NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted December 6, 2023*
Decided December 18, 2023

Before

DIANE P. WOOD, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

JOHN Z. LEE, *Circuit Judge*

No. 23-1405

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,	Appeal from the United States District Court for the Central District of Illinois.
v.	No. 17-cr-40011-002
LEDELL S. TYLER, *Defendant-Appellant*.	Sara Darrow, *Chief Judge*.

O R D E R

In a collateral attack, Ledell Tyler convinced the district court to vacate his 18 U.S.C. § 924(c) conviction but not his other related convictions. Tyler was resentenced. To account for the firing of a gun during the other offenses, the district court applied a Guidelines enhancement that previously had been precluded by the § 924(c) conviction.

* We granted the parties' joint motion to waive oral argument. Thus, this appeal was submitted on the briefs and the record. FED. R. APP. P. 34(f).

Tyler argues that reviving the enhancement was improper, but he is mistaken, so we affirm.

Tyler and two other men, passing a loaded handgun and rifle between themselves, entered a house that they believed contained a brick of cocaine. One of them discharged the handgun in the foyer, and they held the occupants at gunpoint and demanded drugs. The gunmen obtained no cocaine, but they did steal some cash.

A jury found Tyler guilty of attempted Hobbs Act robbery, 18 U.S.C. §§ 1951, 2; discharging a firearm in furtherance of a crime of violence, *id.* §§ 924(c)(1)(A)(iii), 2; and possessing a firearm as a felon, *id.* §§ 922(g)(1), 924(a)(2). The probation officer calculated a total offense level of 23 and criminal history category of III under the Sentencing Guidelines, yielding, after accounting for the mandatory minimum 120-month sentence on the § 924(c) conviction, a sentencing range of 177–191 months.

This probation officer expressly declined to apply to the robbery count a firearm enhancement under U.S.S.G. § 2B3.1(b)(2)—for the stated reason that the enhancement was precluded by Tyler's § 924(c) conviction, per U.S.S.G. § 2K2.4, cmt. n.4. The court imposed 180 months' imprisonment: concurrent 60-month terms for attempted robbery and being a felon in possession, consecutive to 120 months on the § 924(c) count. Tyler appealed, but we granted his appointed counsel's motion to withdraw and dismissed the appeal. *United States v. Tyler*, 780 F. App'x 360 (7th Cir. 2019).

But then Tyler moved to vacate his sentence under 28 U.S.C. § 2255, relying on *United States v. Taylor*, 142 S. Ct. 2015 (2022), which holds that attempted Hobbs Act robbery is not a crime of violence under § 924(c). The district court agreed, vacated the § 924(c) conviction, and called for resentencing on the other two counts. The probation office prepared a revised PSR.

This time, because the § 924(c) conviction had been vacated, it no longer precluded a weapon enhancement for the robbery count, so seven levels were added to the base offense level under U.S.S.G. § 2B3.1(b)(2)(A). The total offense level became 30, making the new sentencing range 121–151 months.

Tyler objected that 18 U.S.C. § 3742(g)—a statute that determines which edition of the Sentencing Guidelines must be used at resentencing after a direct appeal—required the judge to stick with the precise set of enhancements applied at the original sentencing. The court overruled this objection, adopted the PSR's revised range, and

imposed 144 months for attempted robbery and 120 months for the felon-in-possession count, to run concurrently.

On appeal, Tyler challenges the seven-level firearm enhancement applied at resentencing. He again argues that § 3742(g) forbids courts from recalculating the Guidelines range at resentencing after a successful § 2255 motion. (He does not deny that, in substance, he otherwise qualifies for the enhancement.) In resolving a challenge to a Guidelines enhancement, we review the district court's legal conclusions de novo and its factual findings for clear error. *United States v. Ihediwa*, 66 F.4th 1079, 1082 (7th Cir. 2023).

Section 2K2.4 of the Guidelines provides that when courts impose a sentence under § 924(c) "in conjunction with a sentence for an underlying offense"—here, attempted robbery—they should "not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense." U.S.S.G. § 2K2.4 cmt. n.4. So, when Tyler was originally sentenced, his conviction under § 924(c) precluded a weapon enhancement on the attempted-robbery sentence. Once the court vacated Tyler's § 924(c) conviction, though, it properly revived the § 2B3.1(b)(2)(A) enhancement to account for the discharge of a firearm. Absent a separate § 924(c) sentence, there was no longer any rationale for omitting the firearm enhancement as to the remaining counts.

Indeed, we made the same point in precedents that Tyler's brief overlooks. *See, e.g.*, *United States v. Smith*, 103 F.3d 531 (7th Cir. 1996). In *Smith*, a defendant's § 924(c) conviction was vacated, and he was resentenced with a firearm enhancement previously blocked by the separate § 924(c) sentence. *Id.* at 533. In rejecting Smith's challenge to the revived enhancement, we explained that district courts fashion "sentencing packages" that get "unbundled" when part of a sentence is vacated; and when a § 924(c) conviction is set aside, the package "radically changes." *Id.* at 533–34. At that point, "nothing should prevent the imposition of the enhancement" previously barred by the § 924(c) sentence. *Id.* at 535; *see also United States v. Brazier*, 933 F.3d 796, 804 (7th Cir. 2019); *United States v. Binford*, 108 F.3d 723, 729 (7th Cir. 1997); *Woodhouse v. United States*, 109 F.3d 347, 348 (7th Cir. 1997).

Still, Tyler insists that § 3742(g) bars courts from recalculating the Guidelines range after a successful § 2255 challenge. Yet the statute says only that at resentencing, "the court shall apply the guidelines issued by the Sentencing Commission … that were in effect on the date of the previous sentencing." This is just a command to use the same edition of the Guidelines Manual—not, as Tyler seems to assume, the same exact

calculation as before. *See United States v. Angle*, 598 F.3d 352, 360 (7th Cir. 2010) ("[U]nder 18 U.S.C. § 3742(g), the guidelines in effect at the time of the original sentencing must be used again when an appeal results in an order for resentencing."). The court applied the 2016 Guidelines (as Tyler committed the offense in 2017) both at the original sentencing and at resentencing. And regardless, a plain reading of § 3742(g) shows that it applies only when resentencing follows a direct appeal, not a successful § 2255 motion. Section 3742(g) limits itself to cases remanded pursuant to subsection (f)(1) or (f)(2), which in turn refer to determinations made exclusively by the court of appeals and not to collateral attacks resolved by the district court under § 2255. *Cf. Pepper v. United States*, 562 U.S. 476, 499 (2011) (holding that § 3742(g)(2) applies only to resentencing after direct appeal).

Tyler cites no case law other than *United States v. Nguyen*, 702 F. App'x 442 (7th Cir. 2017), to support his proposed reading of § 3742(g). And even that unpublished decision explains only that § 3742(g) requires judges to use the same edition of the Guidelines at resentencing as at the original sentencing; there is no suggestion that the court is locked into the same exact calculation as before.

Finally, Tyler asserts, without citation to authority, that it "seems" to violate "the spirit" of the *ex post facto* doctrine and the rule of lenity to "increase" the Guidelines range at resentencing. This argument is frivolous. As the government points out, on resentencing, Tyler's combined range fell from 177–191 months to 121–151 months, and the court reduced his total sentence from 180 months to 144 months. Neither the spirit nor the letter of the law suggests that this sentence violates *ex post facto* or lenity principles. Furthermore, Tyler has not developed any argument that the revival of the firearm enhancement was vindictive, and it is difficult to imagine one. *See United States v. Rivera*, 327 F.3d 612, 615 (7th Cir. 2003).

AFFIRMED