IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-10467
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAY CHARLES GARY a/k/a R. C. GARY,
and ELLIS EARL HAWKINS,

Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Texas
(5:93-CR-135-C)

(January 13, 1995)

Before KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:*

Ray Charles Gary and Ellis Earl Hawkins were convicted of two counts of carjacking in violation of 18 U.S.C. §§ 2 & 2119 (Counts 1 and 2), and two counts of carrying and using a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1) (Counts 3 and 4). Hawkins was also convicted of

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

possession of a firearm as a felon, in violation of 18 U.S.C. § 922(g)(1) (Count 5). Gary was convicted of receipt of a stolen firearm (Count 6) and possessing a firearm with obliterated serial numbers (Count 7), in violation of 18 U.S.C. §§ 922(j) and (k), respectively. The only portions of their respective sentences that are challenged on appeal are the 240-month sentences they received for using and carrying a firearm in relation to a crime of violence.

I

First, Gary and Hawkins challenge their convictions for both 18 U.S.C. § 2119 and § 924(c)(1) on double jeopardy grounds. They argue that the Supreme Court's decision in U.S. v. Dixon,[1] reestablished the Blockburger[2] same elements test "as the sole constitutional analysis used to determine double jeopardy violations." They argue that "[w]hile this Court has held that congressional intent to punish cumulatively can overcome a Blockburger violation, . . . [the] Supreme Court has not held similarly and that, in fact, Dixon's effect suggests otherwise."

"The Fifth Amendment's [D]ouble [J]eopardy [C]lause protects a criminal defendant against . . . multiple punishments for the same offense." U.S. v. Singleton, 16 F.3d 1419, 1422 (5th Cir.

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[1]U.S. v. Dixon, ___ U.S. ___, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993).

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

1994) (internal quotations and citations omitted). This Court applies 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 the statutes fail this test, a defendant may not be punished under both of them "in the absence of a clear indication of contrary legislative intent." Id. (quoting Whalen v. U.S., 445 U.S. 684, 692, 100 S.Ct. 1432, 1438, 63 L.Ed.2d 715 (1980)).

The Singleton Court held that § 2119 and § 924(c) failed the Blockburger same elements test. Id. at 1422-25. Nevertheless, based on the text and the legislative history of § 924(c), we concluded that "Congress has made a sufficiently clear indication of its intent to impose cumulative punishments for violations of § 924(c) and all crimes of violence, including `carjacking,' to satisfy the requirements of the Double Jeopardy Clause." Id. at 1429. Accordingly, we upheld the convictions and sentences under both statutes. Id.; see also U.S. v. Portillo, 18 F.3d 290, 291-92 (5th Cir. 1994) (Congress's clear indication of intent to impose cumulative punishment for § 924(c) violations and crimes of violence satisfies the requirements of Double Jeopardy).

Recognizing that the holding of Singleton forecloses their argument, Gary and Hawkins maintain that the Supreme Court abandoned the "clear expression of legislative intent" prong of the

double jeopardy analysis in Dixon, 113 S.Ct. at 2856, effectively overruling Whalen and Missouri v. Hunter[3], 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983).

First, we believe that Gary and Hawkins mischaracterize Dixon. The issue in that case was "[w]hether the Double Jeopardy Clause bars prosecution of a defendant on substantive criminal charges based upon the same conduct for which he previously has been held in criminal contempt of court." Dixon, 113 S.Ct. at 2854. A divided Court held that double jeopardy bars the subsequent prosecution to the extent that prosecution is for crimes that provided the basis for the contempt order. Id. at 2856-58 (Scalia, Kennedy, J.J.); id. at 2868-79 (White, Stevens, J.J., concurring in the judgment in part and dissenting in part); id. at 2879-81 (Blackmun, J., concurring in the judgment in part and dissenting in part); id. at 2881-91 (Souter, J., concurring in the judgment in part and dissenting in part). Dixon did not address whether enhanced penalty statutes, such as § 924(c), violate the Double Jeopardy Clause, nor did the Court purport to overrule Hunter. Instead, a five-justice majority in Dixon overruled Grady v. Corbin, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), and abandoned the "same conduct" test set forth therein. Id. at 2859-64, 2865-68 (Scalia, Kennedy, Rehnquist, O'Connor, and Thomas,

[3]Hunter held that legislative intent governs whether the imposition of cumulative punishment violates double jeopardy. 459 U.S. at 368-69.

J.J.). Now, under Dixon, if a court determines that a defendant's prosecution for a subsequent offense does not violate Blockburger, the inquiry is over and the court need not take the additional step Grady imposed. See 113 S.Ct. at 2859-64, 2865-68.

Second, contrary to Gary and Hawkins's argument, Singleton cited Dixon and recognized the change effected by it. Singleton noted that, in determining whether two statutes punish the same offense, "[t]he Blockburger `same elements' test is the only hurdle the prosecution must overcome to avoid a double jeopardy bar," and cited Dixon as support. See 16 F.3d at 1422 n.10. Singleton further observed that Dixon rejected the "same conduct" test of Grady. Id. However, Singleton went on to find no double jeopardy violation based on the reasoning of Hunter.

Absent en banc consideration or a superseding decision from the Supreme Court, Singleton is binding precedent on subsequent panels addressing this issue. See In re Dyke, 943 F.2d 1435, 1442 (5th Cir. 1991). Dixon is not "clearly contrary" to this Court's decision in Singleton. See Singleton, 16 F.3d at 1443. Therefore, Singleton is controlling and disposes of this issue.

II

Next, Gary and Hawkins argue that they should not have received 20-year sentences on Count 4, which charged the use of a firearm in relation to the Count 2 carjacking.

Section 924(c)(1) provides that the penalty for a conviction for using or carrying a firearm in relation to any crime of

violence shall be five years imprisonment to run consecutively to the prison term for the crime of violence. 18 U.S.C. § 924(c)(1). Gary and Hawkins received the mandatory five-year consecutive sentences for their convictions on Count 3 for the use of a firearm in relation to the Count 1 carjacking. However, that section further provides that "[i]n the case of [the defendant's] second or subsequent conviction" for the use or carriage of a firearm in relation to a crime of violence, the mandatory sentence is a 20-year consecutive term. 18 U.S.C. § 924(c)(1).

In U.S. v. Deal, 954 F.2d 262, 263 (5th Cir. 1992), aff'd, 113 S.Ct. 1993 (1993), we held that the enhancement provision of § 924(c) for a "second or subsequent conviction" is triggered even though the second or subsequent conviction resulted from the same indictment as the first conviction. The Supreme Court affirmed the decision. Deal v. U.S., ___ U.S. ___, 113 S.Ct. 1993, 1998, 124 L.Ed.2d 44 (1993).

Gary and Hawkins argue that the 20-year sentence for a "second or subsequent" firearm conviction does not apply when the first conviction and the "second or subsequent" conviction both flow from offenses that occur "within minutes of each other" and are part of a "continuing criminal spree." On December 26, 1992, Gary and Hawkins carjacked two different victims at two different locations. The first carjacking occurred at about 9:47 p.m. and the second at about 10:30 p.m. that same night. They argue that Deal is inapplicable because the Deal Court implicitly "relied on the

temporal distance between Deal's six offenses to determine that these were, in effect, separate criminal episodes for which he could be sentenced consecutively on the gun counts."

Gary and Hawkins have misinterpreted Deal. "In the context of § 924(c)(1), we think it unambiguous that `conviction' refers to the finding of guilt by a judge or jury that necessarily precedes the entry of a final judgment of conviction." Deal, 113 S.Ct. at 1996. Additionally, the "second or subsequent conviction" does not refer to a "subsequent offense." Id. at 1997-98. The Deal Court did not rely on the temporal distance between offenses to determine that the court properly imposed the enhanced penalty based on a "second or subsequent conviction." See id. at 1996-98.

Gary and Hawkins were convicted of two counts of using or carrying a firearm in relation to a crime of violence. When the offenses were committed is irrelevant to these sentences. Gary and Hawkins were clearly subject to the sentence enhancement under § 924(c)(1). The district court did not err in imposing 20-year sentences for their second conviction for a violation of § 924(c)(1).

III

For the reasons stated herein, the convictions and sentences of Ray Charles Gary and Ellis Earl Hawkins are

A F F I R M E D.