. Ann. tit. 21, § 644(D)(1) (“Any person who, with intent to do bodily harm and without justifiable or excusable cause, commits any assault, battery, or assault and battery upon an intimate partner or a family or household member as defined by Section 60.1 of Title 22 of the Oklahoma Statutes with any sharp or dangerous weapon, upon conviction, is guilty of domestic assault or domestic assault and battery with a dangerous weapon which shall be a felony . . . .”); *id.* § 641 (“An assault is any willful and unlawful attempt or offer with force or violence to do a corporal hurt to another.”). True, Russey denied engaging in behavior that satisfies the elements of domestic assault with a dangerous weapon, but the district court expressly stated it relied on the entire record to support its finding. That record

included police reports of interviews with Alvey, Russey, and a witness to the altercation; the description of the incident set out in the PSR; and the undisputed fact Russey was charged in Oklahoma state court with the crime of domestic assault with a dangerous weapon.

Russey does not fully explain why the timing of the possession is critical to the determination of whether the government proved by a preponderance of the evidence that he used the firearm in connection with the crime of domestic assault with a deadly weapon. Presumably, Russey could have wrested the firearm from Alvey and then threatened to use it to harm her.<sup>4</sup> Under that scenario, it is immaterial that Alvey possessed the weapon first. It would appear, therefore, that Russey's real complaint is that the district court did not find his version of the altercation credible, not that the court declined to resolve an isolated factual dispute. And, having reviewed the appellate record, we can discern no clear error in the district court's finding that the government met its burden of proving the four-level enhancement was appropriate.<sup>5</sup>

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<sup>4</sup>In a related appellate argument directed at the separate Oklahoma crime of domestic assault and battery, Okla. Stat. Ann. tit. 21, § 644(C), Russey states that his version of the facts, if accepted, would be a complete defense to that crime. Russey does not, however, direct this court to any part of the record showing this argument was made to the district court as to the crime of domestic assault with a dangerous weapon.

<sup>5</sup>Even assuming the district court erred in declining to resolve the factual dispute identified by Russey, any error in applying the four-level enhancement  
(continued...)

#### IV. Conclusion

The judgment of the district court is **affirmed**.

ENTERED FOR THE COURT

Michael R. Murphy  
Circuit Judge

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<sup>5</sup>(...continued)

was harmless. We take judicial notice of the public record in Case No. CF-2019-3397, District Court of Oklahoma County, Oklahoma, which shows that Russey pleaded guilty to the charge of domestic assault with a dangerous weapon on June 21, 2021. *See*

<https://www.oscn.net/dockets/GetCaseInformation.aspx?db=oklahoma&number=C F-2019-3397&cmid=3798519> (last visited Oct. 20, 2021). We further note Russey never disputed the facts set out in the PSR indicating he left Alvey's residence with the firearm and refused to pull his vehicle over when pursued by police. Officers later found the firearm in the vehicle. Based on those facts, he was charged with aggravated attempting to elude a peace officer, an additional Oklahoma felony to which he pleaded guilty on June 21, 2021. *See id.*