United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
March 8, 2021
Lyle W. Cayce
Clerk

No. 20-30455
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

PHILLIP CROSBY,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 5:19-CR-265

Before HAYNES, WILLETT, and HO, *Circuit Judges*.

PER CURIAM:*

Phillip Crosby pleaded guilty to one count of possession with intent to distribute five grams or more of methamphetamine pursuant to a written plea agreement. The district court sentenced Crosby as a career offender based upon prior convictions, including attempted simple robbery and attempted

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

distribution of methamphetamine under Louisiana law. He did not object but now appeals the conclusion that his prior offenses qualify him as a career offender.

The parties do not dispute, and we conclude, that plain error review applies. To prevail on plain error review, an appellant must show a forfeited error that is clear or obvious and affects his substantial rights. *Puckett v. United States*, 556 U.S. 129, 135 (2009). If he makes such a showing, this court has the discretion to correct the error but only if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* (alteration in original) (quotation omitted).

Under § 4B1.1(a) of the Sentencing Guidelines, a defendant qualifies as a career offender if he was 18 years old at the time of the instant offense, the instant offense is a crime of violence or a controlled substance offense, and the defendant has two or more prior felony convictions that are either crimes of violence or controlled substance offenses. A "crime of violence" is a federal or state offense that is punishable by more than one year in prison and that either "has as an element the use, attempted use, or threatened use of physical force against the person of another" or is an enumerated offense. U.S. SENT'G GUIDELINES MANUAL § 4B1.2(a) (U.S. SENT'G COMM'N 2018). Notably, the list of enumerated offenses includes "robbery." *Id.* § 4B1.2(a)(2). A "controlled substance offense" is defined as a federal or state offense, punishable by more than one year in prison, "that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance . . . or the possession of a controlled substance . . . with intent to manufacture, import, export, distribute, or dispense." *Id.* § 4B1.2(b). According to the Sentencing Guideline commentary, both "crime of violence" and "controlled substance" offenses include conspiracies and attempts to commit such offenses. *Id.* § 4B1.2, cmt. n.1.

Crosby challenges the commentary, arguing that his prior Louisiana convictions do not qualify as crimes of violence or controlled substance offenses. Although he acknowledges that "robbery" is an enumerated offense, he argues that the Guideline does not list "attempted" robbery as an enumerated offense and that the commentary improperly expands the definition beyond the language of the Guideline itself. In the same vein, Crosby asserts that his Louisiana convictions for attempted distribution of controlled substances do not qualify as controlled substance offenses because § 4B1.2(b) does not include attempts and the commentary impermissibly expands the definition of such offenses.

We have previously held that Louisiana robbery qualifies as a crime of violence under § 4B1.2(a). *See United States v. Brown*, 437 F.3d 450, 452 (5th Cir. 2006) (finding that simple robbery, under Louisiana law, was a crime of violence for purposes of the Armed Career Criminal Act because it includes as an element the use, or threatened use of physical force); *United States v. Richardson*, 672 F. App'x 368, 372 (5th Cir. 2016) (per curiam) (holding, under plain error review, that Louisiana simple robbery constitutes a crime of violence under § 4B1.1 and § 4B1.2 in light of *Brown*). In his assertion that *attempted* simple robbery does not qualify as an offense under Sentencing Guideline § 4B1.2(a)(1)'s use-of-force clause, Crosby argues that the Louisiana definition of "attempt" does not require the actual, attempted, or threatened use of force. Likewise, he attempts to avoid the relevant commentary language about attempts by citing to out-of-circuit case law that addresses whether attempts to commit crimes qualify as crimes of violence under 18 U.S.C. § 924(c).[1] *See, e.g.*, *United States v. Taylor*, 979 F.3d 203, 206–10 (4th Cir. 2020) (addressing attempted Hobbs Act robbery). He also

[1] This statute does not contain language indicating that a crime of violence also includes attempts. 18 U.S.C. § 924(c).

analogizes to conspiracy cases under the same statute. *See United States v. Lewis*, 907 F.3d 891, 894–95 (5th Cir. 2018) (holding that conspiracy to commit Hobbs Act robbery does not necessarily require the use of force).

Crosby challenges only the "attempted" portion of his prior convictions; he does not argue that Louisiana simple robbery does not qualify as the enumerated offense of "robbery" under § 4B1.2(a)(2) or that the state statute prohibiting distribution would not qualify as a controlled substance offense under § 4B1.2(b). In support of his contention that we may not rely on the commentary to the Guideline, Crosby relies on Supreme Court case law stating that "commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, *or is inconsistent with,* or a plainly erroneous reading of, *that guideline*." *Stinson v. United States*, 508 U.S. 36, 38 (1993) (emphasis added). Crosby also cites to case law from the D.C. Circuit, which held that the commentary to § 4B1.2 impermissibly expanded the definition of "crime of violence." *See United States v. Winstead*, 890 F.3d 1082, 1090–92 (D.C. Cir. 2018).

However, Crosby cites no authority from our court applying *Stinson* to hold that the commentary to § 4B1.2 should not be considered in determining whether an offense qualifies as a crime of violence for career offender purposes. Instead, as the Government notes, we have held that inchoate offenses may be used as predicate crimes. *See United States v. Kendrick*, 980 F.3d 432, 444 (5th Cir. 2020) (holding, under plain error review, that conspiracy convictions qualify as controlled substance offenses in light of the commentary to § 4B1.2); *United States v. Claiborne*, 132 F.3d 253, 256 (5th Cir. 1998) (per curiam) (holding that attempted unauthorized entry of an inhabited dwelling constitutes a crime of violence under

§ 4B1.2(a)(2)).[2] Given the lack of precedent in our circuit, we conclude that Crosby has failed to show that any error is plain. *United States v. Gonzalez*, 792 F.3d 534, 538 (5th Cir. 2015) (A "lack of binding authority is often dispositive in the plain-error context."); *see also United States v. Ceron*, 775 F.3d 222, 226 (5th Cir. 2014) (per curiam) ("When the case law is unsettled, we cannot say that any error is clear or obvious.").

AFFIRMED.

[2] In *Claiborne*, we determined that the crime of unauthorized entry constituted a crime of violence under the now-excised residual clause of § 4B1.2(a)(2), as it "involve[d] conduct that presents a serious potential risk of physical injury to another." 132 F.3d at 254–55 (quoting U.S. SENT'G GUIDELINES MANUAL § 4B1.2(a)(2) (U.S. SENT'G COMM'N 1997). The subsequent Guideline amendment has no effect on the rationale regarding attempts in *Claiborne*—if an offense qualifies as a crime of violence under § 4B1.2(a), the commentary dictates that an attempt to commit such an offense also qualifies. *See* U.S. SENT'G GUIDELINES MANUAL § 4B1.2, cmt. n.1 (U.S. SENT'G COMM'N 2018).