FILED
United States Court of Appeals
Tenth Circuit

July 7, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

OSHAY SHADON BROWN,

Defendant - Appellant.

No. 21-6175
(D.C. No. 5:20-CR-00277-G-1)
(W.D. Okla.)

ORDER AND JUDGMENT[*]

Before **McHUGH**, **EID**, and **CARSON**, Circuit Judges.

Reply briefs are optional. Briefing a potentially dispositive legal issue is not. This common-sense rule remains true even if an appellee asks us to affirm on an alternate ground in their response brief. Because our role is not to construct arguments for the litigants who appear before us, an appellant's failure to dispute a plausible reason to affirm the district court's decision leaves us with only one choice. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

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[*] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

I.

Chickasaw Nation Lighthorse Police Officer Sharon Wostal was patrolling outside the Goldsby Gaming Center, a casino owned by the Chickasaw Nation. Shortly after midnight, she noticed a black four-door sedan with mud and grass lodged in its tires and undercarriage, with more mud running down its sides. Suspecting that the sedan had recently been involved in an accident, she approached the car and peered inside with her flashlight. She noticed two alcoholic beverage containers (one open) behind the passenger seat. She also spotted a broken marijuana cigarette on the driver's side floorboard.

At this point, Officer Wostal called dispatch and reported the sedan. While she spoke with dispatch, Defendant Oshay Brown—the sedan's driver and an enrolled member of the Chickasaw Nation tribe—exited the casino and approached her. He began talking to Officer Wostal about the car, admitting to driving his car through a ditch when arriving at the casino. Officer Wostal noticed that he was slurring his words and that he had bloodshot, watery eyes. She also smelled alcohol coming from his person. She asked Defendant if he had a medical marijuana card and he told her that he did not.

After confirming Defendant did not have a medical marijuana card, Officer Wostal informed him that she would be conducting a probable cause search. Defendant asked her if he could retrieve the marijuana from his car himself. Officer Wostal declined his offer, citing officer safety concerns and the potential for evidence destruction. And after Defendant unlocked his car for her, Officer Wostal

immediately discovered a firearm in the driver-side door pocket. At that point, Officer Wostal asked Defendant if he was a felon. Defendant confirmed he was.

A federal grand jury ultimately indicted Defendant with one count of being a felon in possession in violation of 18 U.S.C. § 922(g)(1).[1] Defendant moved to suppress the firearm, claiming that Officer Wostal lacked probable cause to search the vehicle. The district court denied the motion. Defendant then agreed to waive his jury rights in favor of a bench trial based on stipulated evidence, subject to his right to appeal the district court's suppression ruling. After the bench trial, the district court found him guilty of the indictment's sole count.

After the court found Defendant guilty, the United States Probation Office ("USPO") provided the court with Defendant's presentence report ("PSR"). The PSR provided an advisory guideline range of 77 to 96 months' imprisonment, based in part on a base offense level of 24 under USSG § 2K2.1(a)(2). That provision of the sentencing guidelines increases the base offense level of a felon-in-possession conviction to 24 if Defendant has "at least two [prior] felony convictions of either a crime of violence or a controlled substance offense." USSG § 2K2.1(a)(2). The PSR cited three of Defendant's prior felony convictions in Oklahoma state court as § 2K2.1(a)(2) predicate convictions: (1) unlawful possession of a controlled dangerous

[1] The Chickasaw Nation also charged Defendant with three tribal offenses in tribal court—possession of a controlled dangerous substance, intoxication, and being intoxicated with a weapon.

substance (marijuana) with intent to distribute; (2) aggravated assault and battery; and (3) kidnapping.

Defendant objected to the USPO's use of these three convictions as USSG § 2K2.1 predicates.[2] First, Defendant argued that his Oklahoma marijuana conviction could not be a "controlled substance offense" under § 2K2.1(a)(2) because, at the time of the offense, Oklahoma included hemp within its controlled substance laws and the federal Controlled Substances Act, see 21 U.S.C. § 812 *et seq.*, did not. Second, Defendant argued that his Oklahoma conviction for aggravated assault and battery is not a "crime of violence" because individuals can commit aggravated assault and battery under Oklahoma law in two ways—when an individual inflicts "great bodily injury"; or when an individual "of robust health or strength" commits assault and battery upon a victim "who is aged, decrepit, or incapacitated." See Okla. Stat. tit. 21, § 646(A)(1), (2). According to Defendant, because Oklahoma charged him under both definitions and the second circumstance lacks the physical force necessary for a crime to be a "crime of violence" under the Guidelines, his aggravated assault and battery conviction could not be a § 2K2.1(a)(2) predicate. See USSG § 2K2.1(a)(2), § 4B1.2(a)(1); Okla. Stat. tit. 21, § 646(A)(1), (2). And lastly,

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[2] Defendant also broadly objected to the USPO considering any of his state convictions at sentencing, arguing that the Supreme Court voided all his Oklahoma convictions for lack of jurisdiction in McGirt v. Oklahoma, 140 S. Ct. 2452 (2020). The district court rejected this argument because Oklahoma's highest criminal court held that McGirt does not apply retroactively in State ex rel. Matloff v. Wallace, 497 P.3d 686, 689 (Okla. Crim. App. 2021). Defendant does not challenge that ruling on appeal.

Defendant argued that his Oklahoma conviction for kidnapping did not qualify as a "crime of violence" under § 2K2.1(a)(2) because one can commit kidnapping in Oklahoma without the use of any physical force. See USSG § 2K2.1(a)(2), § 4B1.2(a)(1); Okla. Stat. tit. 21, § 741.

The district court overruled Defendant's objections and concluded that the PSR properly considered Defendant's controlled substance and aggravated assault and battery convictions to be USSG § 2K2.1(a)(2) predicate felonies. And because § 2K2.1(a)(2) only requires two predicate convictions, the court declined to rule on whether Defendant's kidnapping charge constituted a "crime of violence" under the guidelines. But despite overruling Defendant's objections, the district court ultimately varied downward from the guideline range and sentenced Defendant to 48 months' imprisonment. Defendant timely appealed.

II.

Defendant challenges both his conviction and sentence. He first argues that the district court erroneously denied his motion to suppress because Officer Wostal lacked the probable cause to search his vehicle. He also argues that the district court erred by calculating his base offense level at 24 under USSG § 2K2.1.

We begin with Defendant's motion to suppress. When reviewing the denial of a motion to suppress, we review the legal question of reasonableness under the Fourth Amendment de novo. United States v. Smith, 531 F.3d 1261, 1265 (10th Cir. 2008). But when reviewing any disputed factual issues, we view the evidence in the light most favorable to the government and accept the district court's factual findings

unless clearly erroneous. Id. And when reviewing a district court's choice to believe witness testimony, we will only find error "if the events recounted by the witness were impossible 'under the laws of nature' or the witness 'physically could not have possibly observed' the events at issue." United States v. Cardinas Garcia, 596 F.3d 788, 794 (10th Cir. 2010) (quoting United States v. Oliver, 278 F.3d 1035, 1043 (10th Cir. 2001)). For that reason, credibility determinations are "virtually unreviewable on appeal." Id. at 795 (10th Cir. 2010) (quoting United States v. Virgen–Chavarin, 350 F.3d 1122, 1134 (10th Cir. 2003)).

Yet Defendant's only argument related to his motion to suppress is that the district court should not have believed Officer Wostal's testimony. He contends that Officer Wostal could not have possibly seen a "green leafy substance" on the car's floorboard when looking through the car's heavily tinted windows at night with a flashlight. In response, the government submits that surveillance video from casino security cameras proves that the interior of the vehicle was visible through the driver's side window, even without a flashlight.

Defendant offers no reply. Indeed, Defendant does not attempt to explain how his car's windows were so dark that Officer Wostal could not have seen through them with her flashlight in a well-lit parking lot. Nor does Defendant address the casino security footage. We affirm the district court's denial of Defendant's motion to suppress.

We turn next to Defendant's challenge to his sentence. The parties initially raised three issues. First, Defendant argued that the district court plainly erred by

holding that his marijuana conviction was a § 2K2.1(a)(2) controlled-substances predicate because Oklahoma legalized his conduct after his conviction but before his sentencing.[3] Second, Defendant contended that the district court erred by concluding that Defendant's aggravated assault and battery conviction satisfied the § 2K2.1(a)(2) crime-of-violence definition. Then, the government raised an alternative basis to support the district court's sentencing calculation—arguing that Defendant's kidnapping conviction also qualified as a "crime of violence" under § 2K2.1(a)(2). See Richison v. Ernest Grp., Inc., 634 F.3d 1123, 1130 (10th Cir. 2011) ("We have long said that we may affirm on any basis supported by the record, even if it requires ruling on arguments not reached by the district court."). Accordingly, the government urged us to uphold Defendant's sentence if we concluded that any two of Defendant's three disputed convictions constituted valid § 2K2.1(a)(2) predicates.

After the parties completed their briefing but before oral argument, both sides filed supplemental notices making certain concessions based on recently published decisions. On one hand, Defendant now concedes that United States v. Harbin, 56 F.4th 843, 851 (10th Cir. 2022), forecloses his argument that the district court plainly erred in determining that his Oklahoma marijuana conviction qualified as a

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[3] Defendant argues for plain error, as he must, because he failed to preserve his timing argument below. See United States v. Rosales-Miranda, 755 F.3d 1253, 1257 (10th Cir. 2014). Defendant also re-urges a different argument he advanced below—that we should interpret the term "controlled substance offense" to only include controlled substance offenses under federal law. But, as he concedes, his interpretation fails under binding precedent. See United States v. Jones, 15 F.4th 1288, 1292 (10th Cir. 2021) (holding that the term "controlled substance offense" includes controlled substances under state and federal law).

controlled substance offense under the Guidelines. And on the other hand, the government now concedes that under United States v. Winrow, 49 F.4th 1372, 1382 (10th Cir. 2022), Defendant's Oklahoma conviction for aggravated assault and battery cannot qualify as a "crime of violence" under § 2K2.1(a)(2).

Thus, the success of Defendant's challenge to his sentence comes down to whether his kidnapping conviction offers us a proper alternate ground to affirm the district court's use of § 2K2.1(a)(2). The government thoroughly argued that it does.[4] Defendant, however, failed to brief this issue. Instead, he merely advises us in a 28(j) letter that "[r]emand is appropriate" because "the trial court declined to decide that issue."[5]

Defendant's cursory remand request ignores the longstanding principle that appellate courts do not reverse trial judges when they reach the right result for the

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[4] The government argues that Defendant's Oklahoma conviction is a crime of violence because the guidelines expressly list "kidnapping" as a crime of violence in the enumerated offenses clause. See USSG § 4B1.2(a)(2). Though that provision does not define kidnapping, the government submits that any definition of kidnapping we adopt should be broad enough to include the federal crime of kidnapping codified at 18 U.S.C. § 1201. Because the Oklahoma kidnapping crime categorically matches the federal kidnapping crime, the government continues, Defendant's Oklahoma conviction must be a "crime of violence" under the guidelines.

[5] The term 28(j) letter refers to Federal Rule of Appellate Procedure 28(j):

> Citation of Supplemental Authorities. If pertinent and significant authorities come to a party's attention after the party's brief has been filed—or after oral argument but before decision—a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations.

F. R. App. P. 28(j).

wrong legal reason. "The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground." SEC v. Chenery Corp., 318 U.S. 80, 88 (1943); see also Richison, 634 F.3d at 1130. By failing to respond to the government's argument that Defendant's kidnapping conviction supported the district court's use of § 2K2.1(a)(2), Defendant waived any non-obvious objections he may have had to the government's analysis. See Hasan v. AIG Prop. Cas. Co., 935 F.3d 1092, 1099 (10th Cir. 2019) (citing Hardy v. City Optical Inc., 39 F.3d 765, 771 (7th Cir. 1994)). Because we see no obvious flaws in the government's position on this complex legal issue, we hold that the district court committed no reversible error when it calculated Defendant's guideline sentence.

AFFIRMED.

Entered for the Court

Joel M. Carson III
Circuit Judge