IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-1788

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PAUL ALBERT PHILBIN, III,

Defendant-Appellant.

Appeal from the United States District Court for
the Northern District of Texas
(4:93-CR-39-A)

(August 5, 1994)

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

PER CURIAM:*

This direct criminal appeal involves an attack on the judgment of conviction as to one count of carjacking, a violation of 18 U.S.C. Section 2119, and one count of carrying of a firearm during a crime of violence, a violation of 18 U.S.C. 924(c). Appellant, Paul Albert Philbin, alleges both a double jeopardy violation and a commerce clause violation. We affirm.

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Pursuant to that Rule, the Court has determined that this opinion should not be published.

I. DOUBLE JEOPARDY CLAIM

Philbin contends that his conviction for both carjacking[1] and the carrying of a firearm during a crime of violence violates the double jeopardy clause. The government claims that because Philbin voluntarily entered his pleas of guilty, he has waived all nonjurisdictional defects. This general waiver rule has an exception. Specifically, a defendant "may succeed on his double jeopardy claim only if the violation is apparent on the face of the indictment or record." Taylor v. Whitley, 933 F.2d 325, 328 (5th Cir. 1991) (citing United States v. Broce, 488 U.S. 563, 109 S.Ct. 757, 765 (1989) and United States v. Kaiser, 893 F.2d 1300, 1303 (11th Cir. 1990)). In this case, the claim may be resolved on the face of the record, and thus, the claim is not waived.

Nonetheless, Philbin is precluded from prevailing on his double jeopardy claim. Very recently, in United States v. Singleton, 16 F.3d 1419, 1421 (5th Cir. 1994), this Court, recognizing it as a claim of first impression, squarely addressed "[t]he question whether the Fifth Amendment's double jeopardy clause bars prosecution for both armed carjacking and possession of a firearm in the commission of a violent crime." The Court found no double jeopardy bar.[2]

Nevertheless, Philbin contends that Singleton was improperly

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[1] Carjacking is a federal offense only when the defendant possesses a firearm.

[2] This result was followed in United States v. Harris, No. 93-7554, slip op. 5186 (5th Cir., June 29, 1994) and United States v. Portillo, 18 F.3d 290 (5th Cir. 1994).

decided because this Court did not consider whether Missouri v. Hunter, 459 U.S. 359, 103 S.Ct. 673 (1983), was still good law after United States v. Dixon, __ U.S. __, 113 S.Ct. 2849 (1993). But this argument ignores that, in Singleton, we noted the holding in Dixon and continued to rely on the analysis in Missouri v. Hunter. In any event, this panel is bound by Singleton because the Fifth Circuit adheres to the rule that one panel may not overrule the decision of another. United States v. Taylor, 933 F.2d 307, 313 (5th Cir.), cert. denied, __ U.S. __, 112 S.Ct. 235 (1991).

II. COMMERCE CLAUSE CLAIM

Next, relying on United States v. Cortner, 834 F.Supp. 242 (M.D. Tenn. 1993), Philbin argues that Congress exceeded its authority under the Commerce Clause when it enacted legislation to regulate carjacking.[3] On June 29, 1994, we rejected this precise claim in United States v. Harris, No. 93-7554, slip op. 5186 (5th Cir., June 29, 1994). In Harris, we acknowledged the district court's opinion in Cortner that the carjacking statute may be unwise and encroach on traditional views of federalism, but we held that the statute did not violate the Commerce Clause doctrine. Philbin, like Harris, argues that the statute is unconstitutional because it lacks a rational nexus to interstate commerce. We specifically rejected that claim, stating that "`[i]t is obvious that carjackings as a category of criminal activity have an effect

[3] Although the government correctly argues that a guilty plea ordinarily waives all objections, including constitutional claims, "[w]e may assume, without deciding, that [the appellant] preserved the issue of the constitutionality of the statute on appeal." United States v. Burian, 19 F.3d 188, 190 & n.2 (5th Cir. 1994).

on interstate travel and the travel of foreign citizens to this country.'" Harris, slip op. at 5193 (quoting United States v. Johnson, 22 F.3d 106 (6th Cir. 1994). Philbin is precluded from prevailing on this claim.

Accordingly, the convictions are AFFIRMED.

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