

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-40427  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

RANDALL LYNN CLEMMONS,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Eastern District of Texas  
(6:92-CR-46-1)

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(January 20, 1995)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:<sup>1</sup>

Randall Lynn Clemmons contends that the imposition of consecutive sentences for violation of 18 U.S.C. §§ 922(g) (felon in possession of a firearm) and 922(j) (receiving a stolen firearm) constitutes double jeopardy.<sup>2</sup> We **AFFIRM**.

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<sup>1</sup> 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 Pursuant to that Rule, the court has determined that this opinion should not be published.

<sup>2</sup> Pursuant to Clemmons' counsel submitting an **Anders** brief, we directed that he brief this issue.

I.

Clemmons, a convicted felon, was charged with possessing two firearms, as well as with unlawfully receiving and concealing them, knowing that they were stolen. He pleaded guilty to violating 18 U.S.C. § 922(g) (felon in possession of a firearm) and § 922(j) (receiving a stolen firearm), and was sentenced to 120 months imprisonment for each violation, with 30 months to be served concurrently, for a total imprisonment of 210 months.

II.

Clemmons contends that the imposition of a consecutive sentence, based on the two violations of 18 U.S.C. § 922 and involving the same firearms, violates double jeopardy. The Double Jeopardy Clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb ...." U.S. CONST. amend. V. This prohibition "protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *overruled in part on other grounds*, *Alabama v. Smith*, 490 U.S. 794 (1989).<sup>3</sup> We hold that § 922(g) and § 922(j) do not constitute the same offense; thus, there is no double jeopardy.

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<sup>3</sup> In addition to protecting against multiple punishments for the same offense, the Double Jeopardy Clause also "protects against a second prosecution for the same offense after conviction." *Pearce*, 395 U.S. at 717. Clemmons contends also that his consecutive sentences violated this prohibition. Because he has been subject to only one trial, it is impossible to ascertain how he can contend that his "right to be free from multiple trials for the same offense has been violated." *Missouri v. Hunter*, 459 U.S. 359, 365 (1983).

Clemmons states that it is unclear whether Congress intended for multiple prosecutions or punishments for violations of the subsections of § 922. When confronted with a double jeopardy challenge, and to resolve that question of intent, we rely upon the seminal test of **Blockburger v. United States**, 284 U.S. 299 (1932) "[T]he test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." *Id.* at 304. "Expressed another way, the question is whether each violation requires proving a fact that the other does not." **United States v. Nation**, 832 F.2d 71, 73 (5th Cir. 1987).

Rather than utilizing **Blockburger** to ascertain whether subsections (g) and (j) constitute the same offense, Clemmons relies upon the rule of lenity in the construction of the statutes and the penalties they impose. When the **Blockburger** test is met, however, the ambiguity concerning congressional intention as to the separateness of the offenses, which is a necessary predicate of the rule of lenity, is removed. **United States v. Evans**, 854 F.2d 56, 58 (5th Cir. 1988). Thus, the **Blockburger** test is the proper analysis.

Analysis of Clemmons' convictions demonstrates that different elements of proof are required for each conviction. Under § 922(g)(1), the government must prove, *inter alia*, that Clemmons was a felon; under § 922(j), however, the government must prove, *inter alia*, that Clemmons knew, or had reason to know, that the firearms were stolen. Thus, these two sections involve different elements;

and, under **Blockburger**, the imposition of consecutive sentences does not constitute double jeopardy. See **Nation**, 832 F.2d 71 (cumulative sentences based, in part, on conviction under § 922(g)(1) and § 922(i) (shipping and transporting a stolen firearm) did not violate Double Jeopardy Clause).

III.

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

**AFFIRMED.**