FILED
United States Court of Appeals
Tenth Circuit

November 3, 2026

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

NICOIS MEGALE SMITH,

Defendant - Appellant.

No. 25-6042
(D.C. No. 5:23-CR-00342-HE-2)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **MATHESON**, **CARSON**, and **ROSSMAN**, Circuit Judges.

A jury convicted Nicois Smith on one count of possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1). The district court sentenced Mr. Smith to 84 months' imprisonment and three years of supervised release. In calculating the advisory custodial range under the Sentencing Guidelines, the district court added a four-level enhancement under § 2K2.1(b)(6)(B). Mr. Smith appeals the sentence

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

imposed and specifically challenges the enhancement. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I

The government indicted Mr. Smith on two counts of violating § 922(g)(1). The first count was for possessing a CZ 9mm pistol on May 21, 2023, and the second count was for possessing a Canik 9mm pistol on June 8, 2023. The case proceeded to a jury trial, which resulted in a verdict of not guilty for the June possession and guilty for the May possession.

The Probation Office prepared a presentence investigation report (PSR). The PSR set Mr. Smith's base offense level at 14 and included a two-level increase because the firearm was stolen. The PSR also recommended the application of § 2K2.1(b)(6)(B), which adds four offense levels "[i]f the defendant . . . used or possessed any firearm or ammunition in connection with another felony offense . . . ." [1] The application notes to § 2K2.1(b)(6)(B) provide the phrase "in connection with" means "if the firearm . . . facilitated, or had the potential of facilitating, another felony offense or another offense, respectively." *Id*. cmt. 14(A).

The PSR stated that, in addition to the CZ pistol, officers seized 1.6 grams of crack cocaine, 6.5 grams of marijuana, $820, and a scale. Officers seized these items

[1] The PSR used the 2023 edition of the Sentencing Guidelines Manual. We cite to that edition in this Order and Judgment. *See United States v. Sullivan*, 255 F.3d 1256, 1259 (10th Cir. 2001) (noting "a sentencing court must apply the guidelines in effect at the time of sentencing . . . unless such application would violate the ex post facto clause"); U.S.S.G. § 1B1.11(a) ("The court shall use the Guidelines Manual in effect on the date that the defendant is sentenced.").

from Mr. Smith's bedroom while searching his residence pursuant to a search warrant.[2] They found the pistol "inside a beanie-style hat on [Mr. Smith's] bed." R. vol. II at 58.

The PSR thus concluded Mr. Smith possessed the firearm along with quantities of drugs that, because of his prior convictions, constituted a felony offense. *See* R. vol. II at 59, ¶ 19 n.1 ("It appears the distinction between distribution and/or possession in this case is immaterial as defendant's possession of cocaine base is a felony offense under federal law or state law based on his prior convictions.") Under these circumstances, the PSR applied the enhancement under § 2K2.1(b)(6)(B).

The addition of the four-level enhancement under § 2K2.1(b)(6)(B) yielded a total offense level of 20. With a criminal history category V, Mr. Smith's advisory Guidelines range was 63 to 78 months' imprisonment. The PSR suggested a sentence above the Guidelines range "may be warranted" in light of Mr. Smith's criminal history, R. vol. II at 76, and the government ultimately sought an upward variance to 120 months, R. vol. I at 364–67.

Mr. Smith objected to the application of § 2K2.1(b)(6)(B). In his view, and contrary to the PSR's conclusion, simply possessing the drugs and firearm together did not satisfy the "in connection with" requirement because, on the facts recited in the PSR, the firearm did not "facilitate" or "make easier" the drug possession.

[2] The search of the residence occurred when officers were investigating a shooting that did not involve Mr. Smith. The victim had ended up at Mr. Smith's residence. Mr. Smith answered law enforcement's questions about the shooting, but he refused to allow them entry, so they obtained a warrant.

See R. vol. I at 428 (emphasis omitted). He also pointed to the small quantity of drugs found, and that they were not packaged for sale, suggesting personal use.

The district court overruled the objection. Relying on *United States v. Justice*, 679 F.3d 1251, 1255 (10th Cir. 2012), the court reasoned, "the possession of the firearm . . . can essentially facilitate the illegal possession [of drugs], because it tends to embolden the person who might otherwise be concerned with losing possession" and that "in the particular circumstances of this case, . . . the possession of the gun at least had the potential to facilitate [the] illegal [drug] possession." R. vol. III at 424. The district court then adopted the advisory guideline calculation in the PSR.

Ultimately, the district court imposed a sentence of 84 months in prison, which was above the top of the applicable guideline range but lower than what the government had requested. The district court focused particularly on Mr. Smith's prior criminal history as the basis for the upward variance under 18 U.S.C. § 3553(a):

> I think the more troubling aspect of this and the thing that causes me, as I suspect the report writer in suggesting a potential upward departure here, was the fact that the defendant's criminal record is very extensive. It involves multiple violent types of crimes, the domestic abuse and assault and battery situations and so on. And that, against the recidivist factor I've identified here where this is the second conviction for being a felon in possession causes me to conclude that an upward variance is warranted here, though, I think it is unnecessary to go to the extent that the government has sought.

R. vol. III at 31–32.

This timely appeal followed.

II

Mr. Smith seeks resentencing. He argues the district court erred in applying a four-level enhancement under § 2K2.1(b)(6)(B) after mistakenly concluding the firearm facilitated the possession of controlled substances.[3] This is a challenge to the procedural reasonableness of his sentence. *See* *United States v. Rocha*, 145 F.4th 1247, 1260 (10th Cir. 2025) ("Procedural reasonableness involves using the proper method to calculate the sentence. Procedural error[] include[s] failing to calculate (or improperly calculating) the Guidelines range . . . ." (citation and internal quotation marks omitted)).

"The government has the burden of proving, by a preponderance of the evidence, that Section 2K2.1(b)(6) applies." *United States v. Leib*, 57 F.4th 1122, 1126 (10th Cir. 2023) (quoting *United States v. Kitchell*, 653 F.3d 1206, 1226 (10th Cir. 2011)). "When evaluating sentence enhancements under the Sentencing Guidelines, this Court reviews the district court's factual findings for clear error and questions of law de novo. In particular, we review the application of § 2K2.1(b)(6)(B) in a given case for clear error." *Leib*, 57 F.4th at 1125–26 (internal quotation marks and citation omitted). "Clear error is highly deferential and requires us to uphold any district court determination that falls within a broad range of permissible conclusions." *Chieftain Royalty Co. v. EnerVest Energy Inst. Fund XIII-*

[3] Mr. Smith made his objection first in a pro se filing and, later, through a counseled objection filed with the district court's leave. He also argued the issue at the sentencing hearing, R. vol. III at 416–21. The issue is preserved.

A, L.P., 166 F.4th 34, 50 (10th Cir. 2026) (internal quotation marks omitted). As we explain, we discern no error.

A

Mr. Smith challenges the district court's application of § 2K2.1(b)(6)(B) based on its finding that his possession of a 9mm firearm "at least had the potential to facilitate [the] illegal possession" of crack cocaine and marijuana, R. vol. III at 424:19–20. We disagree. Under §2K2.1(b)(6)(B), even if a particular defendant's firearm possession did not—in fact—facilitate illegal drug possession, the application notes clarify that the phrase "in connection with" means the enhancement applies if the firearm possession "had the *potential*" to do so. *See* U.S.S.G. 2K2.1, cmt. 14(A) (emphasis added). We have "agree[d] with several other circuits that have held that possession of a firearm *may* facilitate an offense by emboldening the possessor to commit the offense." *Justice*, 679 F.3d at 1255 (emphasis added); *United States v. Sanchez*, 22 F.4th 940, 942 (10th Cir. 2022) ("All § 2K2.1(b)(6)(B) requires under our precedents is that Defendant's possession of the firearm had the potential to facilitate" the illegal possession).

Applying these standards here, we cannot conclude the district court erred. The district court's finding that Mr. Smith's firearm, located "on top of a bed right next to several crack rocks," R. vol. III at 423:7–8, had the potential to facilitate his illegal drug possession has record support based on the evidence offered at trial—a detective with the Oklahoma City Police Department testified, with photographic

support, that officers discovered the gun, hat, and scale "less than a foot apart" from each other in his bedroom, *id.* at 199.[4]

Urging a contrary conclusion, Mr. Smith points out other facts in the record that he says undermine the district court's finding—for example, the gun was in his personal living area, and he was not carrying it in public at the time of his arrest. We are not so sure these other facts, given the record as a whole, disturb the district court's finding. But, in any event, Mr. Smith's point about the record would not compel reversal under the clear error standard.[5] *United States v. McClatchey*, 316 F.3d 1122, 1128 (10th Cir. 2003) ("To constitute clear error, we must be convinced that the sentencing court's finding is simply not plausible or permissible in light of the entire record on appeal, remembering that we are not free to substitute our judgment for that of the district judge.") (internal quotation marks omitted);

[4] Given our disposition, we do not consider the government's alternative argument that the record supports a finding related to drug distribution. *See* Resp. Br. at 19–26.

[5] Mr. Smith argues the "[standard of] review is de novo" because "[i]n this appeal, the facts surrounding the enhancement were undisputed." Aplt. Opening Br. at 11. We are not persuaded. *See United States v. Jones*, 530 F.3d 1292, 1305 (10th Cir. 2008) ("[D]eferential appellate review of a district court's application of the Guidelines to undisputed facts is appropriate because, as a general rule, 'the district court is in a better position than the appellate court to decide whether a particular set of individual circumstances' merits application of a Guidelines provision." (quoting *Buford v. United States*, 532 U.S. 59, 64 (2001)). The determination at issue here—whether the findings support the application of §2K2.1(b)(6)(B)—involves the application of the Guidelines to the facts. Still, the standard of review is not dispositive here because, under any standard, we would not reach a different disposition on this record.

Rocha, 145 F.4th at 1269 (factfinder's choice between two permissible views of the evidence cannot be clearly erroneous).

We also reject Mr. Smith's contention that his possession of the firearm facilitated the possession of only misdemeanor quantities of drugs. In light of his criminal history, his possession of *any* quantity of crack cocaine was felonious. *See* R. vol. II at 79–80 ("Under [21 U.S.C. § 844(a)], a defendant who has a prior drug possession offense under the law of any state (the defendant has four such convictions) is subject to being charged with felony possession.").

We thus must reject Mr. Smith's argument that the district court clearly erred in applying a four-level enhancement under § 2K2.1(b)(6)(B).

III

We affirm the judgment of the district court.

Entered for the Court

Veronica S. Rossman
Circuit Judge