

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-8016
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

DICKIE DALE BROWN,

Defendant-Appellant.

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

(SA 92 CR 26 1)

(October 25, 1993)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

An agent from the Bureau of Alcohol, Tobacco, and Firearms (ATF) and other law enforcement officers executed a warrant to search the residence of Dickie Dale Brown for a firearm silencer.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

After advising Brown of his rights, the agent questioned him concerning the silencer. Brown referred to the silencer as a muffler and told the agent that he no longer had it. The search produced nothing, and the agent once again asked Brown to show him where the silencer was. Brown directed the agent to a bedroom closet, and the agent found the object on the top shelf.

The grand jury charged Brown under the National Firearms Act with possession of a firearm silencer which was unregistered (count one) and unidentified by a serial number (count two). Represented by court-appointed counsel, he entered a plea of not guilty and proceeded to trial. The jury returned a verdict of guilty on both counts.

The district court imposed a term of imprisonment of five months on each count to run concurrently, concurrent three-year terms of supervised release, mandatory residence in a Community Confinement Center for five months, a fine of \$1,000, and a special assessment of \$100. The sentence represents a significant downward departure from the guidelines range under U.S.S.G. § 5K2.11.

BACKGROUND

Brown argues that the evidence was insufficient to sustain his conviction on each count. Because Brown moved for judgment of acquittal following the Government's case and in a motion for new trial, the standard for evaluating the sufficiency of the evidence is that enunciated in United States v. Bell, 678 F.2d 547, 549 (5th Cir. 1982) (en banc) (footnote omitted), aff'd, 462 U.S. 356 (1983):

It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt. A jury is free to choose among reasonable constructions of the evidence.

In viewing the evidence in the light most favorable to the verdict, this Court affords the Government the benefit of all reasonable inferences and credibility choices. United States v. Nixon, 816 F.2d 1022, 1029 (5th Cir. 1987), cert. denied, 484 U.S. 1026 (1988).

To support a conviction under 26 U.S.C. § 5861(d), the Government was required to prove that Brown 1) possessed a certain object, 2) the object was a silencer¹, and 3) the silencer was not registered. See United States v. Freed, 401 U.S. 601, 612, 91 S. Ct. 1112, 28 L. Ed. 2d 356 (1971) (Brennan, J., concurring). A conviction under § 5861(i) requires proof of the first two elements plus a showing that the silencer was not identified by a serial number.

Brown contends that the Government failed to prove that the object in question was a silencer because the modified barrel extender does not qualify as a silencer. Alternatively, he contends that, if the modified barrel extender was a silencer, he did not know that it was a silencer because it was ineffective in reducing the sound level of the firearm. There is no dispute that Brown possessed the object and that it was unregistered.

¹ A silencer is a firearm as defined in 26 U.S.C. § 5845(a).

The following evidence was presented to the jury at trial. Robert Burrows, a firearms enforcement officer with ATF, testified that he employed a two-phase test when examining silencers: a physical examination to determine the design characteristics and an actual shooting test using a sound level meter to measure the sound decibels.

The silencer found in Brown's closet was manufactured from a barrel extender, a device used on the end of a firearm to prevent the flash from being seen. According to Burrows, a barrel extender can be legally possessed, and there is no registration requirement. In its original form, the barrel extender consisted of an outer tube and a smooth, unperforated inner tube. In the modified version, the inner barrel had been removed from the main tube, perforated, and packed with insulation material. The outer barrel had been cut with a hacksaw to allow gas to escape if the device was used as a silencer. The main tube was wrapped in black electrical tape to prevent the gas from leaking, and there was no serial number.

The first test was performed using a Ruger .22 caliber standard automatic pistol. The test gun had a three inch barrel with a small diameter and external threads cut on the barrel. Threaded collars could be screwed onto the gun to test-fire various silencers. The first test showed a reduction of 14.2 decibels when two metal end caps were used. The sound was approximately half as loud as a shot fired without the device. The test was repeated without the front end cap, and the sound reduction was 15.7

decibels or about half as loud. In response to a request that he measure the effects of the silencer using a nine millimeter semi-automatic pistol, Burrows performed the test a third time. The result was a reduction in sound of 9.3 decibels or approximately one-half the sound. In Burrows' opinion, the device was by design, construction, and function a firearm silencer and compared favorably to other homemade silencers.

Brown argues that any unmodified barrel extender would reduce the report of a firearm and the 9.3 decibel reduction resulting from the modification to the barrel extender was too slight to constitute a felony. The question whether an unmodified barrel extender would affect the decibel level of a firearm has no legal significance in this case. Brown was found in possession of a modified barrel extender, which in the opinion of the expert witness was a silencer. Further, the decibel reduction was not insignificant. Decibel reduction levels approximating 9.3 decibels have been held to be sufficient to meet the definition of silencer. See United States v. Anderson, 853 F.2d 313, 322 (5th Cir. 1988), vacated in part, reinstated in relevant part, 885 F.2d 1248, 1249 (5th Cir. 1989) (en banc) (silencer produced a reduction in sound of 9 decibels); United States v. Poulos, 895 F.2d 1113, 1121 (6th Cir. 1990) (10 decibel reduction when the silencer was used).

Brown's argument that he did not know that the device was a silencer because it was ineffective is also unconvincing. Brown consciously sought to alter the barrel extender to perform as a silencer, and he referred to the device as a muffler. He testified

that he went to see his cousin, Paul Pearmon, to arrange to "silence" a nine millimeter pistol he had purchased at a gun show. Brown told Paul to drill holes in the barrel extender, and he filled the tube with steel wool. Because the gun was still too loud, they later sawed notches in the barrel extender and filled it with a white insulation material. Contrary to Burrows testimony that the noise was reduced by half, Brown stated that the modification still did not reduce the sound.

Affording the Government the benefit of all reasonable inferences and credibility choices, a rational jury could have found that the modified device was a silencer and that Brown knew that it was a silencer.

Brown contends that the language defining "firearms silencer[s] in 18 U.S.C. § 921(a)(24) is so broad as to encompass lawful devices--such as barrel extenders--which will reduce the sound level of any given firearm simply by increasing the barrel's length."

However, Brown does not assert that the statute is unconstitutionally vague, and he has not shown that he was improperly prosecuted under the statute. Section 921(a)(24) provides:

The terms "firearm silencer" and "firearm muffler" mean any device for silencing, muffling, or diminishing the report of a portable firearm, including any combination of parts, designed or redesigned, and intended for use in assembling or fabricating a firearm silencer or firearm muffler, and any part intended only for use in such assembly or fabrication.

There is no question that Brown's modified device falls within the definition of firearm silencer or muffler.

Accordingly, the judgment of the district court is AFFIRMED.