FILED
United States Court of Appeals
Tenth Circuit

September 12, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BRADLEY DEAN JACKSON,

Defendant - Appellant.

No. 21-8054
(D.C. No. 1:20-CR-00066-ABJ-1)
(D. Wyo.)

ORDER AND JUDGMENT*

Before **HARTZ**, **BACHARACH**, and **EID**, Circuit Judges.

A grand jury issued a two-count indictment against Bradley Dean Jackson relating to the possession of firearms. Jackson pleaded not guilty to both charges. Later, Jackson decided to plead guilty to being a felon in possession of a firearm without a plea agreement, and the district court conducted a plea colloquy where Jackson admitted to the unlawful possession of two shotguns. After a trial, the jury acquitted Jackson on the second felon-in-possession charge; Jackson proceeded to sentencing on the first charge. At sentencing, the court applied an initial base offense level of 20 under U.S.S.G. § 2K2.1(a)(4)(A), finding that Jackson's prior Colorado

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

conviction for cultivation of marijuana qualified as a controlled substance offense. The court calculated an advisory sentencing range of 84 to 105 months but ultimately varied downward and sentenced Jackson to 63 months' imprisonment.

Jackson argues the district court failed to establish a sufficient factual basis to find him guilty of unlawfully possessing firearms and that the court erred in finding his 2006 Colorado conviction qualified as a "controlled substance offense" under U.S.S.G. § 4B1.2. We affirm the court's acceptance of Jackson's guilty plea because he knowingly transported two shotguns from his constructive possession to his family's actual possession, and the court did not plainly err when it found there to be a sufficient factual basis to support Jackson's plea. We also affirm the court's application of the 2006 Colorado conviction as a controlled substance offense under U.S.S.G. § 4B1.2 because the court interpreted the guideline in line with our precedent.

I.

A.

On December 25, 2019, in Sheridan, Wyoming, a police officer stopped a Toyota Tundra driven by Bradley Jackson because the officer believed that he delayed too long at a stop sign. During the stop, the officer discovered outstanding warrants for Jackson's arrest. Jackson was arrested, and his truck was impounded. While conducting an inventory search of the truck, police found two shotguns stored inside gun cases beneath the rear seats of the truck. A subsequent criminal history check revealed Jackson was previously convicted of a felony offense.

On February 19, 2020, Jackson was arrested for strangulation of his girlfriend at her home in Sheridan, Wyoming. The girlfriend began gathering Jackson's possessions remaining in her apartment in the following days. During this process, she found a pistol she did not recognize under her couch and among Jackson's belongings. The girlfriend called police and said she found a pistol in her home and believed it belonged to Jackson. An officer later collected the pistol. The police did not dust the pistol for fingerprints or check it for DNA.

Police subsequently referred both firearm-possession incidents to the Bureau of Alcohol, Tobacco, Firearms and Explosives, which began an investigation. Based on these two incidents, a grand jury issued the two-count indictment. Count One alleged a violation of 18 U.S.C. § 922(g)(1) and § 924(a)(2) based on police finding the two shotguns under the rear seat of Jackson's pickup truck. Count Two alleged a violation of the same statutes based on the girlfriend's belief that Jackson had left a pistol under her couch. Jackson pleaded not guilty to both charges.

B.

On May 17, 2021, jury selection for Jackson's trial began. After a jury was empaneled, Jackson notified the court that he intended to plead guilty to Count One. There was no plea agreement. After a brief recess, the court initiated a plea colloquy to determine whether Jackson's plea was voluntary, knowing, and intelligent. The court recited the basic elements under Count One. The court explained the government would have to prove beyond a reasonable doubt that Jackson "knowingly possessed the [] shotguns." R. Vol. I at 158. The court did not elaborate on what the

possession element legally entailed. After this recitation, the court asked Jackson whether he understood the nature of this charge, and Jackson replied, "yes." *Id.* at 159.

After Jackson told the court he was "Guilty, Your Honor," as to Count One, the court noted Jackson's attorney preferred "to elicit the factual basis for these cases, and so she'll be asking questions." *Id.* at 159–60. In this colloquy, Jackson admitted he knew prior to December 25, 2019, that he had been convicted of a crime punishable by more than a year of imprisonment, and knew that he was a felon. He also admitted that he knew the two shotguns were placed in his truck and had crossed state lines. Jackson agreed that his father and brother placed the guns in his truck because he was going to guide them on a hunting trip. He stated he would have been able to exercise control over the guns, but that he would "have had to pull over and get them out from underneath the backseat." *Id.* at 161.

Defense counsel ended the questioning and told the court she believed the factual basis was "sufficient," but the government disagreed. *Id.* at 162. The government's theory was that Jackson constructively possessed the shotguns, which required that he "knowingly ha[d] the power and intent . . . to exercise dominion or control over [the weapons]." *United States v. Little*, 829 F.3d 1177, 1182 (10th Cir. 2016) (cleaned up). So, according to the government, Jackson needed to admit "he had the ability and intent to exert control over [the shotguns] . . . [n]ot just that they happened to be in his vicinity." R. Vol. I at 162. Defense counsel then resumed her

questioning and asked a series of follow-up questions to establish Jackson had the intent to exercise control over the two shotguns:

> Q. Again, Mr. Jackson, you knew that the two shotguns were in your truck on or about that date; is that correct?
> A. Yes.
> Q. And you were able to access those guns if you wanted to?
> A. If I wanted to, yes.
> Q. And you–at some point, when they were in your truck, did you intend to possess them?
> A. That's where we–are–you know, have–I can't–I can't say that I did. They belong to my dad and my brother. We went out to hunt. I guided with the dog. They were–they–I brought [sic] them, they shot them, and the dog went and got them.
> Q. And by "bought them," you're talking about birds?
> A. I paid for the birds, yes, as a Christmas gift.
> Q. And you did have control over your truck; is that correct?
> A. I did have control over my truck, and I knew that they were in the vehicle, yes.

Id. at 162–63.

The government once again claimed these admissions were not sufficient. The court agreed. Defense counsel resumed questioning:

> Q. Okay. Mr. Jackson, after you were aware that the shotguns were in your truck, did you intend to bring them back to your dad and your brother?
> A. Yes.
> Q. So, at that point you intentionally possessed them to bring them back to your dad and your brother?
> A. Yes.

Id. at 163.

Defense counsel then stated she believed "that would be sufficient." *Id.* at 163–64. The government agreed. The court also agreed, accepted Jackson's plea, and adjudged him guilty of Count One.

C.

After a trial, the jury acquitted Jackson on Count Two. Jackson proceeded to sentencing on Count One. The probation officer prepared a presentence investigation report ("PSR"). In the PSR, the officer calculated that Jackson started at a base offense level of 20. This was because, in the officer's view, Jackson had previously sustained a conviction for a controlled substance offense. The officer relied on Jackson's 2006 Colorado state conviction for cultivation of marijuana.[1] The officer also reported that Jackson claimed the "shotguns were his property." R. Vol. II at 29.

Jackson objected to the report on several fronts. Jackson disputed the PSR's statement that Jackson claimed ownership of the shotguns. He argued his words were taken out of context. As Jackson was being released from Sheridan Police custody, he inquired about the return of property, referring generally to all the property in the truck as "his." *Id.* at 93. Jackson later clarified the shotguns belonged to his father and brother. "Shortly after leaving the SPD station, Jackson emailed Officer Nate Dygon informing him of which shotgun belonged to his father and which belonged to his brother and ask[ed] what other information would be required for their release." *Id.* at 94. In response to Jackson's objections, the probation officer stated that she "cannot make changes to the Prosecutor's Statement as it is the government's

[1] That conviction was based on a previous version of Colo. Rev. Stat. § 18-18-406(8)(a)(I), which stated, "No person knowingly shall cultivate, grow, produce, process, or manufacture any marihuana or marihuana concentrate or knowingly allow to be cultivated, grown, produced, processed, or manufactured on land owned, occupied, or controlled by him any marihuana or marihuana concentrate except as authorized pursuant to part 3 of article 22 of title 12, C.R.S."

findings of fact, the defendant's objection is noted, and no changes are made to the report." *Id.* at 62.

Jackson also objected to the probation officer's conclusion that he had a previous conviction for a controlled substance offense. Jackson argued he did not have a previous conviction for a controlled substance offense, so his base offense level should not be determined by § 2K2.1(a)(4)(A). Jackson claimed the Colorado statute he was previously convicted of violating was categorically broader than the Guidelines' definition of a controlled substance offense.

At the sentencing hearing, the district court heard oral arguments on Jackson's objections. As to the base offense level, Jackson's counsel reiterated that "the Colorado statute is categorically overbroad because it covers far more conduct than allowed in the guideline definition of a controlled substance offense." R. Vol. III at 30. The government argued that the Colorado conviction was a controlled substance offense because "21 U.S.C., Section 856, covers all of the behavior alleged in" the Colorado conviction. *Id.* at 34; *see also* 21 U.S.C. § 856 (maintaining drug-involved premises).

Ultimately, the district court accepted the government's argument. While noting "[a]ny analysis of the Colorado statute is one that is done categorically," the court reasoned "the same conduct that is prohibited in Colorado is prohibited in Title 21, Section 8[56]," and that the two statutes appeared "very similar." *Id.* at 40–41. Thus, adopting the view that "a cramped interpretation or one that is overly strict is improper," the court overruled Jackson's objection and held that U.S.S.G.

§ 2K2.1(a)(4)(A) applied to the Colorado conviction just as it would for a § 856 conviction. *Id.*

II.

A.

The first issue is whether the district court plainly erred when it accepted Jackson's guilty plea on Count One. We ordinarily review a district court's compliance with Federal Rule of Criminal Procedure 11 de novo but review unpreserved allegations of violations of Rule 11(b) under the plain error standard. *See United States v. Carillo*, 860 F.3d 1293, 1300 (10th Cir. 2017); *United States v. Rollings*, 751 F.3d 1183, 1191 (10th Cir. 2014). To satisfy the plain error standard, Jackson must show: "(1) an error; (2) the error is plain or obvious; (3) the error affects [his] substantial rights (*i.e.*, the error was prejudicial and affected the outcome of the proceedings); and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Carillo*, 860 F.3d at 1300.

Because Jackson did not object to this alleged violation of Rule 11(b)(3) below, we apply plain error review. Jackson argues the district court plainly erred by accepting his plea because the plea was without a sufficient factual basis.

Rule 11(b)(3) provides that "[b]efore entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea." Fed. R. Crim. P. 11(b)(3). The "factual basis requirement is a lower standard than the beyond a reasonable doubt standard required to satisfy the due process requirements of a criminal trial." *United States v. Valdez*, 269 F. App'x 805, 811 (10th Cir. 2008)

(unpublished)[2] (cleaned up). "To determine whether a factual basis exists . . . the district court must compare the conduct admitted or conceded by the defendant with the elements of the charged offense to ensure the admissions are factually sufficient to constitute the charged crime." *Carillo*, 860 F.3d at 1305.

Jackson was charged with unlawful possession of a firearm in violation of 18 U.S.C. § 922(g)(1), which requires the government to prove: (1) Jackson was previously convicted of a felony; (2) he thereafter knowingly possessed a firearm; (3) he was aware that he was prohibited from possessing a firearm; and (4) the possession was in or affecting interstate commerce. *See United States v. Nelson*, No. 20-1340, 2021 WL 4995460, at *2 (10th Cir. Oct. 28, 2021); *United States v. Samora*, 954 F.3d 1286, 1290 (10th Cir. 2020) (cleaned up). The only element at issue here is whether Jackson knowingly possessed firearms with intent to exercise control over them. To this end, "constructive possession exists when a person not in actual possession knowingly has the power and intent at a given time to exercise dominion or control over an object." *Little*, 829 F.3d at 1184.

Jackson argues the factual basis was "completely devoid of any facts that would demonstrate that he had an 'intent to exercise dominion or control over the shotguns.'" Aplt. Br. at 14. However, Jackson stated that he knew the guns were placed in his truck and that he had control over the truck. When counsel asked if Jackson was able to exercise control over the shotguns if he wanted to, he replied

[2] Unpublished decisions are not precedential, but may be cited for their persuasive value. Fed. R. App. P. 32.1; 10th Cir. R. 32.1 (2023).

"I'd have had to pull over and get them out from underneath the backseat, but that was doable, yes." R. Vol. I at 161. Counsel then asked if he was aware of the shotguns in his truck and if he intended to take them back to his dad and brother. Jackson indicated that this was correct. Counsel continued, "[s]o at that point you intentionally possessed them to bring them back to your dad and your brother?" *Id.* at 163. Jackson answered, "yes." *Id.*

These facts are sufficient to establish a factual basis for Jackson's plea because he admitted that he knew the guns were in his truck, that he drove the truck, and that his intent was to drive the shotguns to his father and brother. Unlawful possession of a firearm does not require that the defendant intend to use the firearm in any specific way (*i.e.*, that Jackson intended to pull the trigger); it simply requires a knowing and intentional possession and can be either actual or constructive. *See* 18 U.S.C. § 922(g)(1); *see also United States v. Heckard*, 238 F.3d 1222, 1228 (10th Cir. 2001) (inferring dominion and control when defendant had exclusive possession of premises where contraband was found). As the truck's sole occupant, Jackson knowingly transported two shotguns from his constructive possession to his family's actual possession.[3] Thus, the district court did not plainly err when it found there to be a sufficient factual basis to support Jackson's guilty plea.

[3] During the pendency of this appeal, Jackson submitted supplemental authority to support his view that merely transporting the shotguns is not sufficient to show that he exercised possession of them. Aplt. Fed. R. App. P. 28(j) Letter (June 24, 2022). The Fifth Circuit's decision in *Flores-Abarca v. Barr*, 937 F.3d 473 (5th Cir. 2019) is not inconsistent with this opinion. "The term 'transport' does not necessarily imply possession. The driver of a vehicle can transport passengers and

B.

The second issue is whether the district court's application of the 2006 Colorado conviction as a controlled substance offense was procedural error. We "review the procedural reasonableness of [the] defendant's sentence using the familiar abuse-of-discretion standard of review . . . under which we review de novo the district court's legal conclusions regarding the Guidelines and review its factual findings for clear error." *United States v. Sanchez-Leon*, 764 F.3d 1248, 1262 (10th Cir. 2014) (cleaned up).

When determining whether a previous state conviction qualifies as a prior felony controlled-substance offense, courts apply an offense matching exercise known as the categorical approach, comparing the elements of the statute of conviction with those from the Guidelines without looking to the underlying conduct

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their possessions without having the power and intent to exercise control over every object in the vehicle." *Flores-Abarca*, 937 F.3d at 483 (cleaned up). "[D]ominion over the vehicle . . . alone cannot establish constructive possession of a weapon found in the vehicle, particularly in the face of evidence that strongly suggests that somebody else exercised dominion and control over the weapon." *Id.* (cleaned up).

The government also submitted supplemental authority, arguing that Jackson waived any challenge to the sufficiency of his factual basis. Aple. Fed. R. App. P. 28(j) Letter (June 24, 2022). The government's original briefing argued in a footnote that, to the extent Jackson's factual basis was insufficient, he invited and facilitated the error, so we should decline to review this claim. *See* Aple. Br. at 9. But Jackson correctly responds that we normally deem arguments raised in a footnote waived. Aplt. Resp. to Aple Fed. R. App. P. 28(j) Letter (June 27, 2022) ("Arguments raised in a perfunctory manner, such as in a footnote, are waived." (quoting *United States v. Hardman*, 297 F.3d 1116, 1131 (10th Cir. 2002)). Thus, we decline to consider the government's supplemental briefing on this point.

of the conviction. *United States v. Kendall*, 876 F.3d 1264, 1267 (10th Cir. 2017).[4] When applying this method, courts "must presume that the conviction rested upon nothing more than the least of the acts criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *United States v. Dominguez-Rodriguez*, 817 F.3d 1190, 1197 (10th Cir. 2016) (cleaned up).

Jackson contends that the district court improperly considered the conduct as defined under 21 U.S.C. § 856 when determining whether his 2006 state conviction was a controlled substance offense. But his line of argument confuses the issue that is really in front of this Court.[5] The real issue comes down to whether a court can include conduct (*i.e.*, maintaining drug-involved premises) as a controlled substance offense under U.S.S.G. § 4B1.2(b). And this Court has already answered that question: it can.

This Court's decision in *United States v. Smith* determines that courts must "assess [Jackson's Colorado] conviction under [Colo. Rev. Stat. § 18-18-406] in light of an interpretation of the Guideline informed by the application notes" of U.S.S.G.

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[4] Following discussion during oral argument, the parties filed supplemental briefing on how *Shular v. United States*, 140 S. Ct. 779 (2020), applies to this case. Having considered the matter, we resolve whether Jackson's prior Colorado conviction qualifies as a controlled substance offense for sentencing purposes on other grounds.

[5] We note that during the pendency of this appeal, Jackson and the government submitted various supplemental authorities regarding how we should apply the categorical approach. Aple. Fed. R. App. P. 28(j) Letter (Jan. 9, 2023); Aplt. Fed. R. App. P. 28(j) Letter (Dec. 13, 2022); Aple. Resp. to Aplt. Fed. R. App. P. 28(j) Letter (Sep. 12, 2022); Aplt. Fed. R. App. P. 28(j) Letter (Sep. 12, 2022); Aple. Fed. R. App. P. 28(j) Letter (Aug. 19, 2022); Aplt. Fed. R. App. P. 28(j) Letter (June 15, 2022).

§ 4B1.2(b). 433 F.3d 714, 717 (10th Cir. 2006). In doing so, courts can recognize that the "examples listed in the explanatory note"—including, as relevant here, "maintaining any place for the purpose of facilitating a drug offense"—are not "inconsistent with, or a plainly erroneous reading of [the] guideline." *Id.* (quoting *Stinson v. United States*, 508 U.S. 36, 38 (1993)). That is because "the application notes can be understood as including within the Guideline convictions for conduct that could have been charged as a controlled substance offense." *Id.*

With that "broader interpretation" in mind, we apply the categorical approach to see if Jackson's conviction falls within how the Guidelines define a "controlled substance offense." *Id.* The short answer: his conviction categorically qualifies as one.

Jackson identifies that his statute of conviction criminalizes "occupying land while knowingly allowing someone else to grow marijuana on the same land." Aplt. Br. at 23; *see* Colo. Stat. 18-18-406(8)(a)(I) ("No person knowingly shall . . . allow to be cultivated, grown, produced, processed, or manufactured on land owned, occupied, or controlled by him any marihuana or marihuana concentrate . . . ."). The action of maintaining a place for illegal marijuana cultivation falls squarely within U.S.S.G. § 4B1.2(b)'s definition of a "controlled substance offense"—which, again, includes "maintaining any place for the purpose of facilitating a drug offense." *Smith*, 433 F.3d at 717; *see* U.S.S.G. § 4B1.2 App. Note 1. Because the elements of the statute of conviction are a categorical match with the Guideline's definition, the district court properly found that Jackson's base offense level was 20.

In response, Jackson has two arguments. Each falls short. First, he argues that his statute of conviction could involve allowing someone else to cultivate marijuana on jointly occupied land, which he believes involves conduct that falls outside the Guidelines' definition of a controlled substance offense. Not so. As stated above, given the broad interpretation we give to a controlled substance offense, the Guidelines confirm that the definition includes such conduct. *Smith*, 433 F.3d at 717; *see* U.S.S.G. § 4B1.2 App. Note 1.

Second, Jackson argues that at the time of his 2006 conviction, Colorado defined "marijuana" to include hemp—a substance that Colorado no longer considers a controlled substance. He then reasons that he should get the benefit of this change in the law and that his previous conviction should not qualify as a controlled substance offense.

Because Jackson did not raise this objection at his sentencing hearing, we review this issue for plain error. *See United States v. Finnesy*, 953 F.3d 675, 682 (10th Cir. 2020). That standard requires Jackson to "demonstrate either that this Court or the Supreme Court has resolved these matters in his favor, or that the language of the relevant statutes or guidelines is clearly and obviously limited to the interpretation he advances." *United States v. Harbin*, 56 F.4th 843, 845 (10th Cir. 2022) (cleaned up).

Jackson fails to meet his burden. As this Court recently recognized in *United States v. Harbin*, it is not yet clear "whether a prior state drug conviction should be defined by reference to current rather than former state law." 56 F.4th 843, 851 (10th Cir. 2022). And Jackson does not point us to any Tenth Circuit or Supreme

Court case since *Harbin* that clarifies otherwise. Given "the absence of Supreme Court or circuit precedent directly addressing [this] particular issue," we cannot find plain error here. *Id.* at 845 (citing *United States v. Salas*, 889 F.3d 681, 687 (10th Cir. 2018)).

III.

For these reasons, we AFFIRM.

Entered for the Court

Allison H. Eid
Circuit Judge