NONPRECEDENTIAL DISPOSITION
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United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued November 6, 2023
Decided November 28, 2023

Before

JOEL M. FLAUM, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

No. 22-2959

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RAYMOND BOWIE,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:21-cr-00309-JPH-DML-1

James P. Hanlon,
Judge.

O R D E R

Raymond Bowie pleaded guilty to possessing a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g)(1). At sentencing the district court accurately calculated an advisory range of 37 to 46 months' imprisonment but imposed an upward variance to 72 months to reflect a number of aggravating factors it found were not adequately accounted for by Bowie's Guidelines range. One of those factors was Bowie's possession of a fully automatic firearm.

What concerns Bowie on appeal also leaves us with uncertainty on a point that is material to the district court's consideration of Bowie's Guidelines range and, by extension, the basis for its upward variance. The confusion rooted itself in the PSR's

determination that Bowie's base offense level was 22 under U.S.S.G. § 2K2.1(a)(3), which calls for an enhanced base offense level if:

> (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense.

U.S.S.G. § 2K2.1(a)(3)(A)–(B) (2021).

According to paragraph 15 of the PSR, § 2K2.1(a)(3) applied "because the offense involved a semiautomatic firearm capable of accepting a large capacity magazine" and because Bowie had previously been convicted of armed robbery, a crime of violence. The district court credited this position at sentencing, adopting "what's in the presentence investigation report," including paragraph 15, "as [its] own findings for the offense level." Tr. 26:10–11.

Sentencing seemed to proceed from there on the view that the base offense level was 22 not because Bowie possessed an automatic weapon, but rather, as the district court stated, "because the offense involved a semiautomatic firearm capable of accepting a large capacity magazine." Tr. 25:19–22. So when it came time to apply the sentencing factors enumerated in 18 U.S.C. § 3553(a), the district court reached the sensible conclusion that an upward variance was necessary in part to account for the nature of Bowie's firearm—a Ruger AR 556 modified to fire automatically. In the final analysis, the district court sentenced Bowie to 72 months—approximately double the low end of the advisory range.

What no one seemed to realize—not the government, not Bowie, not the district court, not the probation officer—is that § 2K2.1(a)(3)(A)(ii), which sets forth an alternative ground for the application of § 2K2.1(a)(3)'s enhanced base offense level, applies to weapons like Bowie's. It does so through its cross-reference to 26 U.S.C. § 5845(a), a provision that applies by its terms to machineguns. See 26 U.S.C. § 5845(b) (defining "machinegun" to include "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger"). Through § 2K2.1(a)(3)(A)(ii), then, the Sentencing Commission expressly factored the special danger posed by automatic weapons into

Bowie's advisory range. Put differently, the district court's determination that Bowie's offense level was 22 under § 2K2.1(a)(3), and its calculation of an advisory range based on that offense level, necessarily accounted for the fact that Bowie's Ruger was automatic.

No doubt, the district court was free to disagree with the judgment of the Sentencing Commission that a 37-to-46-month sentence will generally be sufficient in such cases. See *Kimbrough v. United States*, 552 U.S. 85, 101–02, 108–09 (2007). What concerns us on appeal, however, is the possibility that the district court grounded Bowie's upward variance not in reasoned disagreement with the Commission, but rather on the mistaken view that § 2K2.1(a)(3) does not account for Bowie's possession of an automatic weapon in this case. Bowie argues that such a mistake occurred here, rendering his sentence procedurally unsound. See *Gall v. United States*, 552 U.S. 38, 51 (2007). He asks us to vacate his sentence and remand for resentencing.

The government concedes Bowie's framing of the alleged mistake here as one implicating procedural error. It posits, however, that the district court *was* aware that § 2K2.1(a)(3) applies to defendants convicted of possessing automatic weapons. On the government's account, the sentencing transcript reveals not a misunderstanding of the Guidelines, but rather a policy disagreement with the Sentencing Commission. Regardless, the government insists that any procedural error is harmless and that, in any event, Bowie forfeited the arguments he raises on appeal by not presenting them to the district court.

The government's position on waiver stands in irreconcilable tension with our recent decision in *United States v. Wood*, 31 F.4th 593 (7th Cir. 2022). The error Bowie challenges on appeal occurred *during* the district court's explanation of its sentence. He was therefore under no obligation to object to preserve the argument for appeal. *Id.* at 597–98.

On the merits, and represented by very able counsel, Bowie raises a valid concern, and there is much in the transcript that supports his position. Not only did the district court adopt paragraph 15 of the PSR in full, it stated on the record that Bowie's "base offense level [was] 22 … under Section 2K2.1(a)(3) … because the offense involved a semiautomatic firearm capable of accepting a large capacity magazine," not because Bowie's Ruger AR 556 was modified to fire automatically. Tr. 25:19–22. At no time during Bowie's sentencing hearing did the district court ever reference § 2K2.1(a)(3)(A)(ii), or the relevance to Bowie of that provision's cross-reference to 26 U.S.C. § 5845(a). This silence

leaves us unable to discern whether the district court was aware that the Sentencing Commission considered a base offense level of 22 appropriate even for § 922(g)(1) defendants convicted of possessing automatic weapons.

The government disagrees. It directs our attention to the district judge's explanation that although it thought § 2K2.1(a)(3) accounted for some aspects of Bowie's offense, including the fact Bowie's Ruger could "accept an extended magazine," it did not believe that that provision "fully account[ed] for the fact that it was a fully automatic weapon." Tr. 44:8–15. The government reasons that the district court's use of the qualifier "fully" implies that it believed that § 2K2.1(a)(3) accounted at least in part for the fact that Bowie's Ruger could fire automatically. On that basis, it encourages us to conclude that the district court not only was aware of § 2K2.1(a)(3)(A)(ii)'s application to automatic weapons but that its upward variance reflected a policy disagreement with the Commission's decision to punish the possession of such weapons no differently from less dangerous weapons covered by § 2K2.1(a)(3).

It might be possible to view the transcript that way. Given the evidence on the other side, however, we are left with meaningful concerns on the record before us that Bowie's sentence may be procedurally unsound. And given the emphasis the district court placed on the automatic nature of Bowie's firearm in upwardly varying from the advisory range, we cannot say that the error was harmless. See *United States v. Black*, 815 F.3d 1048, 1056–57 (7th Cir. 2016).

In the face of much uncertainty, and mindful of the importance of not only accurately calculating the applicable Guidelines range but also understanding the conduct embodied by that range, we think the most prudent course is to vacate Bowie's sentence and remand for a plenary resentencing hearing.

On remand, the parties can fully litigate the relevance, if any, of § 2K2.1(a)(3)(A)(ii) to Bowie's sentence. The district court may well determine that the same sentence is appropriate. But that decision will be for the district court to make in the first instance after revisiting Bowie's sentence in light of the concerns identified in this order. Because we vacate Bowie's sentence in full to allow for a plenary resentencing, we need not consider Bowie's additional objection that the district court added to his written judgment a condition of supervised release not orally pronounced at sentencing.

For these reasons we VACATE Bowie's sentence and REMAND for resentencing.