FILED
United States Court of Appeals
Tenth Circuit

June 28, 2023

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

PAUL DEWAYNE GALLIMORE, JR.,

Defendant - Appellant.

No. 22-6081

**Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. 5:21-CR-00150-R-1)**

Submitted on the briefs:*

Kyle E. Wackenheim, Assistant Federal Public Defender, Oklahoma City, Oklahoma, for Defendant-Appellant Paul Dewayne Gallimore, Jr.

Robert J. Troester, United States Attorney, and Steven W. Creager, Assistant United States Attorney, Oklahoma City, Oklahoma, for Plaintiff-Appellee United States of America.

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

CARSON, Circuit Judge.

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument.

The Armed Career Criminal Act ("ACCA") sentencing enhancement applies to defendants with three prior convictions for committing violent felonies on separate occasions. 18 U.S.C. § 924(e). Identifying an "occasion" requires a multi-factored inquiry. Wooden v. United States, 142 S. Ct. 1063, 1069–71 (2022). But "[i]n many cases, a single factor—especially of time or place—can decisively differentiate occasions." Id. at 1071. Defendant Paul Gallimore pleaded guilty to committing three robberies on three consecutive days in different locations at age 16. He argues that he committed these robberies on one occasion. We disagree and find that the time between each robbery and their different locations both decisively differentiate occasions here. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I.

Defendant pleaded guilty without a plea agreement to one count of being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1). The United States Probation Officer's initial Presentence Investigation Report ("PSR") applied the ACCA enhancement citing Defendant's four prior convictions. 18 U.S.C. § 924(e). These convictions pushed his criminal history category to VI under USSG § 4B1.4(c)(2) which, in turn, set his guideline imprisonment range at 188 to 235 months. The statutory range, because of the ACCA enhancement, was fifteen years to life.

Relying on the Supreme Court's decision in Wooden, Defendant objected to the PSR's application of the ACCA enhancement, arguing that three of his prior

convictions occurred on a single occasion. If the robberies occurred on one occasion, Defendant would avoid the ACCA enhancement because § 924(e) requires a defendant to have committed the prior offenses "on occasions different from one another." 18 U.S.C. § 924(e)(1). The Probation Officer responded with a PSR Addendum that recognized Wooden's multifactored inquiry which considers the offenses' temporal and locational proximity, as well as similarities between the offenses. The Addendum prompted the district court to ascertain facts underlying Defendant's prior convictions and to apply Wooden to those facts at Defendant's sentencing hearing.

At the sentencing hearing, the parties uncovered the details of the three prior convictions. They were for robberies that Defendant committed on consecutive days in November 2007, at age 16. Defendant's first robbery took place at an apartment complex around 3:00 p.m. in Del City, Oklahoma. The next day, Defendant robbed a carhop at a Sonic restaurant around 11:15 a.m. in Del City, Oklahoma, about half a mile from the first incident. On the third day, Defendant robbed another Sonic restaurant around 10:30 a.m. in Midwest City, Oklahoma, about six miles from the first two robberies. In each incident, Defendant used a firearm to take money by threat of force.

After considering the facts and applying the Wooden factors, the district court overruled Defendant's objection. In doing so, the sentencing judge explained:

> I have read and considered the Wooden case, obviously, which controls this case, and I'm going to overrule this objection. It just strikes me – if

> nothing else, common sense tells us that this did not happen on one occasion.
>
> The victims were distinct, the locations were distinct. The manners were pretty similar. I mean, it involved the defendant with a gun robbing in two instances and robbing and shooting in another instance.
>
> The times were separated. It occurred over three different days. It just defies logic to say these all happened on the same occasion. So I'm going to overrule that objection.

ROA Vol. III at 16. The district court then sentenced Defendant to 200 months' imprisonment, followed by five years of supervised release. Defendant appeals.

II.

Section 924(e) requires a sentencing court "to impose a sentence of not less than fifteen years upon a defendant who is found guilty of violating 18 U.S.C. § 922(g) and who has 'three previous convictions . . . for a violent felony . . . committed on occasions different from one another.'" United States v. Michel, 446 F.3d 1122, 1132 (10th Cir. 2006) (quoting 18 U.S.C. § 924(e)(1)). We review § 924(e) legal conclusions de novo and factual findings for clear error. United States v. Doe, 398 F.3d 1254, 1257 (10th Cir. 2005); United States v. Green, 55 F.3d 1513, 1515 (10th Cir. 1995).

In Wooden, the Supreme Court interpreted the meaning of "occasions" as "multi-factored in nature" and requiring consideration of "a range of circumstances." Wooden, 142 S. Ct. at 1070–71. The Court highlighted factors such as the offenses' time, location, character, and relationship. Id. at 1071. But the Court also said that "[f]or the most part, applying this approach will be straightforward and intuitive."

Id. "In many cases, a single factor—especially of time or place—can decisively differentiate occasions. Courts, for instance, have nearly always treated offenses as occurring on separate occasions if a person committed them a day or more apart, or at a 'significant distance.'" Id. (first quoting United States v. Rideout, 3 F.3d 32, 35 (2d Cir. 1993); and then citing United States v. Riddle, 47 F.3d 460, 462 (1st Cir. 1995) (per curiam)).

Rideout and Riddle provide useful illustrations of this approach's application of time and location. In Rideout, the Second Circuit said a defendant's two burglaries, which he committed a "significant distance" of thirteen miles and thirty minutes apart, counted as separate occasions. Rideout, 3 F.3d at 35. And in Riddle, the First Circuit determined that "five different [burglaries] on four different dates involving five different locations and victims" qualified as separate occasions. Riddle, 47 F.3d at 462. The First Circuit also concluded that Congress, in pursuing public safety, rejected a defendant's youthfulness as a factor. Id.; see also § 924(e)(2)(B) ("[T]he term 'violent felony' means . . . any act of juvenile delinquency involving the use or carrying of a firearm . . . ."). These cases reinforce that a later time and changed location generally split occasions under § 924(e).[1]

[1] Post-Wooden decisions have reiterated the decisiveness of different times and places. The Sixth Circuit said four similar robberies across two months at different locations took place on separate occasions. United States v. Williams, 39 F.4th 342, 350 (6th Cir. 2022), cert. denied, No. 22-947, 2023 WL 3046167 (Apr. 24, 2023). The Eighth Circuit said two robberies committed two days apart in neighboring cities were two separate occasions. United States v. Bragg, 44 F.4th 1067, 1079 (8th Cir. 2022), cert. denied, 143 S. Ct. 1062 (2023).

But if the crimes "share a common scheme or purpose," they may be "more apt . . . to compose one occasion." Wooden, 142 S. Ct. at 1071. In Wooden, the defendant burglarized ten storage units, in a single location, by the same means, on one night. Id. ("The burglaries were part and parcel of the same scheme, actuated by the same motive, and accomplished by the same means."). The Court determined that, while the burglaries resulted in double-digit convictions, they amounted to one occasion under § 924(e). Id. Important to its analysis though, the defendant committed the crimes at the same place and time.

Wooden's multifactored approach and the persuasive case law it cites offer a "straightforward and intuitive" answer here: Defendant's prior convictions occurred on separate occasions. Id. Although either time or place may be dispositive, here *both* time and place decisively differentiate the three burglaries. The facts here nearly mirror the facts in Riddle. Both defendants committed multiple crimes on different dates with different locations and victims. This pattern, especially the different dates and locations, instructs us to find three separate occasions.

And Rideout's analysis—that a thirty-minute gap may divide crimes into two distinct occasions—alleviates any doubt. At least twenty hours split each of Defendant's robberies—a far greater timespan than in Rideout. True, the Rideout defendant committed crimes at a further distance than Defendant here—thirteen miles versus a half mile and six miles—but Riddle held that different calendar days paired with "different locations" without specificity amounted to separate occasions. Because the temporal distance stretches much further between crimes here and

Defendant committed them in different locations, time and location decisively favor separate occasions.

Defendant contends that his age at the time of the robberies should stand as a Wooden factor. He was sixteen. But we reject youthfulness as a consideration. Congress prioritized public safety above age. See Riddle, 47 F.3d at 462. The ACCA defines a violent felony to include "any act of juvenile delinquency involving the use or carrying of a firearm." 18 U.S.C. § 924(e)(2)(B). Acts committed at any age, then, count for ACCA purposes. Our job is to decide if the acts happened on separate occasions, regardless of age.

Defendant also contends that his crimes "share a common scheme or purpose." Wooden, 142 S. Ct. at 1071. Just as in Wooden, each crime resembled the next. Defendant robbed each victim at gunpoint and two of the locations were Sonic restaurants. But commonality does not dictate one occasion without more. The defendant in Wooden also committed every crime in the same night at the same location. Here, Defendant committed each robbery on distinct calendar days in different locations. Because these two factors decisively differentiate the robberies, the Defendant's common scheme does not amount to one occasion. He committed three robberies on three occasions.

III.

For the first time on appeal, Defendant contends that a jury must decide whether his prior convictions qualify as separate occasions under the ACCA. But our precedent forecloses this effort.

"[W]hether prior convictions happened on different occasions from one another is not a fact required to be determined by a jury but is instead a matter for the sentencing court." United States v. Reed, 39 F.4th 1285, 1295 (10th Cir. 2022) (quoting United States v. Michel, 446 F.3d 1122, 1132 (10th Cir. 2006)), cert. denied, 143 S. Ct. 745 (2023). This ruling stems from the prior-conviction exception to the Supreme Court's Apprendi v. New Jersey, 530 U.S. 466 (2000), decision, "which excludes the 'fact of a prior conviction' as a matter for jury deliberation." Reed, 39 F.4th at 1295 (quoting Apprendi, 530 U.S. at 490). Defendant, thus, cannot argue to the contrary "[a]bsent en banc reconsideration or a superseding contrary decision by the Supreme Court." Id. (citing In re Smith, 10 F.3d 723, 724 (10th Cir. 1993) (per curiam)). Because Defendant effectively requests that this panel overturn Reed, we reject his argument that a jury must decide whether his convictions qualify as separate occasions under the ACCA. See United States v. Garcia, 936 F.3d 1128, 1139 (10th Cir. 2019) (citing In re Smith, 10 F.3d at 724).

AFFIRMED.