

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2470
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

THOMAS JOE THOMS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-H-93-26)

(February 17, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:¹

Thomas Joe Thoms appeals from his conviction and sentence for possession of a firearm by a convicted felon. We **AFFIRM**.

I.

Thoms, a previously convicted felon, agreed to purchase from James Mulholland, for \$800, a Remington 12-gauge pump shotgun and a Remington Model 700 seven millimeter magnum rifle. Mulholland brought the firearms to the home of Thoms' neighbors, Lynn and Bobby Williams. Mulholland and Thoms met outside the Williams'

¹ 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 Pursuant to that rule, the court has determined that this opinion should not be published.

house; and Thoms told Mulholland to put the weapons in the Williams' house, because he did not want them in his. Thoms told Mulholland that he would have the money for the weapons later that day.

Mulholland returned to the Williams' house later that day and Lynn Williams handed him \$800. Mulholland gave her a handwritten receipt for the guns, which indicated that they were sold to Bobby Williams. Mulholland testified that he put Bobby Williams' name on the receipt because Thoms had told him that he would like to have the weapons in someone else's name. Thoms retrieved the weapons from Lynn Williams a day or two later.

Approximately one month later, Thoms asked a friend, Mark Siems, to pawn the rifle for him. Siems pawned it for \$150 and gave the money and the pawn ticket to Thoms. Siems and Thoms later returned to the pawnshop and, while Thoms remained outside in his truck, Siems attempted to sell the rifle to the pawnshop. The pawnshop refused to purchase it.

Later, Thoms and his girlfriend, Tracy Pressley, returned to the pawnshop. At Thoms' direction, Pressley redeemed the rifle. Pressley and Thoms took the rifle to a second pawnshop. Thoms negotiated the pawn of the rifle. Pressley pawned it and received \$225; and neither Pressley nor Thoms returned to redeem it.

Thoms was convicted for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), and was sentenced to 105 months imprisonment.

II.

Thoms challenges the sufficiency of the evidence, the constitutionality of § 922(g)(1), and the district court's upward departure from the Sentencing Guidelines range.

A.

Section 922(g)(1) provides, in relevant part, that: "It shall be unlawful for any person ... who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year ... to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition". 18 U.S.C. § 922(g)(1). Generally, the term "crime punishable by imprisonment for a term exceeding one year" does not include: (1) certain business crimes; (2) state-designated misdemeanors with terms of imprisonment of not more than two years; (3) convictions that have been expunged; (4) convictions for which the defendant has been pardoned; and (5) convictions relative to which the defendant has had his civil rights restored. 18 U.S.C. § 921(a)(20); see **United States v. Thomas**, 991 F.2d 206, 209 (5th Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 607 (1993). Section 921(a)(20) is "an integral element of the definition ... of the term 'crime punishable by imprisonment for a term exceeding one year' found in § 922(g)(1)". **Thomas**, 991 F.2d at 209.

1.

Thoms contends that the evidence is insufficient to prove that he had been convicted of a "crime punishable by imprisonment for a term exceeding one year", because the Government failed to prove

the inapplicability of the above described exceptions listed in § 921(a)(20). When considering a challenge to the sufficiency of the evidence, "we must view the evidence and draw all reasonable inferences most favorable to the verdict. If the evidence so viewed would permit a rational jury to find all elements of the crime beyond a reasonable doubt, we must affirm the conviction". **United States v. Bell**, 993 F.2d 427, 429-30 (5th Cir.), cert. denied, ___ U.S. ___, 114 S. Ct. 271 (1993) (footnote omitted).

At trial, the Government introduced the following stipulation, signed by both Thoms and his attorney:

Now comes the defendant ... and offers to stipulate and does hereby agree with the United States Government that it is true that prior to or on or about the date alleged in the indictment, that I have been finally convicted of a criminal offense punishable by imprisonment by a term exceeding one year.

I understand that by making this agreement with the United States Government I am hereby supplying proof which will be used against me at my trial and which will make it unnecessary for the Government to prove the specifics of my criminal record.

Thoms did not object to the district court's instruction to the jury that, because of the stipulation, it could assume that the felon element of the offense had been proved beyond a reasonable doubt. Although Thoms moved for a judgment of acquittal pursuant to Fed. R. Crim. P. 29, no grounds were stated in support; and, during closing argument, his counsel focused solely on the element of constructive possession.

Thoms does not assert that any of the exceptions in § 921(a)(2) apply, nor does he challenge the stipulation. Needless

to say, the Government was entitled to rely on it; it obviated the necessity for any further proof on the felony element. In sum, we will not permit Thoms to contend now, through new counsel on appeal, that the Government should have introduced evidence that was rendered unnecessary by the stipulation.² See **United States v. Clark**, 993 F.2d 402, 406 (4th Cir. 1993).

2.

Thoms maintains that the Government failed to prove that he possessed a firearm "in or affecting" interstate commerce.³ He asserts that the evidence merely established that the gun, "insofar as it may have been connected to [him], never left the State of Texas".

An ATF agent testified that he had been employed by the ATF for 25 years and had specialized training in identifying and determining the place of origin of firearms. He testified that the Remington rifle possessed by Thoms was manufactured in the State of New York, that Remington did not make rifles in Texas, and that the rifle would have had to cross state lines in order to arrive in Texas. Thoms did not present evidence to controvert this testimony. Our court has held that similar testimony is sufficient to establish the nexus to interstate commerce required by §

² Indeed, in light of the stipulation, "such evidence might have been inadmissible as prejudicial to the defendant". **United States v. Reedy**, 990 F.2d 167, 169 (4th Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 210 (1993).

³ As noted, Thoms neither specified this assertion as a basis for his motion for judgment of acquittal, nor argued to the jury that the evidence was insufficient to prove the requisite nexus to interstate commerce.

922(g)(1). See **United States v. Wallace**, 889 F.2d 580, 584 (5th Cir. 1989), *cert. denied*, 497 U.S. 1006 (1990).

3.

For the first time on appeal, Thomas contends that such an interpretation of § 922(g) "suggests an immutability in an interstate commerce aspect of an object that is overbroad to such an extent as to be an unconstitutional denial of due process". Issues raised for the first time on appeal need not be considered. *E.g.*, **United States v. Garcia-Pillado**, 898 F.2d 36, 39 (5th Cir. 1990).

In any event, our court rejected a similar contention in **Wallace**, concluding that § 922(g) reaches only "those firearms that traveled in interstate or foreign commerce", and that Congress' regulation of firearms in or affecting commerce was constitutional. **Wallace**, 889 F.2d at 583; see also **United States v. Gillies**, 851 F.2d 492, 493 (1st Cir.), *cert. denied*, 488 U.S. 857 (1988) (Congress may use its Commerce Clause powers to regulate, under § 922(g), the intrastate possession of a firearm that traveled in interstate commerce before the felon possessed it).

4.

Thoms asserts that the Government failed to prove that the firearm he possessed was a weapon prohibited by § 922(g)(1). He maintains that, because one of the definitions of "firearm" is "any destructive device", 18 U.S.C. § 921(a)(3)(D), and because the term "destructive device" does not include a rifle which the owner intends to use solely for sporting purposes, see § 921((a)(4), a

sporting rifle does not qualify as a "firearm" for purposes of § 922(g).

The term "any destructive device" is only one of several alternative definitions of "firearm" in § 921(a)(3). Another definition (the one used in the jury instructions, to which Thoms did not object is "any weapon ... which will or is designed to or may readily be converted to expel a projectile by the action of an explosive". 18 U.S.C. § 921(a)(3)(A); see also **United States v. Meldish**, 722 F.2d 26, 28 (2d Cir. 1983) (rejecting application of sporting rifle exception to guns that are otherwise "weapons"), cert. denied, 465 U.S. 1101 (1984). The rifle possessed by Thoms falls within the definition of "firearm" in § 921(a)(3)(A). See **Meldish**, 722 F.2d at 28.

B.

Finally, Thoms contends that the district court's method of departing upward from the applicable guideline range was "artificial and arbitrary".

"A departure from the guideline[s] will be affirmed if the district court offers acceptable reasons for the departure and the departure is reasonable". **United States v. Pennington**, 9 F.3d 1116, 1118 (5th Cir. 1993) (internal quotation marks and citation omitted). "Section 4A1.3 of the guidelines permits courts to depart upward when the criminal history category significantly under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit further crimes". **United States v. McKenzie**, 991 F.2d 203, 204 (5th Cir.

1993) (quoting U.S.S.G. § 4A1.3 (Nov. 1990)).⁴ The reasons articulated by the district court are findings of fact that are reviewed only for clear error. **Pennington**, 9 F.3d at 1118.

Thoms had an offense level of 20, and 23 criminal history points, placing him in criminal history category VI (the highest category available, encompassing defendants who have 13 or more criminal history points). The resulting Guidelines sentencing range was 70-87 months of imprisonment. The district court concluded that an upward departure under § 4A1.3 was appropriate because of the seriousness of Thoms' past criminal conduct and the likelihood that he would commit future crimes.

The correct methodology for a departure above criminal history category VI is for the court to stay within the Guidelines by considering sentencing ranges for higher base offense levels. **Pennington**, 9 F.3d at 1118 (citing **United States v. Lambert**, 984 F.2d 658, 663 (5th Cir. 1993) (en banc)). At sentencing, the district court followed that methodology, considering sentencing ranges for higher base offense levels. It chose level 22 (an increase of two levels), with a sentencing range of 84-105 months, and sentenced Thoms at the top of that range.

The district court correctly applied the methodology specified by **Lambert** in determining Thoms' sentence. The extent of the departure (18 months above the highest point in the sentencing range of 70-87 months) was reasonable. Cf. **Lambert** 984 F.2d at 664

⁴ The relevant portion of § 4A1.3 in the 1992 version of the Guidelines, applicable at Thoms' sentencing in May 1993, is identical to the 1990 version quoted in **McKenzie**.

(departure from 18 months to 36 months reasonable in light of defendant's "consistent, serious criminal history").

III.

For the foregoing reasons, Thoms' conviction and sentence are

AFFIRMED.