

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-8643

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ELVIS DELGADO,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas
(W 92 CR 3 1)

September 10, 1993

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Elvis Delgado was convicted, pursuant to his guilty plea, of one count of knowingly and unlawfully possessing a machine gun, in violation of 18 U.S.C. § 922(o) (1988). He was sentenced to a term of forty-eight months imprisonment. Delgado appeals both his conviction and sentence, contending that the district court: (a) violated his double jeopardy rights; (b) erred in imposing a one-level increase to his base offense level, pursuant to U.S.S.G.

* Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

§ 2K2.1; and (c) erred in failing to grant a two-level reduction to his base offense level, pursuant to U.S.S.G. § 3E1.1(a). Finding no error, we affirm.

As detailed in the Presentence Report ("PSR"), on or about October 1991, Delgado sold an AK-47 machine gun to Astrid Phillips for \$500.00. On November, 7, 1991, Delgado told an undercover agent for the Bureau of Alcohol, Tobacco and Firearms ("ATF"), that he had three machine guns for sale but that they were not yet completely assembled. Two weeks later, Delgado sold the same ATF agent an H & K, G3 type machine gun for \$800.00. Thereafter, Delgado sold the same agent a short-barreled shotgun for \$200.00.

Delgado was originally charged in a one-count indictment for unlawfully possessing an unregistered H & K, G3 type machine gun, in violation of 26 U.S.C. § 5861(d) (1988). Delgado pled guilty to the original indictment. Thereafter, the government filed a motion for new trial, based upon the alleged implicit repeal of the statute (26 U.S.C. § 5861(d)) which formed the basis of the original indictment and Delgado's guilty plea to that indictment.¹ Rejecting Delgado's argument that jeopardy, for Fifth Amendment purposes, attached when the court "accepted" his guilty plea, the court granted the motion for new trial.

¹ Section 5861(d) makes unlawful the possession of an unregistered firearm, including machine guns. A separate criminal statute prohibits the possession of *any* machine gun made after the statute's effective date in 1986. See 18 U.S.C. § 922(o); see also *United States v. Dalton*, 960 F.2d 121, 122 (10th Cir. 1992).

Delgado was subsequently charged in a three-count second superseding indictment.² Delgado then entered a guilty plea to Count Two of the second superseding indictment, which charged him with unlawfully possessing an H & K, G3 type machine gun, in violation of 18 U.S.C. § 922(o). The district court sentenced Delgado to forty-eight months imprisonment and three years supervised release. Delgado filed a timely notice of appeal.

Delgado first contends that the court violated his double jeopardy rights by allowing the government to retry him after the court accepted his guilty plea to the original indictment. See Brief for Delgado at 14-17. Under the Fifth Amendment, a person may not be retried for the same offense once jeopardy attaches. See *Green v. United States*, 355 U.S. 184, 187, 78 S. Ct. 221, 223, 2 L. Ed. 2d 199 (1957) ("The constitutional prohibition against `double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense."); see also *Fransaw v. Lynaugh*, 810 F.2d 518, 523 (5th Cir.) (citing *Green*), cert. denied, 483 U.S. 1008, 107 S. Ct. 3237, 97 L. Ed. 2d 742 (1987). "In a plea bargaining context, the rule in this Circuit with respect to the offense pleaded to is that `jeopardy attaches with the [unconditional] acceptance of a guilty plea.'" See *Fransaw*, 810 F.2d at 523 (quoting *United States v. Sanchez*, 609 F.2d 761, 762 (5th Cir. 1980)).

² Delgado's first superseding indictment charged him with one count of unlawfully possessing an H & K, G3 type machine gun, in violation of 18 U.S.C. § 922(o).

Even assuming, *arguendo*, that the court unconditionally accepted Delgado's guilty plea to the original indictment, we conclude that Delgado's double jeopardy rights were not violated. The Supreme Court in *Lockhart v. Nelson*, 488 U.S. 33, 38, 109 S. Ct. 285, 289, 102 L. Ed. 2d 265 (1988) stated:

It has long been settled, however, that the Double Jeopardy Clause's general prohibition against successive prosecutions does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside, through direct appeal or collateral attack, because of some error in the proceedings leading to conviction.

In our case, Delgado was charged with, and initially pled guilty to, violating a statute which had been implicitly repealed, making the original charging instrument defective. Because *Lockhart* holds that the Double Jeopardy Clause does not bar the government from retrying a defendant whose conviction is overturned due to a defect in the "judicial process," *see id.*, 488 U.S. at 38-40, 109 S. Ct. at 289-90, it follows that the government's retrying of Delgado because of the same type of defect, also does not violate the Double Jeopardy Clause. *See United States v. Dalton*, 990 F.2d 1166, 1168 (10th Cir. 1993) (holding that the government's successive prosecution of a defendant, whose conviction pursuant to 26 U.S.C. § 5861(d) had been vacated due to that statute's implicit repeal by 18 U.S.C. § 922(o), is not barred by the Double Jeopardy clause), *petition for cert. filed*, July 29, 1993 (No. 93-5416); *see also Montana v. Hall*, 481 U.S. 400, 404, 107 S. Ct. 1825, 1827, 95 L. Ed. 2d 354 (1987) ("It is clear that the Constitution permits

retrial after a conviction is reversed because of a defect in the charging instrument.").³

Delgado next argues that the court erred in imposing a one-level increase to his base offense level based upon its finding that at least three firearms were involved in the offense of conviction.⁴ See U.S.S.G. § 2K2.1(b)(1)(A); Brief for Delgado at 6-8. We review the district court's application of the guidelines de novo, and its factual findings for clear error. *United States v. Rodriguez*, 897 F.2d 1324, 1325 (5th Cir.), cert. denied, ___ U.S. ___, 111 S. Ct. 158, 112 L. Ed. 2d 124 (1990). Section 2K2.1(b)(1)(A) directs courts to increase by one a defendant's base offense level, if three or four firearms were involved in the offense of conviction. For purposes of calculating the number of firearms involved, courts should "count only those firearms that were unlawfully sought to be obtained, unlawfully possessed, or unlawfully distributed." U.S.S.G. § 2K2.1, comment. (n.9). The record shows that Delgado possessed at least three firearms related to the offense of conviction: the H & G machine gun, the AK-47

³ That Delgado was never convicted on the basis of the original indictment is not a meaningful distinction between our case and *Lockhart* and *Dalton*, because it is beyond question that had Delgado been convicted, and the conviction been vacated because of the use of the wrong statute, then *Lockhart* and *Dalton* would apply.

⁴ We need not address Delgado's argument that the district court erred in determining that he was a prohibited person under U.S.S.G. § 2K2.1(a)(4)(B))the guideline upon which the court determined his base offense level of twenty))as Delgado raises the mixed fact-law issue for the first time on appeal. See *United States v. Garcia-Pillado*, 898 F.2d 36, 39 (5th Cir. 1990) (stating that "issues raised for the first time on appeal are not reviewable by this court unless they involve purely legal questions and failure to consider them would result in manifest injustice" (emphasis added) (attribution omitted)); U.S.S.G. § 2K2.1, comment. (n.6) (defining a "prohibited person" to include one who has been convicted of a felony).

machine gun, and the short-barreled shotgun. See PSR at 4-6. Possession of these firearms was unlawful because at the time of possession Delgado was a convicted felon. See *id.* at 11 (detailing Delgado's prior conviction of two counts of possession of marijuana, resulting in a sentence of three years imprisonment on both counts); 18 U.S.C. § 922(g)(1) (1988) (declaring unlawful for any person, who has been convicted of a crime punishable by imprisonment for more than a year, to possess any firearm). We therefore find no clear error in the district court's finding that Delgado unlawfully possessed at least three firearms. Accordingly, we also find no error in the resulting one-level increase to Delgado's base offense level as set forth in U.S.S.G. § 2K2.1(b)(1)(A).

Lastly, Delgado argues that the court erred in not granting a two-level reduction to his base offense level based upon its finding that he failed to accept responsibility for his criminal conduct. See U.S.S.G. § 3E1.1(a). "Because of the district court's unique position to assess the defendant's acceptance of responsibility," its findings in this matter are entitled to greater deference on review than that conferred by the clearly erroneous standard. See *United States v. Rodriguez*, 942 F.2d 899, 902-03 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 990, 117 L. Ed. 2d 151 (1992); see also U.S.S.G. § 3E1.1, comment. (n.5). The district court's conclusion will stand unless the defendant proves the court's determination was "without

foundation." *United States v. Buss*, 928 F.2d 150, 152 (5th Cir. 1991).

Delgado's guilty plea does not automatically entitle him to a sentencing reduction for accepting criminal responsibility. See U.S.S.G. § 3E1.1(c). Moreover, before the defendant is entitled to a reduction for acceptance of responsibility he must first accept responsibility for "all of his relevant criminal conduct." *United States v. Mourning*, 914 F.2d 699, 705 (5th Cir. 1990).⁵ The record shows that Delgado denied any knowledge of possessing the AK-47 machine gun and the short-barreled shotgun in his interview with the probation officer, see PSR at 8-9, and again at the sentencing hearing. See Record on Appeal vol. 5, at 4. Therefore, we hold that the district court did not err in not granting the two-level reduction.

Accordingly, we AFFIRM the conviction and sentence.

⁵ We held in *Mourning* that conditioning a two-level reduction upon a defendant's admission of all relevant conduct, does not offend the defendant's Fifth Amendment right against self-incrimination.