UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-8040
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

WILLIAM PENN DIXON,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(W-91-CR-067)

(March 16, 1994)

Before DAVIS, JONES and DUHÉ, Circuit Judges.

DUHÉ, Circuit Judge:[1]

Appellant, William Penn Dixon, pleaded guilty to being a convicted felon in possession of a firearm under 18 U.S.C. § 922(g)(1). Applying a version of the Sentencing Guidelines that went into effect after Dixon was arrested, the district court sentenced Dixon to 120 months imprisonment, 3 years of supervised release, a $1,000 fine and a $50 special assessment. Based on the Government's admission that Dixon's sentence had been imposed in violation of the Ex Post Facto Clause, we vacated Dixon's sentence

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

and remanded for resentencing.

On remand, the probation officer notified the district court that in preparing the original presentence report (PSR), he had received information that Dixon had shot at his brother nine times. The probation officer recommended that Dixon's offense level be determined by cross referencing to the aggravated assault guideline § 2A2.2.[2] Section 2A2.2 carries a base offense level of 15 and an upward specific offense adjustment of 5 for individuals who discharge a firearm during an aggravated assault. The resulting total offense level of 20, together with a criminal history category of VI, yielded a sentencing range of 70 to 87 months.

Dixon objected to the probation officer's recommendation, contending that his offense level should not be calculated by cross referencing to the aggravated assault guideline. Alternatively, Dixon argued that he merely brandished the weapon, which would increase the base offense level for aggravated assault by only three levels, and that his conduct amounted to an attempt under § 2X1.1, requiring a three level reduction in the offense level. The court overruled Dixon's objections and adopted the probation officer's recommendations. The district court sentenced Dixon to 87 months imprisonment, 3 years of supervised release, and a $50

[2] The sentence for possession of a firearm by a felon would ordinarily be calculated under § 2K2.1. Section 2K2.1 refers to § 2X1.1 (Attempt, Solicitation, or Conspiracy) if the defendant used or possessed a firearm in connection with the commission or attempted commission of another offense. Section 2X1.1 states that if the attempt, solicitation, or conspiracy is expressly covered by another section, that section should apply. Accordingly, the probation officer recommended that § 2A2.2, the specific guideline section for aggravated assault, should apply.

special assessment. Dixon appeals.

DISCUSSION

I.

Dixon first argues that his guilty plea is invalid because the district court failed to inform him during the plea colloquy of the maximum possible penalty as required by Federal Rule of Criminal Procedure 11(c). The Government responds that Dixon has waived his right to raise this issue for the first time on his second appeal. We agree.

An issue not briefed on appeal is deemed to be waived. See Marple v. Kurzweg, 902 F.2d 397, 399 n.2 (5th Cir. 1990). Because Dixon could have properly raised his Rule 11 challenge in his first appeal, and failed to do so, he has abandoned that claim, and we will not consider it on appeal. See Brooks v. United States, 757 F.2d 734, 739 (5th Cir. 1985) ("[A] second appeal generally brings up for revision nothing but proceedings subsequent to the mandate following the prior appeal") (citing United States v. Camou, 184 U.S. 572, 574, (1902)); cf. United States v. Fitzhugh, 984 F.2d 143, 145 n.3 (5th Cir.) (noting that defendant's failure to raise issue on first appeal calls into question his ability to raise issue on subsequent appeal, but pretermitting, "this preliminary question" because claim was meritless), cert. denied, 114 S. Ct. 259 (1993); United States v. Martirosian, 967 F.2d 1036, 1038 n.2 (5th Cir. 1992) (addressing the merits of the defendant's Rule 11 claim, raised for the first time in a post remand supplemental brief, where the Government fully responded and did not assert

waiver or prejudice), overruled on other grounds by United States v. Johnson, 1 F.3d 296 (5th Cir. 1993) (en banc); United States v. Williams, 679 F.2d 504, 507 (5th Cir. 1982) (explaining that defendant got "two bites at the appellate apple" because he was appellee in the first appeal and, thus, could not have raised the arguments he urged in the second direct appeal), cert. denied, 459 U.S. 1111 (1983).

II.

Dixon also argues that his second sentence should be vacated and the case remanded for a third sentencing because the district court's findings at resentencing were insufficient to resolve whether he discharged the firearm during the course of an aggravated assault. When a defendant objects to the factual accuracy of material contained in a PSR, Federal Rule of Criminal Procedure 32(c)(3)(D) requires the district court to make "as to each matter controverted . . . (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing." Rule 32(c)(3)(D) does not require, however, a district court to use the exact phraseology of the rule or to cite any magic words. United States v. Piazza, 959 F.2d 33, 37 (5th Cir. 1992). Moreover, the district court need not make a specific statement on the record as to each fact determined and rejected when the facts are indicated in a PSR that the court has adopted by reference. United States v. Sherbak, 950 F.2d 1095, 1099 (5th Cir. 1992). The court need only address the defendant's arguments and

comply with applicable legal limits in a manner that is comprehensible when a sentencing hearing is viewed in the context of the record, including the PSR. United States v. Whitlow, 979 F.2d 1008, 1011-12 (5th Cir. 1992).

The PSR indicates that Dixon got into an argument with, among others, his brother, Larry Dixon. Dixon threatened Larry with a fireplace poker and a knife. Dixon then went to a neighbor's house to retrieve a gun. Larry got into his car and was attempting to drive away when Dixon started shooting at him. Another brother, Herman Dixon, heard Larry drive off and then heard six shots being fired followed by a pause and three more shots. Other witnesses heard several shots being fired. In his written objections to the PSR, Dixon admitted that he fired a .22 pistol once into the air in an attempt to scare Larry, who was in possession of a .357 handgun.

Adopting the PSR by reference, the district court determined that cross referencing to aggravated assault was proper. The district court also explained that the appropriate offense level was 20 based on "reliable evidence that the firearm was discharged numerous time." Viewing the district court's statements in the context of the record as a whole, including the PSR, the court made an adequate finding that Dixon fired at his brother Larry during the course of an aggravated assault.

III.

Dixon was permitted to incorporate the brief from his former appeal into the present appeal. One of Dixon's arguments in his first appeal was that the court erred in not granting his pretrial

suppression motion. Because this issue was not considered in his original appeal, Dixon has requested that we review the issue now. Dixon may not challenge the denial of the motion to suppress. Entry of his guilty plea waived all but jurisdictional defects in the proceedings leading to conviction. United States v. Smallwood, 920 F.2d 1231, 1240 (5th Cir.), cert. denied, 111 S. Ct. 2870 (1991). Such a waiver includes motions to suppress evidence. United States v. Benavides, 793 F.2d 612, 618 (5th Cir.), cert. denied, 479 U.S. 868 (1986).

CONCLUSION

For the foregoing reasons, Dixon's sentence is

AFFIRMED.