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United States Court of Appeals
Tenth Circuit

November 7, 2023

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DALTON DASH BROWN,

Defendant - Appellant.

No. 22-6175

Appeal from the United States District Court for the Western District of Oklahoma (D.C. No. 5:21-CR-00124-D-1)

Shira Kieval, Assistant Federal Public Defender (Virginia L. Grady, Federal Public Defender, with her on the briefs), Denver, Colorado, for Defendant - Appellant.

Danielle London, Assistant United States Attorney (Robert J. Troester, United States Attorney, with her on the brief), Oklahoma City, Oklahoma, for Plaintiff - Appellee.

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

KELLY, Circuit Judge.

Defendant-Appellant Dalton "Dash" Brown pled guilty to a single count of being a felon in possession of ammunition, 18 U.S.C. § 922(g)(1), and was sentenced to 120 months' imprisonment and three years' supervised release. On appeal, he challenges his sentence, arguing that the district court improperly calculated his offense level under the

Sentencing Guidelines. According to Mr. Brown, the district court erred in applying (1) a multiple-firearms enhancement, (2) a stolen-firearm enhancement, (3) a higher base offense for possession of a high-capacity magazine, (4) a reckless-endangerment upward adjustment, and (5) an "in-connection-with" enhancement. He urges the court to reverse and remand for resentencing with a lower offense level. Aplt. Br. at 35. Our jurisdiction arises under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), and we affirm.

Background

On March 3, 2021, an officer observed a Dodge Charger parked at a convenience store that matched the description of a stolen vehicle from a nearby town. Local law enforcement advised that the driver might be Dalton Dash Brown. The officer confirmed the tag matched the stolen car and approached Mr. Brown as he exited the store. Officers instructed the passenger, Mr. Brown's girlfriend Stephanie Cullum, to keep her hands on the dashboard while they patted down Mr. Brown. The officer found three rounds of 9mm ammunition in Mr. Brown's front pocket and the key fob to the stolen vehicle. Officers also observed the handgrip of a firearm — later identified as stolen — visibly sticking out of a purse on the front passenger floorboard. Mr. Brown denied knowing about the firearm or that the vehicle was stolen but admitted to seeing the ammunition in the car and putting it in his pocket. In addition to the Taurus, Model PT111 9mm pistol, officers also located an extended magazine containing 13 rounds of 9mm ammunition in the driver side

door compartment, identification belonging to Mr. Brown's son, and several used car dealership tags.

At the time of his arrest, Mr. Brown was serving suspended sentences from 2015 state convictions for being a felon in possession of a firearm and possessing a firearm during the commission of a felony.[1] This federal prosecution followed.

A. Criminal History

The Presentence Report (PSR) details Mr. Brown's extensive criminal history including twelve felony convictions. The PSR recites the facts surrounding the federally charged offense in March 2021, as well as three other instances of criminal conduct involving Mr. Brown in December 2020 and February 2021.

1. December 21, 2020

On December 21, 2020, an officer observed a vehicle traveling at high speeds and identified the driver as Mr. Brown. The officer attempted to initiate a traffic stop, but Mr. Brown escaped. Later that day, another officer saw a vehicle matching Mr. Brown's parked at the residence of his child's mother. She told officers that Mr. Brown and their son had arrived at her house, told her the car had broken down, and requested a ride. With flashlights on the car windows, officers observed a rifle stuffed between the passenger door and the passenger seat. Mr. Brown's girlfriend

[1] In January 2015, Mr. Brown was convicted on several counts, including gun and drug possession charges, after he led law enforcement officers on a high-speed chase that ended when Mr. Brown crashed into a law enforcement vehicle. Mr. Brown was convicted again in February 2015 on similar charges after he eluded officers attempting a traffic stop, caused a crash, and tried unsuccessfully to flee on foot. A vehicle search yielded firearms, drugs, and drug paraphernalia.

then arrived at the scene and explained he had asked her to get the car. After executing a search warrant, officers recovered a Marlin .22 rifle (reported as stolen) loaded with three rounds of ammunition, 16 rounds of various caliber ammunition, and Brown's ID cards.

2. February 11, 2021

On February 11, 2021, an officer pursued a Ford Mustang traveling at high speeds. After losing the car, the officer informed law enforcement of the pursuit and vehicle description, and another officer reported that he saw Mr. Brown in a matching vehicle days earlier. Officers drove by Mr. Brown's residence and saw the same vehicle in the driveway with the alarm sounding. The car was confirmed stolen, and officers saw a firearm in the driver's seat. A lawful search revealed: an FMP9 9mm pistol containing one 9mm round, a loaded 50-round drum magazine for the FMP9 pistol, a loaded PT pro 9mm pistol magazine, and other ammunition. The vehicle also contained paperwork and ID cards for Dalton Brown and a silver key ring engraved with the name "Dash" (Mr. Brown's alias). 2 R. 41–42, ¶ 14. DNA evidence linked the FMP9 pistol to Mr. Brown.

3. February 14–15, 2021

On February 14, 2021, an officer saw Mr. Brown's girlfriend getting into the passenger seat of a pickup truck matching the description of a stolen vehicle used in an armed robbery on February 10. A high-speed chase ensued and the truck eluded the officer. On February 15, the truck was spotted again, and after another high-speed chase, officers found the pickup wrecked near an intersection. Mr. Brown and

his girlfriend were taken into custody, and his girlfriend identified Mr. Brown as the driver. A key fob seized from Mr. Brown upon his arrest was compatible with the Ford Mustang from the February 11 chase. After executing a search warrant, officers found a box of 9mm ammunition and a camouflage jacket matching the description of the one used in the February 10 robbery.

B. Sentencing

The PSR recommended: (1) a two-level increase based on the involvement of three firearms found in December 2020, February 2021, and March 2021, see U.S.S.G. § 2K2.1(b)(1)(A); (2) a two-level increase because two of the three firearms were stolen, see § 2K2.1(b)(4)(A); (3) a base offense level of 20 because a pistol capable of accepting a large-capacity magazine was found in the car in February 2021 when Mr. Brown was a previously convicted felon, see § 2K2.1(a)(4)(B); (4) a two-level reckless endangerment enhancement based on Mr. Brown fleeing law enforcement in December 2020 and February 2021, see § 3C1.2; and (5) a four-level enhancement based on the possession of firearms or ammunition in connection with a felony (here possessing stolen vehicles), see § 2K2.1(b)(6)(B). Mr. Brown received a three-point reduction for acceptance of responsibility for a total offense level of 27. According to Mr. Brown, the total offense level should have been 12. Aplt. Br. at 35. With a criminal history category of VI, the guideline range would be 30–37 months.

The district court reviewed sentencing memoranda from the parties, additional evidence submitted by the government, and overruled Mr. Brown's numerous objections to the PSR. The court found that (1) the government's evidence was

reliable and sufficient to establish the uncharged conduct by a preponderance of the evidence,[2] and that (2) the instances of uncharged conduct in December 2020 and February 2021 were relevant conduct given their similarity, regularity and temporal proximity. Although the PSR calculated a guideline range of 130–162 months based on an offense level of 27 and a criminal history category of VI, the court applied the lower statutory maximum of 120 months.

Discussion

An 18 U.S.C. § 922(g)(1) conviction corresponds with U.S.S.G. § 2K2.1. Since § 2K2.1 is a groupable offense under U.S.S.G. § 3D1.2(d), "all acts and omissions" that were "part of the same course of conduct or common scheme or plan as the offense of conviction" constitute relevant conduct to determine the guideline range. U.S.S.G. § 1B1.3(a)(2) (emphasis added). Offenses are considered part of the "same course of conduct" based on several factors, including "the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses." § 1B1.3 cmt. n.5(B)(ii).[3] A stronger presence of two factors is required to compensate for one factor's absence. Id.

We review the district court's application of the guidelines de novo and the

[2] Mr. Brown does not challenge the reliability of the government's evidence, Aplt. Br. at 5 n.2, only its sufficiency.

[3] We utilize the same framework as the district court and analyze whether defendant's uncharged conduct is relevant under a "course of conduct" as opposed to a "common scheme or plan." U.S.S.G. § 1B1.3(a)(2), cmt. n.5(B)(ii).

court's underlying factual findings for clear error. United States v. Munoz-Tello, 531 F.3d 1174, 1181 (10th Cir. 2008). This court has assumed the "determination of relevant conduct is a legal conclusion we review de novo." See United States v. Craig, 808 F.3d 1249, 1255 (10th Cir. 2015). The government must prove the uncharged conduct supporting sentencing increases and enhancements by a preponderance of the evidence. United States v. Martinez-Jimenez, 464 F.3d 1205, 1209 (10th Cir. 2006). The district court's factual finding as to whether the government met this burden "is not clearly erroneous unless it is without factual support in the record, or unless the court after reviewing all the evidence, is left with a definite and firm conviction that the district court erred." United States v. Chavez, 734 F.3d 1247, 1250 (10th Cir. 2013) (quotation omitted).

A. The multiple-firearm and stolen-firearm enhancements

The guidelines provide for a two-point increase when relevant conduct includes possessing between three and seven firearms, U.S.S.G. § 2K2.1(b)(1)(A), and a two-point increase when any firearm was stolen, § 2K2.1(b)(4)(A). Section 2K2.1(b)(1)(A) encompasses both constructive and actual possession of firearms. See United States v. Gambino-Zavala, 539 F.3d 1221, 1228–29 (10th Cir. 2008). The district court found the government (1) established by a preponderance of the evidence that Mr. Brown constructively possessed firearms on December 21, 2020, February 11, 2021, and March 3, 2021, and (2) that each act was relevant conduct given Mr. Brown's "course of conduct . . . [of] possessing firearms[.]" 3 R. 37.

Mr. Brown concedes that the guns possessed in December and March were

both stolen, Aplt. Br. at 28, and that he possessed a gun on February 11, id. at 16–17. However, he contends that the evidence demonstrating constructive possession of the March pistol and December rifle is insufficient. Id. at 17–25. He further contends that all uncharged instances of gun possession are not relevant conduct. Id. at 25–28. We address each argument in turn.

1. Constructive possession of March and December guns

The district court did not clearly err in finding Mr. Brown possessed the March pistol and December rifle. "[C]onstructive 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." United States v. Little, 829 F.3d 1177, 1182 (10th Cir. 2016). When an object can be attributed to more than one person, there must be a nexus between the defendant and the object supported by "reasonable inferences from direct or circumstantial evidence[.]" United States v. Reece, 86 F.3d 994, 996 (10th Cir. 1996).

Sufficient circumstantial evidence supports Mr. Brown's knowledge of and intent to possess the March pistol: he was the reported driver of the car, the pistol was found in close proximity to the driver's seat on the floor of the passenger's seat, the pistol was in plain view, a magazine with 9mm ammunition was in the driver side compartment, and most importantly, the 9mm ammunition in his pocket was compatible with the 9mm pistol.[4] Proximity to the gun alone is not enough, but the

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[4] We are not persuaded by cases cited by Mr. Brown to show that there is insufficient evidence for constructive possession. In United States v. Houston, 364

district court could certainly find from the totality of the evidence that Mr. Brown knew of and intended to possess the March pistol. See United States v. Jameson, 478 F.3d 1204, 1209–10 (10th Cir. 2007).

Similarly, the record supports a finding of constructive possession of the December rifle: an officer recognized Mr. Brown driving the car with the rifle, the car was then parked at his son's mother's home, Mr. Brown's girlfriend told officers he had instructed her to retrieve the vehicle with the gun inside, and Mr. Brown's identification cards were found in the car along with ammunition. Even if the rifle wedged between the passenger seat and the door was not "readily accessible" to Mr. Brown at the time, that fact alone is not dispositive. See United States v. Norman, 388 F.3d 1337, 1342 (10th Cir. 2004). Finally, Mr. Brown's history with guns further supports an inference he knew about both guns, and the court apparently made a credibility determination rejecting Mr. Brown's statements to the contrary. See United States v. Hoyle, 751 F.3d 1167, 1175 (10th Cir. 2014).

2. Possession of all other guns as relevant conduct

Mr. Brown's possession of guns in December 2020, February 2021, and March 2021 is also relevant conduct. Under the "same course of conduct" analysis

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F.3d 243, 248–49 (5th Cir. 2004), the gun was not in plain view, and no ammunition was recovered from defendant's person. In United States v. Kelso, 942 F.2d 680, 681–82 (9th Cir. 1991), the only evidence supporting constructive possession was the defendant's proximity to the gun and his prior criminal history — no ammunition was found on his person. We find United States v. Perez, 653 F. App'x 492, 493–94 (9th Cir. 2016), similar to this one — the Ninth Circuit found that a defendant constructively possessed a firearm found in his residence that was the same caliber as the ammunition found in his pocket.

applicable here, "all acts and omissions . . . that were part of the same course of conduct" are relevant. U.S.S.G. § 1B1.3(a)(2). A recurring theme of Mr. Brown's argument is that the district court improperly found a course of conduct of "possessing firearms" even though the charged conduct was possession of ammunition. Aplt. Br. at 10–13; 3 R. 37. First, the district court did not base its finding on possession of firearms alone — it found a course of conduct "with respect to possessing firearms among other things[,]" such as ammunition. 3 R. 37 (emphasis added). Second, Mr. Brown's possession of a stolen 9mm pistol is relevant to the charged possession of 9mm ammunition as a felon — 18 U.S.C. § 922(g) penalizes the possession of firearms and ammunition together, the acts are similar in nature, and pertaining to the charged ammunition possession on March 3, 2021, the acts occurred on the same day. See United States v. Conway, 513 F.3d 640, 643 (6th Cir. 2008).

Furthermore, on December 21, 2020, February 11, 2021, and March 3, 2021, Mr. Brown possessed ammunition, as well as guns, in cars. These acts were all similar in nature and occurred regularly over a span of approximately two months. Mr. Brown was a convicted felon on each occasion. Therefore, the district court did not err in its relevant conduct determination.

B. The high-capacity magazine enhancement[5]

U.S.S.G. § 2K2.1 instructs the court to apply a base offense level of 20 if relevant conduct includes the possession of a "semiautomatic firearm that is capable of accepting a large capacity magazine." U.S.S.G. § 2K2.1(a)(4)(B). The district court applied this enhancement based on the discovery of a loaded 50-round drum magazine compatible with an FMP9 pistol (containing Mr. Brown's DNA) in a car abandoned by Mr. Brown on February 11, 2021. Mr. Brown objects to this enhancement primarily because he argues there is insufficient evidence that he possessed the December rifle or March pistol, so the February gun possession cannot be relevant conduct. Aplt. Br. at 28–29. But we disagree for the reasons stated above — there was sufficient evidence for the district court to find that Mr. Brown possessed the March and December guns, and each incident also involved Mr. Brown's possession of ammunition as a convicted felon.[6] The February 11, 2021 possession of a 50-round drum magazine and compatible gun is relevant conduct and supports the high-capacity magazine enhancement. § 2K2.1(a)(4)(B).

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[5] The parties disagree about the appropriate base offense level if Mr. Brown's objection to the high-capacity magazine enhancement is sustained. Because we affirm the district court's ruling, we do not reach this issue.

[6] Mr. Brown also objects to the district court's consideration of his 2015 convictions to establish a course of conduct of possessing guns and ammunition as a felon. Aplt. Br. at 29. But even without considering Mr. Brown's 2015 convictions, the incidents of gun and ammunition possession in December 2020, February 2021, and March 2021 are more than enough to establish a course of conduct. § 1B1.3(a)(2).

C. The reckless endangerment enhancement

U.S.S.G. § 3C1.2 calls for a two-level enhancement "[i]f the defendant recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer[.]" The district court applied the enhancement because Mr. Brown led law enforcement on three separate high-speed chases in December 2020 and February 2021. See United States v. Gray, 512 F. App'x 803, 807 (10th Cir. 2013).

Mr. Brown asserts that his prior acts of flight in December and February are not relevant conduct because even assuming weapons possession may be relevant conduct, flight is not. Aplt. Br. at 30–33. He further asserts that a nexus is required between reckless endangerment and **charged** conduct. Reply Br. at 14–17. The government argues that § 1B1.3 allows the court to broadly consider all acts from the same course of conduct as the charged offense and that this court has declined to hold that § 3C1.2 requires a nexus. Aplee. Br. at 34–37. Mr. Brown properly objected to the enhancement and whether the prior flights are relevant conduct, and the district court considered and overruled the objection by applying the enhancement.

1. Nexus requirement

This court has yet to decide whether U.S.S.G. § 3C1.2 requires a nexus between reckless endangerment and the offense of conviction. See, e.g., United States v. Gray, 512 F. App'x 803, 807–08 (10th Cir. 2013) ("[W]e have doubts whether there is a nexus requirement since reckless endangerment may simply be part of relevant conduct under § 1B1.3[.]" (quoting United States v. Davidson, 283 F.

App'x 612, 615 (10th Cir. 2008))). The Fifth, Sixth, and Seventh Circuits have held that § 3C1.2 has a nexus requirement. United States v. Dial, 524 F.3d 783, 787 & n.2 (6th Cir. 2008); United States v. Southerland, 405 F.3d 263, 268 (5th Cir. 2005); United States v. Seals, 813 F.3d 1038, 1045–46 (7th Cir. 2016). And the Ninth Circuit assumed a nexus was required without deciding, United States v. Duran, 37 F.3d 557, 559–60 (9th Cir. 1994), abrogated on other grounds by Tapia v. United States, 564 U.S. 319 (2011).

However, in United States v. Deckert, 993 F.3d 399, 405 (5th Cir. 2021), the Fifth Circuit distinguished Southerland in which the court required a nexus for offenses covered under U.S.S.G. § 1B1.3(a)(1). The panel majority in Deckert held that § 3C1.2 does not require a nexus for offenses covered under § 1B1.3(a)(2) (groupable offenses under § 3D1.2(d)) where relevant conduct includes all acts that are part of the same course of conduct. 993 F.3d at 404–05. In so holding, the panel majority noted our decision in United States v. Cuthbertson, 138 F.3d 1325, 1327 (10th Cir. 1998), where we recognized a distinction between §1B1.3(a)(1) and (a)(2), that turned on whether the offense of conviction was groupable. Deckert, 993 F.3d at 404. The Deckert panel majority held that incorporating "[§ 1B1.3](a)(1)'s requirement that the act or omission occur during . . . the offense of conviction would render subsection (a)(2)'s definition of relevant conduct as a 'common scheme or plan' superfluous." Id. at 403 (emphasis added).

We find the panel majority's reasoning in Deckert persuasive. We hold the § 3C1.2 enhancement may be applied to conduct found relevant under § 1B1.3(a)(2).

Thus, relevant conduct that occurs during "the same course of conduct or common scheme or plan" as the offense of conviction may support the enhancement. § 1B1.3(a)(2). We do not resolve whether § 3C1.2 requires a nexus between reckless endangerment and the offense of conviction for conduct found relevant under § 1B1.3(a)(1).

2. Prior flights as relevant conduct

The prior flights from law enforcement are relevant conduct. Mr. Brown argues that the December and February flights are not relevant conduct, and that the district court improperly considered whole incidents, not specific acts, in determining relevant conduct. Aplt. Br. at 11–12. But Mr. Brown's 18 U.S.C. § 922(g) conviction corresponds with U.S.S.G. § 2K2.1, a groupable offense under U.S.S.G. § 3D1.2(d), and therefore the court properly considers at sentencing "all acts" from the same course of conduct. U.S.S.G. § 1B1.3(a)(2) (emphasis added).

Over approximately two months, Mr. Brown possessed ammunition as a convicted felon four times, he possessed firearms as a convicted felon during three of those instances (two of which were stolen), he was driving stolen vehicles three times, and he led law enforcement on high-speed car chases three times. These acts are similar and occurred regularly over a short period of time. U.S.S.G. § 1B1.3 cmt. n.5(B)(ii). Mr. Brown correctly points out he did not lead law enforcement on a high-speed chase on March 3, 2021. But, as we hold here, the district court could apply the enhancement because Mr. Brown's previous flights from law enforcement occurred during "the same course of conduct or common scheme or plan" as the

offense of conviction. § 1B1.3(a)(2).

D. The in-connection-with enhancement

U.S.S.G. 2K2.1(b)(6)(B) provides for a four-level enhancement if the defendant "possessed any firearm or ammunition in connection with another felony offense." The district court accepted the PSR's recommendations and applied this enhancement based on Mr. Brown's possession of firearms or ammunition along with stolen vehicles on February 11, 2021, February 15, 2021,[7] and March 3, 2021. Mr. Brown argues that although the enhancement can be applied based on the possession of ammunition, the court based the enhancement on firearm possession at the sentencing hearing.[8] Aplt. Br. at 33. Further, he contends the enhancement does not apply because he did not possess the March pistol, and the February gun possession was not relevant conduct. [9] We disagree with Mr. Brown and uphold the enhancement. Because his possession of the March pistol is relevant conduct (and is supported by sufficient evidence), and he concedes the car in March was stolen, Aplt. Br. at 5, the enhancement applies based on the March firearm possession alone in

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[7] The government concedes Mr. Brown did not possess a firearm on February 15 as opposed to February 11, but reminds us he had ammunition. Aplee. Br. at 40.

[8] The parties dispute whether Mr. Brown properly preserved his objection to the in-connection-with enhancement and therefore what standard of review should apply. Aplee. Br. at 37–39; Aplt. Reply Br. at 18–20. We need not decide this issue because we find the absence of error.

[9] While the March firearm possession supports the § 2K2.1(b)(6)(B) enhancement, we note that the possession of ammunition also supports the enhancement, id., and we are not limited to the district court's oral adoption of the PSR basing the enhancement on firearm possession. Mr. Brown possessed ammunition on February 11, February 15, and March 3, all while possessing stolen cars.

connection with felony possession of a stolen vehicle. Okla. Stat. tit. 47, § 4-103(A); see also United States v. Sanchez, 22 F.4th 940, 941–42 (10th Cir. 2022).

AFFIRMED.