FILED
United States Court of Appeals
Tenth Circuit

November 14, 2023

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

TERRENCE MICHAEL TAYLOR, a/k/a Terrance Michael Taylor,

Defendant - Appellant.

No. 22-6114

Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. 5:21-CR-00161-R-1)

Submitted on the briefs:*

Amy W. Senia, Assistant Federal Public Defender (Virginia L. Grady, Federal Public Defender with her on the brief), Denver, Colorado for Defendant-Appellant.

Travis Leverett, Assistant United States Attorney (Robert J. Troester, United States Attorney with him on the brief), Oklahoma City, Oklahoma for Plaintiff-Appellee.

Before **HARTZ**, **KELLY**, and **MATHESON**, Circuit Judges.

HARTZ, Circuit Judge.

---

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Defendant Terrence Michael Taylor pleaded guilty in the United States District Court for the Western District of Oklahoma to two counts of felon in possession of ammunition and one count of felon in possession of firearms. *See* 18 U.S.C. § 922(g). He now argues that these charges are multiplicitous in violation of the Double Jeopardy Clause. We reject this argument because he waived his multiplicity claim when he entered his plea to the three separate offenses.

I. BACKGROUND

A. Factual Background

We summarize the facts set forth in the unchallenged presentence report and in police reports submitted in district court. Mr. Taylor was arrested on June 6, 2020, after two shooting incidents. The first shooting occurred on May 29, 2020, when Mr. Taylor shot the tires of a victim's car because the victim had refused to give him a refund for mechanical issues with a vehicle the victim had sold him. Four 9mm shell casings were recovered near the vehicle. The second shooting occurred on June 6. Officers responded to a shots-fired call at a residence and discovered a different victim lying in her yard with several gunshot wounds to her legs and hands. The victim told officers that she and Mr. Taylor had an argument over a used-car sale that ended when Mr. Taylor shot her, snatched her purse, and fled in his vehicle. Officers recovered three 9mm shell casings in the street, two shell casings in the driveway, and two shell casings inside the residence. Witness descriptions of Mr. Taylor's vehicle led officers to him, and he was arrested. After the arrest, officers contacted

his wife, Brandy Spivey, who said that she had never seen Mr. Taylor with a gun but her own 9mm gun was missing.

On June 8 officers executed a search warrant for Mr. Taylor's residence based on a jail call he made to Ms. Spivey in which he asked if she had "cleaned the trash behind the dryer" and said "it don't need to be there, but needs to be somewhere." R. Vol. II at 11 ¶ 25. During the search, officers seized a Marlin .22 rifle behind a bed and a 50-round box of 9mm ammunition in a safe in the living room. The officers asked Ms. Spivey what was behind the dryer. She initially said that she did not know, but when officers told her that they heard the jail call, she told them she removed a purse from behind the dryer and disposed of it in a dumpster.

The next day, Ms. Spivey called the officers and told them that she had found a firearm at the residence. Officers went to the residence and recovered a 9mm Kel-Tec pistol behind a bookshelf in the living room and a box (whose location is not mentioned) containing 21 rounds of 9mm ammunition. Investigators confirmed that the shell casings recovered from the scenes of the shootings were fired from a 9mm Kel-Tec pistol.

B. Procedural History

A grand jury indicted Mr. Taylor on one count of felon in possession of five pistol cartridges marked "FC .9MM LUGER" on May 29, 2020; one count of felon in possession of seven pistol cartridges marked "FC .9MM LUGER" on June 6, 2020; and one count of felon in possession of the 9mm Kel-Tec pistol and the Marlin .22 rifle between June 6 and June 10, 2020.

A week before trial the district court granted Mr. Taylor's request to represent himself and have his previous counsel appointed as stand-by counsel. On the day set for trial he pleaded guilty to all three counts. The district court found that his guilty plea was voluntary and made with an understanding of the charges and the consequences of his plea.

Three weeks after entering his plea, Mr. Taylor submitted pleadings alleging misconduct by his counsel. The district court terminated his original counsel and appointed new counsel to represent him at sentencing. He then personally sent numerous letters to the district court claiming that prosecutors violated his constitutional rights, including his right not to be subjected to double jeopardy. He also submitted a motion to withdraw his guilty plea. The district court denied the motion, explaining that his plea had been "knowing and voluntary." Mr. Taylor was sentenced to 300 months' imprisonment.

II. DISCUSSION

The Double Jeopardy Clause provides that no person shall be "subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. Among other things, this clause protects criminal defendants "against multiple punishments for the same offense imposed in a single proceeding." *Jones v. Thomas*, 491 U.S. 376, 381 (1989) (internal quotation marks omitted). Mr. Taylor argues on appeal that the three counts of felon in possession are multiplicitous in that they reflect one continuous incident of possession, so each count states the same offense,

for which he can receive only a single sentence. We hold that he waived this argument by pleading guilty to the three separate counts.

A. Waiver

Subject to limited exceptions, a "plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence." *United States v. Broce*, 488 U.S. 563, 569 (1989). By pleading guilty the defendant is not only admitting "the discrete acts described in the indictment; he is admitting guilt of a substantive crime." *Id.* at 570.

In *Broce* the two defendants each pleaded guilty to two counts of conspiracy based on agreements to rig bids for highway contracts. *See id.* at 565–66. The defendants then brought a double-jeopardy challenge to their convictions, claiming "that the bid-rigging schemes alleged in their indictments were but a single conspiracy." *Id.* at 567. The district court permitted them to put on evidence that the court said established that "the indictments merely charged different aspects of the same conspiracy." *Id.* at 568. It vacated the judgment on one of the charges, and the court of appeals affirmed. *See id.* at 568–69. The Supreme Court reversed. It held that the defendants waived their double-jeopardy argument by pleading guilty to "two charges of conspiracy on the explicit premise of two agreements which started at different times and embraced separate objectives." *Id*. at 571. "Just as a defendant who pleads guilty to a single count admits guilt to the specified offense, so too does a defendant who pleads guilty to two counts with facial allegations of distinct offenses concede that he has committed two separate crimes." *Id.* at 570.

The Supreme Court did, however, recognize one exception to waiver by pleading guilty. Although *Broce* held that the defendants in that case should not have been permitted to put on evidence to show that the two alleged conspiracies were really only part of the same single conspiracy, a guilty plea does not waive a defendant's right to claim a constitutional violation if the violation can be established "without any need to venture beyond [the] record." *Id. at* 574–75. The Court gave as an example a defendant who was adjudicated in contempt of court for refusal to obey a court order to testify and served jail time but then pleaded guilty to an indictment charging the same refusal to answer questions. In that circumstance the defendant could successfully raise a double-jeopardy challenge to the second conviction. As the Court explained, the defendant did not waive his double-jeopardy challenge because "'a plea of guilty to a charge does not waive a claim that—judged on its face—the charge is one which the State may not constitutionally prosecute.'" *Id.* at 575 (quoting *Menna v. New York*, 423 U.S. 61, 63 n. 2 (1989) (per curiam)). The exception did not apply in *Broce* because the defendants in that case could not "prove their claim by relying on [the] indictments and the existing record." *Broce*, 488 U.S. at 576.

The Supreme Court recently reaffirmed *Broce* when it applied this exception to the general doctrine in *Class v. United States*, 138 S. Ct. 798 (2018). The Court held that a guilty plea does not bar a defendant from challenging the constitutionality of the statute of conviction on direct appeal. *See id.* at 803. While recognizing that *Broce* held that "a valid guilty plea relinquishes any claim that would contradict the

admissions necessarily made upon entry of a voluntary plea of guilty," it said that Class's challenge was "consistent with [his] admission that he engaged in the conduct alleged in the indictment." *Id.* at 805 (internal quotation marks omitted).

The scope of *Broce* is well-illustrated by this court's decision in *Thomas v. Kerby*, 44 F.3d 884 (10th Cir. 1995). We considered on habeas review several convictions in New Mexico state court. The defendant was charged with forging two checks from one business on the same day (depositing them into a single bank account) and later writing two checks from the bank account to two different stores. *See id.* at 886. He pleaded nolo contendere[1] to two counts of forgery and two counts of knowingly issuing checks drawn on insufficient funds. *See id.* We held that his guilty plea did not waive his later double-jeopardy challenge to the two forgery counts. We said that under New Mexico law, "a single taking at one place from several victims, or a series of takings from one victim," is a single offense, *id.* at 887–88, so the two forgery charges were a single offense "as a matter of law," *see id.* at 889. But as for the worthless-check counts, we held that the double-jeopardy challenge was waived because "the information and record do not conclusively demonstrate a single offense but, rather, raise at most a question of fact that might have been resolved in [defendant]'s favor if he had disputed the matter at trial." *Id.* at 889. Whether waiver barred a claim depended on whether the defendant could conclusively demonstrate his claim without supplementing the evidentiary record.

[1] We noted that "[f]or the purposes of the case in which it is entered, a nolo plea in New Mexico amounts to a confession of guilt." *Thomas*, 44 F.3d at 888 n. 4.

Mr. Taylor contends that his guilty plea does not waive his double-jeopardy claim so long as his claim is "consistent with the universe of facts established in the district court." Reply Br. at 3. He relies on the following statement in *United States v. Berres*, 777 F.3d 1083 (10th Cir. 2015) (rejecting double-jeopardy claim): "[A] defendant advancing a double jeopardy claim following a guilty plea must prove his claim by relying on the indictment and the existing record without contradicting the indictment," *id.* at 1096 (cleaned up). But he gets backwards who has the burden of resolving ambiguity. The language in *Berres*, which was taken largely from *Broce*, does not mean that a double-jeopardy claim will prevail so long as it is *consistent* with the record and does not contradict the indictment. It means that such a claim can prevail only if it is *established* by the indictment and the original record, without contradicting the indictment. If the quoted language may be somewhat ambiguous, what happened in *Broce* is not. The defendants' double-jeopardy claim in that case was not inconsistent with the factual allegations in the indictments. Indeed, the evidence at the evidentiary hearing conducted by the district court after the defendants raised their double-jeopardy claim apparently established that there in fact was only one conspiracy, which encompassed the agreements charged in the two indictments. *See Broce*, 488 U.S. at 568. But that evidentiary hearing was conducted after the guilty plea. *See id.* at 566, 568. So even though there could have been (and apparently was) evidence that was consistent with the factual allegations in the indictment and showed a single conspiracy, the double-jeopardy claim had been

waived at the time of the plea. A panel of this court expressed the point nicely in an unpublished opinion:

> Although further factual development *might* allow [the defendant] to prove that his conviction and sentence caused multiple punishments for the same offense, his plea forecloses such factual development. Therefore, we are unable to conclude that the facts which Edwards admitted during his plea allocution *could not* form the basis for the separate crimes to which he pleaded guilty.

Edwards v. Thomas, 1997 WL 46845, at *3 (10th Cir. 1997).

Hence, the question we must answer is clear: Is Mr. Taylor's double-jeopardy challenge "conclusively demonstrate[d]" on the face of the record (and therefore not waived) or does it require addressing unresolved factual issues (and therefore is waived)? *Thomas*, 44 F.3d at 889. We think the latter is true.

B. Separate Offenses Under § 922(g)

Before turning to the facts of this case, we must say a few words about what the unit of prosecution is for offenses under § 922(g), which makes it unlawful for a convicted felon to "possess in or affecting commerce, any firearm or ammunition." We need not provide a complete description. Interesting questions abound regarding whether and when a person can be said to possess the same object on more than one occasion, and whether and when the simultaneous possession of multiple objects can be considered to constitute separate offenses under the statute. We have said that "[t]he simultaneous possession of multiple firearms generally constitutes only one offense unless there is evidence that the weapons were stored in different places or acquired at different times." *United States v. Hutching*, 75 F.3d 1453, 1460 (10th Cir.

1996) (cleaned up) (possession of three firearms present at three different locations—the defendant's bedroom, a car parked in his garage, and his pickup truck—constituted three separate offenses). And Mr. Taylor concedes—relying on out-of-circuit authority and our unpublished opinion in *United States v. Curls*, 219 Fed. App'x. 746 (10th Cir. 2007)—that separate possessions may be demonstrated "when the government proves that the defendant possessed the same firearm(s) and/or ammunition on different dates, and that his constructive and actual possession was interrupted at some point between those dates." Aplt. Br. at 10–11.[2]

C. Application

Mr. Taylor pleaded guilty to (1) possessing five 9mm pistol cartridges on or about May 29, (2) possessing seven 9mm pistol cartridges on or about June 6, and (3) possessing a 9mm Kel-Tec pistol between on or about June 6 and June 10. To be sure, the indictment does not explicitly state "that the firearm and ammunition were each separately acquired, separately stored, or relinquished and repossessed." Aplt. Reply Br. at 7. But that does not matter. "[T]he indictments [in *Broce*] did not include an express statement that the two conspiracies were separate." *Broce*, 488 U.S. at 569. The Supreme Court explained that "[j]ust as a defendant who pleads guilty to a single count admits guilt to the specified offense, so too does a defendant who pleads guilty to two counts with facial allegations of distinct offenses concede that he has committed two separate crimes." *Id.* at 570. Here, the indictment on its

[2] Because of this concession, we have no need to resolve the issue.

face alleges distinct offenses. It does not allege, for example, that from June 6 through June 10 Mr. Taylor continuously carried a bag containing two firearms and a box of ammunition, which he had acquired in the same transaction, containing all the ammunition and firearms mentioned in the indictment. If those had been the facts, Mr. Taylor could have raised the issue before his plea and likely prevailed in having the charges consolidated into one charge. But the indictment is fully consistent with the possibility that Mr. Taylor acquired and stored the firearms separately and had multiple caches of ammunition that he accessed on different dates. Even if we credit the unchallenged presentence report and also consider the relevant police reports in the record (we assume, without deciding, that these are part of the record that *Broce* permits the court to consider),[3] "the [indictment] and record do not conclusively demonstrate a single offense," *Thomas*, 44 F.3d at 889. The searches of the home showed that Mr. Taylor did not store the firearms and ammunition in one place, with the Marlin .22 rifle in a bedroom behind a bed, the 9mm Kel-Tec pistol behind a living-room bookshelf, one box of ammunition in a living-room safe, and one box of ammunition in an unspecified location. And those searches could not show who had the objects and where they were during the previous few days.

[3] As we have already stated, *Broce* permits double-jeopardy challenges that appear on the "face of the record." *Broce*, 488 U.S. at 569. But the Court's analysis was limited to the face of the indictment. *See id.* at 570–71. It is therefore not entirely clear what parts of the record we may consider, although it is likely that we can consider only the record at the time of the plea. *See Thomas*, 44 F.3d at 888 ("[I]f a double jeopardy violation is apparent on the face of the indictment and/or the record existing at the time the plea was entered, it is not waived.").

Because we affirm on the authority of *Broce,* we need not address the government's argument that Mr. Taylor waived appellate review by failing to file a timely pretrial motion challenging multiplicity under Fed. R. Crim. P. 12(b)(3)(B)(ii).

III. CONCLUSION

We **AFFIRM** the judgment below.