

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-9139
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LEON ALLBRIGHT,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:93-CR-93-K-02
- - - - -
(July 22, 1994)

Before POLITZ, Chief Judge, and JOLLY and DAVIS, Circuit Judges.

PER CURIAM:*

Leon Allbright argues that his guilty plea convictions and sentences under 18 U.S.C. § 2113(a) & (d) and 18 U.S.C. § 924(c) violate the Double Jeopardy Clause of the Constitution.

This Court reviews de novo a district court's legal determination whether a charge should be dismissed based on double jeopardy. United States v. Singleton, 16 F.3d 1419, 1421 (5th Cir. 1994). "The Fifth Amendment's [D]ouble [J]eopardy [C]lause protects a criminal defendant against . . . multiple

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

punishments for the same offense." Id. at 1422 (internal quotations and citations omitted). This Court has applied the Blockburger ** test to determine whether two different statutes punish the same offense. Id. Under Blockburger, the two statutes at issue are compared to determine "whether each provision requires proof of an additional fact which the other does not." Id. (citations omitted). "If either statute contains no element not also found in the other statute, the statutes fail the Blockburger test and the defendant may not be punished under both of them in the absence of a clear indication of contrary legislative intent." Id. (internal quotations and citation omitted).

However, even if statutes are construed to prohibit the same conduct, cumulative punishment may be imposed where a legislature specifically authorizes cumulative punishment under two statutes. See Missouri v. Hunter, 459 U.S. 359, 368, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983). Congress has clearly indicated its intent to impose cumulative punishment for violations of § 924(c) and commission of crimes of violence. See United States v. Portillo, 18 F.3d 290, 291 (5th Cir. 1994). Therefore, the Double Jeopardy Clause does not prohibit convictions and sentences for armed bank robbery and the use of a firearm during a crime of violence when both arose out of a single transaction of bank robbery with a firearm. See United States v. Holloway, 905 F.2d 893, 894-95 (1990).

** Blockburger v. U.S., 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

Allbright's argument that United States v. Dixon, ___ U.S. ___, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993) overruled Missouri v. Hunter is without merit. Dixon does not address whether a statute imposing mandatory cumulative punishment violates the Double Jeopardy Clause. Further, subsequent to Dixon, this Court upheld the imposition of cumulative punishment under 18 U.S.C. § 2119 and § 924(c), based on the line of cases recognizing the legality of imposing cumulative punishments under § 2113 and § 924(c). See Singleton, 16 F.3d at 1428; see also Portillo, 18 F.3d at 291.

Because Allbright has not challenged the voluntariness of his guilty plea, and the indictment and record do not establish that Allbright's convictions and sentences constitute a violation of the Double Jeopardy Clause, Allbright has not demonstrated a basis for setting aside his guilty plea. See United States v. Broce, 488 U.S. 563, 569, 574-76, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989).

AFFIRMED.