

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40041
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

WILLIAM BOGAN,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(6:93-CR-18-1)

(August 29, 1994)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:¹

William Bogan appeals from his conviction and sentence for possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g); in particular, from an 18 U.S.C. § 924(e) sentence enhancement. We **AFFIRM**.

I.

Bogan and his wife were charged with possession of marijuana with intent to distribute and using a firearm in connection with a

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 Pursuant to that rule, the court has determined that this opinion should not be published.

drug-trafficking crime. Count 3 charged Bogan alone with possession of a firearm by a felon, with the sentence to be enhanced under § 924(e) (armed career offender enhancement), because of his several prior violent felony convictions. In support of the enhancement, the indictment stated that Bogan had two prior Texas burglary convictions and one for aggravated robbery. In exchange for an agreement to move for dismissal of the other two counts of the indictment against him, Bogan pleaded guilty to count 3, reserving his right to challenge the § 924(e) enhancement.

The presentence investigation report (PSR) determined that Bogan's criminal history included the two burglary and one aggravated robbery convictions, as well as convictions in 1976 for voluntary manslaughter, and in 1981 for attempted murder. Bogan objected to the PSR, claiming, *inter alia*, that the enhancement should not apply because the burglary convictions were constitutionally invalid. He based this on the assertion that his pleas to the charges had not been knowing or voluntary, and appended portions of the state court records for the convictions. The PSR rejected this objection because Bogan had not offered "alternative information to support [his] contention" that the convictions were unconstitutional, and because Bogan was subject to the enhancement regardless of the validity of the burglary convictions (*i.e.*, because of his other prior convictions for violent felonies).

At sentencing, Bogan contended also that his guilty plea to count 3 was based on his understanding that the only prior convictions relevant to the enhancement were the three (aggravated robbery and two burglaries) listed in the indictment. Bogan urged the court to disregard the voluntary manslaughter and attempted murder convictions, and again asserted that the burglary convictions were constitutionally infirm. Bogan conceded, however, that he had committed the burglaries, aggravated robbery, and "other [two] offenses" listed in the PSR.

For the five convictions listed in the PSR, the district court disregarded the voluntary manslaughter conviction and held that the burglary convictions were constitutional, but would be considered a single criminal episode for sentencing purposes.² Accordingly, based on the remaining requisite three convictions, (burglary, attempted murder, and aggravated robbery convictions), the court applied the § 924(e) enhancement, imposing a 188-month sentence.

II.

Bogan challenges the use of the burglary convictions for the enhancement, and contends that his guilty plea to count 3 was involuntary.³

² The Government contended that the burglaries should be counted as two offenses. As discussed *infra*, the enhancement is supported by Bogan's prior convictions, regardless of whether the burglaries are counted together or separately.

³ Bogan contends also that his plea should be set aside because, under Fed. R. Crim. P. 11(f), there is an insufficient factual basis to support it, asserting that the district court failed to establish the existence of an underlying prior felony conviction necessary to support his § 922(g) conviction, and that he did not admit that he had a previous felony conviction. This

A.

Section 924(e) requires proof of three prior convictions for "violent felonies" or "serious drug offenses." 18 U.S.C. § 924(e); **United States v. Martinez-Cortez**, 988 F.2d 1408, 1410 (5th Cir.), *cert. denied*, 114 S.Ct. 605 (1993).⁴ The district court's findings of fact about prior convictions supporting the enhancement are reviewed only for clear error. **United States v. Barlow**, 17 F.3d 85, 89 (5th Cir. 1994), *petition for cert. filed*, No. 93-9505 (U.S. June 6, 1994).

Bogan asserts that he does not have the requisite prior convictions; although he does not contest the use of the aggravated robbery and attempted murder convictions, he disputes the validity of those for burglary.⁵ He bases this on the claim that he was not

claim is factually frivolous. At re-arraignment, Bogan informed the court that he had previous convictions, *inter alia* for aggravated robbery.

⁴ Section 924(e) provides, in relevant part:

(e)(1) In the case of a person who violates [18 U.S.C. § 922(g)] and has three previous convictions ... for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than \$25,000 and imprisoned not less than fifteen years....

18 U.S.C.A. § 924(e)(1) (West Supp. 1994). Without the § 924(e) enhancement, Bogan's maximum term of imprisonment for the § 922(g) violation would have been ten years. See 18 U.S.C.A. § 924(a)(2) (West Supp. 1994).

⁵ In addition to challenging the burglary convictions, Bogan contends that his voluntary manslaughter conviction (disregarded by the district court) is not a final conviction under Texas law. We need not reach this issue, because we hold that the burglary convictions were valid, and Bogan does not challenge the use of the aggravated robbery and attempted murder convictions.

properly admonished about the consequences of his guilty pleas to those charges, rendering the pleas invalid. To exclude the burglary convictions from consideration under § 924(e), Bogan was required to prove by a preponderance of the evidence that his guilty pleas were not knowing and voluntary. **Barlow**, 17 F.3d at 89. The district court found the pleas valid; as stated, we review that finding for clear error. **Id.**

For purposes of the § 924(e) enhancement, because the challenged convictions pre-date **Boykin v. Alabama**, 395 U.S. 238 (1969), the pleas are not presumed invalid even if the plea-bargain record does not contain the **Boykin** admonishments. **Barlow**, 17 F.3d at 89. Moreover, the state record indicates that Bogan was admonished as to the consequences of his pleas. Thus, the district court did not err by rejecting as insufficient Bogan's evidence about the admonishments. See **id.** at 89-90.

B.

Bogan contends next that his guilty plea to count 3 was involuntary, because he entered it based on his understanding that only the prior convictions listed in the indictment would be considered for enhancement purposes. This assertion is unsupported by case law.

Section 924(e) is a sentence-enhancement provision, not a separate offense; the prior convictions on which the enhancement is based need not be stated in the indictment. **United States v. Quintero**, 872 F.2d 107, 110-111 (5th Cir. 1989), *cert. denied*, 496 U.S. 905 (1990). Their inclusion in the indictment "may generally

be disregarded where the charge is not materially broadened and the accused is not misled." *Id.* at 111 (quotation marks and citation omitted). The citation of a conviction in the PSR, regardless of whether it is listed in the indictment, puts the defendant on notice that it may be used to support an enhancement.

Bogan's plea agreement provided that the applicability of the enhancement would be "litigated ... after the preparation of [the PSR]." It further stated his understanding that he would be subject to a minimum 15-year sentence if the court determined that the enhancement provisions "apply to the defendant based on his criminal record...." Based on this language, Bogan could not have been misled by the indictment at the time he entered into the plea agreement; he was aware that his sentence could be enhanced based upon "his criminal record", not just those convictions listed in the indictment.

III.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.