

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8169
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIE CHESTER,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Texas

(W-91-CR-106)

(November 19, 1992)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:*

While performing a routine review of a pawn ticket bulletin, a special agent with the Bureau of Alcohol, Tobacco, and Firearms (ATF) discovered that Willie Chester, a convicted felon, had pawned and redeemed a Mossberg shotgun at Top Dollar Pawn in Waco, Texas. Further investigation revealed that Chester had pawned the shotgun a second time.

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

In a two-count indictment, a grand jury charged Chester with 1) possessing a Mossberg shotgun after three felony convictions and 2) making false written statements concerning his prior convictions, which were likely to deceive a licensed dealer in firearms, on an ATF firearms transactions form. Represented by court-appointed counsel, Chester entered a plea of not guilty and proceeded to trial before a jury. The jury returned a verdict of guilty on both counts.

The government filed a sentencing enhancement information, notifying Chester of its intent to move to enhance his sentence under the armed career criminal statute, 18 U.S.C. § 924(e)(1). The following prior convictions were used for enhancement: the sale of heroin on December 4, 1973, the burglary of a building on September 28, 1981, and the delivery of a controlled substance on July 2, 1987.

The district court sentenced Chester within the guidelines to concurrent terms of imprisonment of 264 months (count one) and 60 months (count two), concurrent terms of supervised release of five years (count one) and three years (count two), a non-interest bearing fine in the amount of \$3,000, and a special assessment of \$100.

Chester asserts that the armed career criminal statute¹ as applied to his offense violated the Eighth Amendment prohibition against cruel and unusual punishment because the punishment is disproportionate to the offense of conviction. Chester contends that the punishment must be examined under the objective criteria set out in Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983).²

An Eighth Amendment challenge to a sentence mandated by the guidelines is subject to narrow review. U.S. v. Sullivan, 895 F.2d 1030, 1031 (5th Cir.), cert. denied, 111 S.Ct. 207 (1990). "[A] reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate." Solem, 463 U.S. at 290 n. 16. This Court is reluctant "to limit legislative responses to criminal activity, and consistently [has] refused to disturb a trial court's sentence absent impermissible motives, incorrect information, or, where applicable, noncompliance with the recently promulgated Sentencing Guidelines." Sullivan at 1032 (citations omitted). Moreover, "the

¹Section 4B1.4 of the Sentencing Guidelines applies to a defendant who is subject to an enhanced sentence under 18 U.S.C. § 924(e). In presenting his arguments, Chester often interchanges the statute and the sentencing provision.

²Solem looks at 1) the gravity of the offense and the harshness of the penalty, 2) a comparison with sentences imposed on other defendants, and 3) other sentences imposed for the same offense. 463 U.S. at 291-92. Solem is a pre-guidelines case.

Guidelines are a convincing objective indicator of proportionality." Id. (citation omitted).

Chester does not dispute that his sentence was imposed within the applicable guideline ranges, nor does he challenge the motives of the district court or the correctness of the information in the probation officer's report. He merely contends that "using" a firearm to secure a loan at a pawn shop and making false statements about his prior felony convictions is not serious enough to warrant the enhancement. He states that the sentence would not be disproportionate if he were a violent felon or had committed a serious drug offense.

Chester's argument is based on an improper premise because he does not address the possession offense. He misconstrues the relevant offenses as pawning the firearm and making false statements when, in fact, the enhancement was imposed because Chester possessed a firearm in violation of § 922(g)(1) after three prior felony convictions. The commentary to U.S.S.G. § 4B1.4 specifically states that "a defendant is subject to an enhanced sentence if the instant offense of conviction is a violation of 18 U.S.C. § 922(g) and the defendant has at least three prior convictions for a 'violent felony' or 'serious drug offense,' or both, committed on occasions different from one another. U.S.S.G. § 4B1.4, comment. (n.1). Chester's argument that the application of the armed career criminal provision to his offense conduct constitutes an Eighth Amendment violation is meritless.

II

Chester contends that U.S.S.G. § 4B1.4, the armed career criminal provision, violates his right to due process and equal protection because 1) it applies to a non-violent felony and 2) it has no temporal restriction on the prior felonies used for enhancement.

Chester asserts that the armed offender provision should apply only to violent felonies and controlled substance violations as in the career offender provision of § 4B1.1. He contends that the omission of the requirement from 18 U.S.C. § 924(e)(1) creates a disparity in the sentencing guidelines between the career offender provisions of § 4B1.1 and § 4B1.4 and that the disparity violates due process.

Chester offers no authority to support his argument that the provision should apply only to violent felonies. To the contrary, he discusses five cases in his brief and concludes that all of the cases "fell short of a violation of due process and equal protection." However, he contends that his situation presents a more blatant violation of his rights than those that have been rejected. He has not shown a violation of due process.

Similarly, Chester fails to support his contention that the absence of a temporal restriction in § 4B1.4 violates due process. He relies primarily on dictum in U.S. v. McConnell, 916 F.2d 448, 450 (8th Cir. 1990), in which the court expressed regret that Congress had not imposed a time limit on the use of prior

convictions for enhancement. McConnell does not address due process concerns in the statute or in the guidelines.

The McConnell court ultimately affirmed the defendant's sentence stating that it believed that, "if Congress had envisioned a time limit, it would have incorporated it into the statute." 916 F.2d at 450. Also, this court has concluded that there was no indication that Congress intended to include a temporal restriction in § 924(e)(1). See U.S. v. Blankenship, 923 F.2d 1110, 1118 (5th Cir.), cert. denied, 111 S.Ct. 2262 (1991). It is clear that Chester's argument fails.

Chester's equal protection challenge is equally unmeritorious. In a conclusional manner, Chester identifies the suspect class as "Career Offender as opposed to Armed Career Criminal." Because Chester has not shown a suspect classification, his argument hinges on whether his classification is rationally related to a legitimate governmental interest. See U.S. v. Rojas-Martinez, 968 F.2d 415, 420 (5th Cir. 1992). He has not addressed this issue. Moreover, the classification survives the "rational relationship" test. See id.

III

Chester argues that 18 U.S.C. § 924(e)(1) and Chapter 4 of the Sentencing Guidelines violate Congressional intent because there is no time limit on the prior convictions, and there is no violence requirement for the instant offense. He contends that Congress has mandated that the sentencing commission should construct the career

offender provision and the armed career criminal provision identically. He offers no authority to support these contentions and simply repeats the arguments presented in issues one and two couched in terms of a Congressional mandate to the Sentencing Commission. His claims are meritless.

IV

Chester asserts that the evidence was insufficient to support a conviction for possession of a firearm by a felon. He does not dispute that there is evidence that he pawned and redeemed the shotgun. However, in yet another meritless argument, he contends that he merely "used" the shotgun as collateral for a loan from a pawn shop and denies that he "possessed" the weapon in the traditional sense of the word. He asks the court to adopt his distinction between using and possessing.

Chester's argument is frivolous. In U.S. v. Molinar-Apodaca, 889 F.2d 1417, 1424 (5th Cir. 1989), a drug trafficking case, this court found that the presence of a firearm was sufficient to establish use. Because Chester concedes that he used the firearm, a fortiori, a rational trier of fact could have concluded that he possessed it. See U.S. v. Ivey, 949 F.2d 759, 766 (5th Cir. 1991), cert. denied, ___ U.S. ___, 1992 WL 113065 (1992) (standard for sufficiency of the evidence).

V

Accordingly, there is clearly no merit to any of Chester's claims. Accordingly, the judgment of the district court is

A F F I R M E D.