IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
October 10, 2007
Charles R. Fulbruge III
Clerk

No. 06-20004

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

RUSSELL MENZIES

Defendant - Appellant

Appeal from the United States District Court
for the Southern District of Texas
(4:05-CR-67-2)

Before JOLLY, DAVIS, and WIENER, Circuit Judges.

PER CURIAM:*

Defendant-Appellant Russell Menzies pleaded guilty to possession of a firearm by a convicted felon. The district court sentenced Menzies to 120 months. On appeal, Menzies contends, and the government agrees, that the district court erred in calculating his sentence. Menzies also argues that his sentence was unreasonable. We need not reach the reasonableness of Menzies's sentence, because, as the evidence indicates that the district court miscalculated

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Menzies's sentence, we grant the government's motion to vacate Menzies's sentence and remand this case for resentencing.

I. FACTS AND PROCEEDINGS

In 2001, Russell Menzies was charged with one count of knowingly and unlawfully being a felon in possession of a firearm (a Browning Model Ultra XS over/under 12 gauge shotgun) in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), and knowingly making a false and fictitious statement of a fact material to the lawfulness of the acquisition of that firearm, in violation of 18 U.S.C. §§ 922(a)(6) and 924(a)(2). Menzies pleaded guilty as charged. With a base offense level of twenty four, a total offense level of twenty seven, and a Category IV criminal history, Menzies's advisory guidelines sentencing range was 100 to 125 months of imprisonment. In calculating Menzies's base level and criminal history, the district court relied on two prior felony convictions: a 1971 conviction for murdering his parents, for which the court assessed three criminal history points, and a 1986 deferred adjudication conviction for injury to a child, for which the court assessed one point. The court sentenced Menzies to 120 months, the maximum term of imprisonment allowed under the indictment. Menzies appeals his sentence.

Despite having successfully argued at the sentencing hearing that a base offense level of twenty four was appropriate, the government has changed course on appeal and has filed a motion to vacate and remand for resentencing, in which it agreed with Menzies that the district court miscalculated his sentence. We subsequently ordered that the government's motion to vacate and remand be carried with the case.

II. ANALYSIS

Menzies raises four points of error on appeal: (1) The district court incorrectly included his two prior felony convictions when determining his base offense level and criminal history; (2) the court erred when calculating his total

offense level in finding that Menzies possessed between eight and twelve firearms; (3) the court abused its discretion in rejecting Menzies's request for a downward adjustment for acceptance of responsibility; and (4) the court's sentence of 120 months, the statutory maximum, was unreasonable. The first three of Menzies's claims are addressed below. As we hold that Menzies's sentence should be vacated and this case remanded for resentencing, we need not reach Menzies's fourth point of error.

A. Standard of Review

We review the district court's guideline application de novo.[1] We review the court's finding of fact for clear error, and the sentence imposed for reasonableness.[2] We are not bound to accept the government's concession of error.[3]

B. Base Offense Level / Criminal History Error

Menzies insists, and the government agrees, that the district court miscalculated Menzies's sentencing guidelines base offense level of twenty four and Category IV criminal history. Under § 2K2.1(a)(2) of the guidelines, a base offense level of twenty four is applicable if the defendant has at least two prior felony convictions for crimes of violence, provided these two prior convictions received criminal history points under § 4A1.1.[4] Three points are added to a defendant's criminal history for each prior sentence of imprisonment that exceeds thirteen months under § 4A1.1(a), and one point is added under §

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[1] United States v. Smith, 440 F.3d 704, 706 (5th Cir. 2006). Note that Menzies was sentenced after United States v. Booker, 543 U.S. 200 (2005).

[2] Smith, 440 F.3d at 706.

[3] See, e.g., United States v. Claiborne, 132 F.3d 253, 254-55 (5th Cir. 1998).

[4] U.S.S.G. § 2K2.1(a)(2)(2000).

4A1.1(c) for a prior sentence that did not result in a term of imprisonment.[5] Nevertheless, § 4A1.2(e) places temporal limitations on prior convictions that may be included in the criminal history category: A prior sentence of imprisonment that exceeds thirteen months is counted only if it "was imposed within fifteen years of the defendant's commencement of the instant offense."[6] Similarly, any lesser prior sentence (one with a term of imprisonment of less than thirteen months, including one with no term of imprisonment) is counted only if it was imposed within ten years prior "to the defendant's commencement of the instant offense."[7] The term "commencement of the instant offense" in § 4A1.2(e) includes "any relevant conduct," which is defined to include "offenses that are part of the same course of conduct or common scheme or plan as the offense of conviction."[8]

The district court scored three criminal history points under § 4A1.1(a) for Menzies's 1971 conviction for murder with malice and one criminal history point under § 4A1.1(c) for his 1986 conviction for injury to a child. Even though Menzies's 1971 murder sentence was imposed more than fifteen years prior to the date of the instant gun possession offense, and his 1986 deferred adjudication sentence was imposed more than ten years prior thereto, the district court found that Menzies had also illegally possessed a firearm as early as 1981 and did so again in 1991. The court therefore ruled that the 1981 and 1991 firearm possessions constituted the same course of conduct as his instant firearm possession offense. Under the reasoning of the district court, Menzies's

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[5] Id. at §§ 4A1.1(a) and 4A1.1(c).

[6] Id. at § 4A1.2(e)(1).

[7] Id. at § 4A1.2(e)(2).

[8] United States v. Brummett, 355 F.3d 343, 344 (5th Cir. 2003) (citing Id. at § 1B1.3(a)(2)) (emphasis added).

illegal 2001 possession was part of a course of such conduct that began in 1981, making his 1971 and 1986 offenses fall within the applicable ten and fifteen year periods, and thereby producing a base offense level of twenty four under § 2K2.1(a)(2).

The district court cited two instances of possession of a firearm by Menzies in support of its base offense level calculation. First, in 1981, Menzies took and possessed a model Nylon 66, .22 caliber rifle that belonged to one of his tenants who was in arrears on his rent payments. Menzies kept this rifle in a small attic space in his own home until 1985, when he gave it to a friend. Second, in 1991, Menzies took and possessed a .380 caliber pistol that he found in a used car on the sales lot of a car dealership where he was working. Menzies sold the pistol to someone who worked at the car dealership approximately two years later.

Whether Menzies's firearm possessions in 1981 and 1991 warrant treatment as relevant conduct under § 4A1.2, and constitute the same course of conduct or common scheme or plan under § 1B1.3(a)(2), is the issue on which this case turns. The comments for § 1B1.3 note that multiple offenses comprise a common scheme or plan when they are "substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar modus operandi."[9] We echoed the § 1B1.3 definition of common scheme or plan in United States v. Brummett, in which we held that a defendant's possession of four firearms on three separate occasions within a nine month period qualified as "part of the same course of conduct if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses."[10]

[9] U.S.S.G. §1B1.3, cmt. (n.9) (2000).

[10] 355 F.3d at 344.

The district court concluded that Menzies's 1981 and 1991 gun possessions establish that he engaged in an ongoing series of possessions of firearms by a convicted felon. Menzies contends on appeal, and the government now agrees, that these two prior possessions were neither relevant conduct nor part of the same course of conduct as his 2001 firearm possession conviction. The district court held that all of Menzies's firearm possessions were for the common purpose of obtaining firearms despite the prohibition against his doing so. We conclude, to the contrary, that there is an insufficient degree of similarity between the different firearm possessions for them to be considered part of the same common scheme or plan and thus relevant conduct. The evidence does not show that (1) Menzies had engaged in conduct similar to the offense of conviction in 2001 when he obtained firearms in 1981 and 1991, (2) he retained uninterrupted possession of the 1981 rifle and 1991 pistol over the course of the years, or (3) he obtained and retained possession of the 1981 rifle, 1991 pistol, and 2001 shotgun for the same purpose.

Menzies did not engage in an ongoing series of offenses similar to the offense of conviction. The methods by which he obtained firearms in 1981, 1991, and 2001 differed significantly. Menzies obtained possession of the Browning 12 gauge shotgun in 2001 through a straw purchase; in contrast, he simply took the .22 caliber rifle from a tenant in 1981 when that person failed to pay his rent; and he "liberated" the .38 pistol from a used vehicle in 1991. Similarly, the timing of Menzies's offenses does not suggest that the three guns were possessed as part of an ongoing common scheme or plan. Although Menzies possessed the tenant's rifle from 1981 through 1985, the car dealership pistol from 1991 until approximately 1993, and a shotgun beginning in 2001, there were significant periods from 1981 to 2001 during which Menzies did not possess any firearms. Menzies's three gun possessions occurred intermittently over too long a time span to be considered an ongoing series of offenses. Menzies also obtained the

three firearms for completely different purposes. He obtained the shotgun in 2001 for the purpose of hunting geese and shooting clay pigeons, whereas his purposes for obtaining the rifle in 1981 and the pistol in 1991, although not entirely clear, were certainly not for waterfowl hunting or clay pigeon shooting, both of which are done exclusively with a shotgun, never with a rifle or a pistol. We are satisfied that the substantial variances in characteristics, time periods, and purposes among the three possessions at issue preclude Menzies's earlier possessions from being deemed relevant conduct and part of a common scheme or plan.

In sum, assessing three criminal history points for Menzies's 1971 conviction for murder with malice, and one point for his 1986 deferred adjudication conviction for injury to a child, is not supported by the evidence. It suggests that these prior offenses should not have been included in Menzies's guidelines calculation, making a base offense level of twenty four inappropriate. The 1981, 1991, and 2001 possession offenses were for different types of firearms, obtained in different ways, for different purposes, over attenuated and unconnected periods of time.

C. Firearm Possessions Error

Menzies asserts that the district court also erred in increasing his base offense level of twenty four by three levels, to twenty seven, based on a finding that the offense of conviction and all relevant conduct involved the possession of a total of ten firearms. Under § 2K2.1(b)(1)(C), three levels are added to a defendant's base offense level if the offense involved eight to twelve firearms.[11] The district court concluded that Menzies's possessed ten firearms (including the

[11] Because Menzies committed his crime in September 2001, the 2000 edition of the guidelines was used by the district court. The 2001 edition, which came into effect in November 2001, contained a revised § 2K2.1(b)(1), under which Menzies would have his total offense level increased by four levels for possessing ten firearms, one more level than the three level increase dictated by the 2000 version of the guidelines.

shotgun to which he pleaded guilty), and that, taken together, this constituted relevant conduct, because they were part of a common scheme or plan. As already discussed, however, the sentencing court erred in lumping together a series of distinguishable and disconnected incidents of firearm possession. The same reasoning governs our approach to these additional firearm possessions which the district court included in calculating Menzies's total offense level. Menzies's 2001 offense involved the use of a straw purchaser to obtain a shotgun for lawful sporting purposes. All of Menzies's other firearm possessions, in contrast, involved very different types of guns, sporadically acquired or obtained for very different purposes, in very different manners, over an extended and frequently interrupted period of time. None of Menzies's other firearms was obtained in a straw purchase, and none was acquired to hunt lawfully or to shoot clay pigeons competitively. We hold that it was thus error for the district court to add three levels to Menzies's base offense level under § 2K2.1(b)(1)(C). The 2001 offense of conviction was for only one firearm, and Menzies's other firearm possessions cannot properly be deemed relevant conduct or part of a common scheme or plan.

D. Denial of Downward Adjustment

Menzies's claim that the district court erred in not awarding him a downward adjustment for accepting responsibility for his crime is meritless. The district court had the discretion to grant or deny Menzies's sentence reduction request. Section 3E1.1 of the guidelines specifically notes that "conduct resulting in an enhancement under § 3C1.1 [which includes violating conditions of supervised release] ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct."[12] We have held that it is a proper exercise of discretion for a district court to deny a reduction for acceptance of

[12] U.S.S.G. §3E1.1, cmt. (n.4) (2000).

responsibility based on a defendant's failure to comply with the conditions of his release.[13] Menzies admittedly violated the conditions of his pretrial release by moving without notifying his probation officer of his change of address. The district court had the discretion to deny Menzies's request for a downward adjustment and, because Menzies violated the conditions of his supervised release by failing to report his change of address, the court cannot be said to have abused its discretion.

III. CONCLUSION

We hold that the district court did not err in refusing to award Menzies a downward adjustment in his sentence for acceptance of responsibility, but that the court did err in (1) including two prior felony convictions in arriving at Menzies's base offense level and criminal history calculation and (2) adding three additional points to determine Menzies's total offense level based on the court's determination that his offense involved ten firearms. The district court commingled sporadic, short-term firearm possessions, involving different types of guns, with different purposes and uses, over a twenty year period, to form its conclusion that these possessions were relevant conduct and part of a common scheme or plan. Menzies's firearm possessions were, however, the antithesis of a common scheme; rather, they were totally random, irregular, and uncommon. The government correctly revised its perspective on Menzies's sentence, and we are unwilling to reject this principled act and the valid reasons for it. The sentence of the district court is therefore VACATED and the case is REMANDED for resentencing consistent with this opinion.

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[13] See, e.g., United States v. Hooten, 942 F.2d 878, 882-83 (5th Cir. 1991).