IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-8336
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MICHAEL STEVEN BARTON,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Texas
(CR-A-91-113)

(December 2, 1992)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

Defendant Michael Steven Barton pawned a .45 caliber Colt Combat Commander Automatic Pistol, serial no. 70BS80711 at the Highland Pawn Shop on September 18, 1990. Barton returned to the pawn shop on October 25, 1990, to redeem the weapon. At that time Barton signed the Bureau of Alcohol, Tobacco and Firearms (ATF) Form 4473 falsely stating that he had not been convicted of a

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[*]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 Pursuant to that Rule, the court has determined that this opinion should not be published.

felony. It was stipulated at trial that Barton was "convicted in a court of a crime punishable by imprisonment for a term in excess of one year, that is, a felony offense prior to January 1, 1990." Based on these facts, a two-count indictment charging Barton with making a false statement to obtain a firearm and being a felon in receipt of a firearm was returned by the grand jury. Barton was subsequently convicted on both counts by a jury. The district court sentenced Barton to 36 months of imprisonment on each count with the terms to run concurrently. A three-year term of supervised release and a fine of $3000 were also imposed.

I

Barton contends that the government did not produce sufficient evidence to support either of the counts of conviction. The basis for this contention is that the government failed to prove that the gun in question was a firearm and that the gun traveled through interstate commerce. The standard for reviewing a jury verdict for sufficiency of evidence is whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. U.S. v. Bell, 678 F.2d 547, 549 (5th Cir. 1982) (en banc) aff'd, 462 U.S. 356 (1983). All reasonable inferences and credibility choices must be made in favor of the jury's verdict. Glasser v. U.S., 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942); U.S. v. Beverly, 921 F.2d 559, 561 (5th Cir.), cert. denied, 111 S.Ct. 2869 (1991).

In U.S. v. Perez, 897 F.2d 751, 754 (5th Cir.), cert. denied, 111 S.Ct. 177 (1990), this Court held that "[a]n inoperable firearm is none the less a firearm." Barton takes issue with this definition and asks the court to re-examine its holding on this point in Perez. It is Barton's position that operability is an essential element of the definition of firearm under 18 U.S.C. § 921(a)(3).[1]

"In this circuit one `panel may not overrule the decision, right or wrong, of a prior panel,' ... in the absence of an en banc reconsideration or superseding decision of the Supreme Court...." Pruitt v. Levi Strauss & Co., 932 F.2d 458, 465 (5th Cir. 1991). As a result, the Government need not have shown that the gun in question was operable in order to show that it was a firearm. Barton has made no other challenge to the sufficiency of the evidence with regard to whether the gun fell under the statutory definition of firearm. Therefore, this challenge to his convictions has no merit.

Barton also contends that the Government did not prove that the gun in question had travelled in interstate commerce. In U.S. v. Wallace, 889 F.2d 580, 584 (5th Cir. 1989), cert. denied, 110 S.Ct. 3243 (1990), the Court held that the testimony of an agent for the ATF "that the markings on the gun established that it was

[1]18 U.S.C. § 921(a)(3) provides the definition for firearm for both counts of the indictment for which Barton was convicted. It also provides the definition of firearm for the offenses in the Perez case, 18 U.S.C. §§ 922(g)(1) and 924(a).

made by a company which does not manufacture or assemble guns in Texas ... [was] sufficient to establish the requisite interstate nexus." In this case, George Taylor, a special agent with ATF was recognized by the district court as an expert in "firearms and their manufacture and movement from state to state." Taylor testified that Colt Combat Commander .45 caliber pistols are manufactured in Hartford, Connecticut. Taylor went on to state that the serial number of the gun in question as listed on Form 4473 was 70BS80711, which indicated that the gun was manufactured in late 1978. Taylor testified that he received this information by "talking to the factory." Taylor's expert opinion on the movement of the gun was that "[i]t had to travel in interstate commerce from Connecticut to arrive here in Texas."

Barton has made numerous arguments that Agent Taylor was referring to an entire class of weapons and not the specific weapon in question when giving his testimony. These arguments are not persuasive. A fair reading of Agent Taylor's testimony would allow a jury to reasonably conclude that the Colt Combat Commander bearing serial number 70BS80711 was manufactured in late 1978 in Hartford, Connecticut, and had been transferred to Texas through interstate commerce. As a result, the government produced sufficient evidence to convict Barton on both counts of the indictment.

II

Barton complains that the prosecutor made improper argument by persistently portraying him as a convicted felon. The following three factors are to be considered in deciding whether a conviction must be overturned as a result of the prosecutor's remarks: (1) the magnitude of the prejudicial effect of the statements; (2) the efficacy of any cautionary instruction; and (3) the strength of the defendant's guilt. U.S. v. Goff, 847 F.2d 149, 165 (5th Cir.), cert. denied, 488 U.S. 932 (1988).

Barton has made no specific claim of prejudice other than to say that the jury was inflamed against him and that the prosecutor created "an atmosphere of fear and intimidation." This characterization is not persuasive. One of the elements that had to be proved against Barton was that he was a convicted felon. Barton stipulated to this fact. Barton complains that one of the witnesses testified that she was his parole officer and that this was inflammatory. What Barton does not mentioned in his brief is that the district court specifically limited this witness' testimony so as to preclude any details about Barton's prior convictions. It is not readily apparent how this testimony was unduly prejudicial given that Barton stipulated to being a convicted felon. The mere fact that he had a parole officer would not have told the jury anything they did not already know. Additionally, the evidence of Barton's guilt was overwhelming. He was identified by the employee of the pawn shop as being the

individual who both pawned the gun and redeemed it. In the light of all of the foregoing, the complained of statements by the prosecutor cast no serious doubt on the correctness of the jury's verdict. U.S. v. Jones, 839 F.2d 1041, 1049 (5th Cir.), cert. denied, 486 U.S. 1024 (1988). As such, the verdict of the jury should be allowed to stand.

III

Barton complains that the district court erred in assessing a $3000 fine. Barton claims that this amount is excessive because he is unable to pay it and not likely to be able to pay it in the future. Barton did not object to the fine at the time of sentencing. In U.S. v. Matovsky, 935 F.2d 719, 722 (5th Cir. 1991), we held that "[w]here the presentence report makes no recommendation concerning the fine, and the defendant neither presents evidence on nor objects to the amount of the fine assessed within the guideline range, the defendant may not raise new objections in this Court absent plain error." All of these conditions exist in this case; therefore, the fine will be overturned only if it was a result of plain error.

In imposing the sentence and fine, the district court specifically stated that it had considered the entire record in the case which included the Presentence Investigation Report (PSR). While the PSR stated that Barton had no current assets or income, it indicated that he was 30 years old, had no dependents, had attained a GED, had attended courses in Nuclear Science Technology

and had occupational skills in word processing and clerical work. The district court also waived interest on the fine due to the jail time Barton received. In Matovsky, the Court quoted U.S. v. Mastropierro, 931 F.2d 905, 907 (D.C. Cir. 1991) to state that even though a defendant had no current ability to pay a fine the record could support an implicit finding that the defendant would be employable in the future and able to pay the fine. 935 F.2d at 723. In this case, it is implicit in the imposition of the fine and the waiver of interest payments that the district court believed that Barton would be able to be gainfully employed in the future based on his education and vocational skills. The record supports such a finding. As such, the district court did not commit plain error in fining Barton $3000.

IV

Barton's final argument is that the judgment in his case erroneously listed the nature of the offense that was the substance of count two of the indictment as "felon in possession of firearm." The judgment correctly reflected that Barton was convicted under 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Barton contends that the nature of the offense should read "felon in receipt of firearm" and that this discrepancy affects his substantial rights. To support his position Barton cites the Fourth Circuit in U.S. v. Burton, 629 F.2d 975, 977 (4th Cir. 1980), cert. denied, 450 U.S. 968 (1981) for the proposition that the possession of a firearm may not be proof of its unlawful receipt. Although this may be true, the

thrust of Burton was that a defendant cannot be given consecutive sentences for unlawful receipt of a firearm and unlawful possession because the possession is incidental to the receipt. Id. at 978.

Barton further argues that the indictment was for the receipt of the firearm and that the district court instructed the jury solely on the issue of receipt not possession. Barton does not challenge the propriety of the instruction given to the jury. As part of that instruction, the district court stated that "[t]he term received means to acquire or obtain possession of an item whether such receipt is actual or constructive, sole or joint." Under both Burton and the instruction given to the jury, it would appear to be impossible to receive a firearm without possessing it at some point.

In any event, at sentencing the district court made no reference to the possession of a firearm but simply noted that Barton was being sentenced with regard to the guilty verdict on counts one and two of the indictment. In U.S. v. Kindrick, 576 F.2d 675, 676-77 (5th Cir. 1978) it was noted that "[t]his Court has long faithfully adhered to the rule that any variance between oral and written versions of the same sentence will be resolved in favor of the oral sentence." In this case, the district court's oral sentence of Barton referred back to the indictment, the language of which is not challenged. As a result, the sentence imposed upon Barton was correct and his substantive rights have not

been abridged in any manner by the description of the offense given in the written judgment.

V

For the reasons stated herein, the conviction and sentence of Michael Steven Barton is

A F F I R M E D.