United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
September 10, 2020
Lyle W. Cayce
Clerk

No. 19-30469

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ALFRED MONTGOMERY, III,

Defendant—Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:16-CR-225-1

Before HIGGINBOTHAM, ELROD, and HAYNES, *Circuit Judges*.

HAYNES, *Circuit Judge*:

Alfred Montgomery III pleaded guilty to two counts of felony possession of a firearm in violation of 18 U.S.C. § 922(g) (as well as one count of distribution of marijuana).[1] For the two felon in possession counts, he was sentenced to the minimum fifteen years (to run concurrently) required by the Armed Career Criminal Act of 1984 ("ACCA"), 18 U.S.C. § 924(e), because of his prior Louisiana conviction of simple burglary of an inhabited dwelling.

[1] The count of distributing marijuana in violation of 21 U.S.C. § 841, for which he received a concurrent sentence of 60 months, is not at issue here.

After Montgomery was sentenced, the Supreme Court decided *Rehaif v. United States*, which held that a defendant's knowledge that he was a convicted felon is an element of a § 922(g) offense. 139 S. Ct. 2191, 2200 (2019). Montgomery appeals his convictions and sentences on those counts, claiming that his convictions should be vacated because of the district court's *Rehaif* error and that his fifteen-year prison sentence was error because Louisiana simple burglary of an inhabited dwelling is not a predicate offense under ACCA. For the foregoing reasons, we AFFIRM.

I. Background

In the 2018 grand jury indictment of Montgomery on the two felon in possession counts, as well as in the factual basis that was part of Montgomery's guilty plea, there was no statement that Montgomery knew that he was a felon at the time he committed the offenses. But Montgomery stipulated that he had prior convictions: one Mississippi conviction for burglary of a dwelling, which was a crime punishable by imprisonment for a term exceeding one year, and a Louisiana conviction for seven separate counts of simple burglary of an inhabited dwelling.

At Montgomery's rearraignment, the district court listed the elements of a § 922(g) conviction to confirm that Montgomery knew the elements of his offense. In doing so, the court did not state that Montgomery had to know that he was a felon at the time of his offense. The court accepted Montgomery's guilty plea.

The original presentence investigation report ("PSR") calculated an advisory Sentencing Guidelines range of forty-five to fifty-seven months' imprisonment based on a total offense level of 17 and a criminal history category of V. Montgomery's criminal history included three prior convictions: (1) a 2010 Mississippi conviction for selling cocaine, (2) 2010 convictions on eight counts of Louisiana simple burglary of an inhabited

dwelling,[2] which were counted as a single conviction for criminal history purposes, and (3) a 2011 Mississippi conviction for burglary of a dwelling.

The Government objected to the PSR, contending that Montgomery's prior convictions qualified him as an armed career criminal for purposes of ACCA. Under ACCA, a defendant is an armed career criminal and subject to a mandatory minimum of fifteen years' imprisonment for felony possession of a firearm if he has three prior convictions for a "violent felony" or a "serious drug offense." 18 U.S.C. § 924(e)(1). The Government argued that Louisiana simple burglary of an inhabited dwelling is a "violent felony" and that Montgomery's convictions on eight counts of this offense counted as eight separate convictions; it also argued that Montgomery's conviction for selling cocaine was a "serious drug offense." The U.S. Probation Office agreed with the objection in part: It determined that Montgomery's conviction of Louisiana simple burglary of an inhabited dwelling, Mississippi burglary of a dwelling, and selling cocaine were three predicate offenses that subjected Montgomery to an enhanced sentence under ACCA. The Probation Office revised Montgomery's total offense level to 30 and calculated an imprisonment range of 180 to 188 months.

Montgomery objected to the revised PSR, arguing that Louisiana simple burglary of an inhabited dwelling does not constitute a violent felony under ACCA because it does not meet the federal definition of "generic burglary." At Montgomery's sentencing hearing, the court rejected his objection and imposed the fifteen-year mandatory minimum sentence. Montgomery timely appealed.

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[2] Montgomery has only seven counts of simple burglary of an inhabited dwelling, as correctly stipulated in his factual basis. The eighth count is for simple burglary under Louisiana Revised Statute § 14:62.

II. Discussion

Montgomery raises two issues on appeal: (1) whether his conviction should be vacated in light of the Supreme Court's decision in *Rehaif*, and (2) whether Louisiana simple burglary of an inhabited dwelling qualifies as "burglary" under ACCA. We AFFIRM.

A. *Rehaif* Error

The Supreme Court's decision in *Rehaif* superseded unanimous circuit precedent by requiring proof that a defendant charged with violating § 922(g) "knew he belonged to the relevant category of persons barred from possessing a firearm" at the time of his offense. *Rehaif*, 139 S. Ct. at 2200; *accord id.* at 2210 & n.6 (Alito, J., dissenting) (collecting appellate decisions holding that scienter was not required for § 922(g) convictions). This decision came after Montgomery pleaded guilty and was sentenced.[3] As a result, the district court did not inform Montgomery of the scienter element of his § 922(g) offense, and he pleaded guilty without knowledge of this requirement. Montgomery did not challenge the validity of his guilty plea in district court.

We review an issue not raised below for plain error. *United States v. Lavalais*, 960 F.3d 180, 186 (5th Cir. 2020), *petition for cert. filed*, No. 20-5489 (U.S. Aug. 20, 2020). This standard of review also applies to *Rehaif* errors not raised below.[4] Under plain error review, the defendant must show

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[3] Montgomery pleaded guilty on October 3, 2018, and was sentenced on June 5, 2019. The Supreme Court decided *Rehaif* on June 21, 2019. *See* 139 S. Ct. 2191.

[4] Montgomery argues that the district court's *Rehaif* error is a structural error that warrants automatic reversal of his guilty plea. However, after Montgomery submitted his brief, we decided *Lavalais*, which expressly rejected the argument that *Rehaif* errors are structural and applied plain error review to a *Rehaif* error that was not raised in district court. 960 F.3d at 187–88. We are bound by our own precedent "in the absence of an intervening contrary or superseding decision by this court sitting en banc or by the United

"(1) an error, (2) that is clear or obvious, and (3) that affects the defendant's substantial rights." *Id.* If the defendant satisfies these three conditions, we "may exercise [our] discretion to grant relief if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* "We may consider the entire district court record" to determine whether a plain error occurred. *United States v. Hicks*, 958 F.3d 399, 401 (5th Cir. 2020).

The district court's failure to list the scienter requirement for Montgomery's § 922(g) offense was an error that is clear and obvious.[5] *See Lavalais*, 960 F.3d at 186–87. However, Montgomery is not entitled to relief because he has not shown a reasonable probability that, but for the error, he would not have entered the plea, and therefore he has not shown that the district court's error affected his substantial rights. *See id.* at 187 (citing *United States v. Dominguez Benitez*, 542 U.S. 74, 81 (2004)).

In *Lavalais*, we recognized that "[d]emonstrating prejudice under *Rehaif* will be difficult for most convicted felons for one simple reason: Convicted felons typically know they're convicted felons. And they know the Government would have little trouble proving that they knew." 960 F.3d at 184. Accordingly, we held that the district court's *Rehaif* error did not prejudice Lavalais. *Id.* at 187. Lavalais had "admitted that he was a felon convicted of a crime punishable by more than one year" in his factual basis for his plea. *Id.* He confirmed his felon status at his rearraignment. *Id.* His PSR also listed his prior felony. *Id.* In that regard, we observed that Lavalais failed to indicate "that his prior felony conviction was somehow new

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States Supreme Court," neither of which has occurred. *United States v. Setser*, 607 F.3d 128, 131 (5th Cir. 2010) (quotation omitted).

[5] Indeed, the Government "concedes that the failure to inform Montgomery of the *Rehaif* knowledge element was error that [wa]s plain."

information that he did not know at the time he possessed the firearm" and that "if anything there [wa]s evidence to the contrary." *Id.*

Similarly, here, the evidence shows that Montgomery knew he was a felon at the time when he possessed the firearms at issue.[6] Both possessions of a weapon occurred in June of 2016. Montgomery's PSR shows that he pleaded guilty to three separate felonies in 2010 and 2011 for which he received sentences of 10 years (6 years suspended), 12 years (11 years suspended), and 10 years. As a result of those crimes and parole violations (and, then, being released on parole), he was in prison for over three years for his prior felonies (from 2011 to 2014) and he was on parole when he committed the § 922(g) offenses. In other words, he had spent several years in prison only a couple of years before the crimes in question. That fact and the fact of his parole status on the dates of the offenses demonstrate that Montgomery's argument—that he might not have been aware of his convicted felon status because his guilty pleas were "entered years ago when he was quite young"—lacks merit.[7]

Because there is strong evidence that Montgomery was aware of his convicted-felon status, he also cannot show that "the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *See id.* at 186, 188 (holding that a *Rehaif* error "does not remotely—let alone seriously—affect the fairness, integrity, or public reputation of judicial proceedings . . . when the record contains substantial evidence that [the

[6] Our focus, of course, is his knowledge at the time of the offense. But we note that he admitted to being a convicted felon in his factual basis and confirmed his knowledge of his status at his rearraignment.

[7] In any event, Montgomery's "knowledge of his felon status is at least subject to reasonable debate," so the evidence is insufficient to conclude that the district court plainly erred. *See Hicks*, 958 F.3d at 401.

defendant] knew of his felon status" (quotation omitted)). We thus hold that the district court's *Rehaif* error did not amount to plain error and affirm Montgomery's § 922(g) convictions.

B. Federal Minimum Sentence Under ACCA

ACCA provides a list of offenses that constitute a "violent felony," and "burglary" is one of them. 18 U.S.C. § 924(e)(2)(B). However, not all state burglary convictions are considered "burglary" under ACCA—only those where the statutory "elements are the same as, or narrower than, those of the generic offense" of burglary. *See Descamps v. United States*, 570 U.S. 254, 257 (2013). For guilty pleas, the defendant must have "necessarily admitted the elements of the generic offense." *Id.* at 262 (brackets and quotation omitted). To determine whether burglary under a state statute is broader than generic burglary, courts generally employ "a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *Taylor v. United States*, 495 U.S. 575, 600 (1990). "At a minimum, the defendant must point to cases in which a state has applied the statute in a broader manner," showing that there is "a realistic probability, *not a theoretical possibility*, that the State would apply its statute to conduct that falls outside the generic definition of the crime." *United States v. Albornoz-Albornoz*, 770 F.3d 1139, 1141 (5th Cir. 2014) (per curiam) (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). We review de novo the district court's characterization of a prior offense as a violent felony under ACCA. *United States v. Massey*, 858 F.3d 380, 382 (5th Cir. 2017).

1. Generic Burglary

In *Taylor*, the Supreme Court defined generic burglary as the "unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." 495 U.S. at 598. The Court

observed that generic burglary is a predicate offense under ACCA "because of its inherent potential for harm to persons"; that is, "[t]he fact that an offender enters a building to commit a crime often creates the possibility of a violent confrontation." *Id.* at 588.

Relying on *Taylor*, the Court later held in *United States v. Stitt* that Tennessee and Arkansas burglary statutes, both of which included "burglary of a nonpermanent or mobile structure that is adapted or used for overnight accommodation," fell under the scope of generic burglary. 139 S. Ct. 399, 404, 406 (2018); *see also United States v. Herrold*, 941 F.3d 173, 176–77 (5th Cir. 2019) (en banc) (addressing a similar issue under the Texas burglary statute), *petition for cert. filed*, No. 19-7731 (U.S. Feb. 18, 2020). In making its ruling, the Court reasoned that "[a]n offender who breaks into a mobile home, an RV, a camping tent, a vehicle, or another structure that is adapted for or customarily used for lodging runs a similar or greater risk of violent confrontation" compared to one who breaks into a home. *Stitt*, 139 S. Ct. at 406.

2. Louisiana Simple Burglary of an Inhabited Dwelling

Louisiana simple burglary of an inhabited dwelling "is the unauthorized entry of any inhabited dwelling, house, apartment, or other structure used in whole or in part as a home or place of abode by a person or persons with the intent to commit a felony or any theft therein." LA. REV. STAT. ANN. § 14:62.2(A). We have yet to address whether this particular statute is generic burglary. *United States v. Courtney*, 783 F. App'x 444, 445–46 (5th Cir. 2019) (per curiam), *cert. denied*, 140 S. Ct. 2545 (U.S. 2020).

Montgomery argues that the Louisiana statute is broader than generic burglary because Louisiana courts' interpretation of the phrase "other structure used in whole or in part as a home or place of abode" covers more

places than does the "building or structure" definition of generic burglary.[8] *See Taylor*, 495 U.S. at 598. He contends that the "building or structure" component of generic burglary is limited to buildings, enclosed spaces, and structures or vehicles adapted or customarily used for overnight accommodation.

We disagree. Generic burglary is not so limited, as the Supreme Court expressly held in *Stitt* that generic burglary covers "burglary of a 'structure appurtenant to or connected with' a covered structure." 139 S. Ct. at 406–07 (quoting TENN. CODE ANN. § 39-14-401(1)(C)). We have held the same. *See United States v. Castro-Alfonso*, 841 F.3d 292, 296–97 (5th Cir. 2016); *Albornoz-Albornoz*, 770 F.3d at 1143; *United States v. Garcia-Mendez*, 420 F.3d 454, 456–57 (5th Cir. 2005).[9] Because the Louisiana cases Montgomery cites all concerned a structure appurtenant to or connected with a residential home,[10] he has failed to show that any Louisiana court "has

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[8] Montgomery also argues that the Louisiana statute is broader than generic burglary because it (1) defines "entry" more broadly and (2) imposes liability on aiders and abettors. As to the first argument, Montgomery fails to "point to cases in which a [Louisiana] court has applied the statute in a broader manner." *See Albornoz-Albornoz*, 770 F.3d at 1141. The second argument also fails because aiders and abettors of this offense incur liability only if the principal committed all elements of the crime. *See State v. Rogers*, 428 So. 2d 932, 934 (La. Ct. App. 1983). As such, the inclusion of aiders and abettors in the Louisiana statute does not exceed the scope of generic burglary. *See Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 190 (2007) (holding that "the criminal activities of . . . aiders and abettors of a generic [crime] must themselves fall within the scope of the [generic] term . . . in the federal statute"). These arguments lack merit and do not warrant further discussion.

[9] These cases concerned whether the state burglary statute constituted the enumerated crime of burglary for a sentence enhancement under U.S.S.G. § 2L1.2(b)(1)(A)(ii). *Castro-Alfonso*, 841 F.3d at 294; *Albornoz-Albornoz*, 770 F.3d at 1140–41; *Garcia-Mendez*, 420 F.3d at 455–56. However, the Sentencing Guidelines and ACCA inquiries are the same. *See Albornoz-Albornoz*, 770 F.3d at 1141.

[10] *See State v. Mitchell*, 181 So. 3d 800, 806 (La. Ct. App. 2015) (concerning a "carport [that] was built onto the rear of . . . [the] house and was abutted to the structure");

applied the statute in a broader manner." *See Albornoz-Albornoz*, 770 F.3d at 1141.

In fact, the Louisiana statute is arguably narrower than generic burglary because the building or structure must be "used in whole or in part as a home or place of abode." LA. REV. STAT. ANN. § 14:62.2(A). This means that someone must be "living in the house at [the] time" of the offense. *State v. Smith*, 677 So. 2d 589, 592 (La. Ct. App. 1996) (quotation omitted). A "place adapted for overnight accommodation" would therefore not suffice. *See Stitt*, 139 S. Ct. at 407. Because the place burglarized must be one where a person lives, there is a greater "possibility of a violent confrontation between the offender and an occupant" than in a generic burglary. *See Taylor*, 495 U.S. at 588. We thus hold that Louisiana simple burglary of an inhabited dwelling is not broader than generic burglary.

III. CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

State v. Ennis, 97 So. 3d 575, 580 (La. Ct. App. 2012) (concerning a "shed [that] was located just outside the main residence and was within the fence that surrounded the residence"); *State v. Martin*, 970 So. 2d 9, 15 (La. Ct. App. 2007) (concerning a screened-in residential porch with doors to a bedroom and the kitchen of the house); *State v. Bryant*, 775 So. 2d 596, 602 (La. Ct. App. 2000) (concerning a "carport storage room" that "was under the same roof as the house"); *State v. Harris*, 470 So. 2d 601, 603 (La. Ct. App. 1985) (concerning "a garage and utility room attached to" the residential house).