PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

September 9, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SAMUEL ELLIOTT,

Defendant - Appellant.

No. 18-2105

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. 2:14-CR-03822-RB-1)

John C. Arceci (Virginia L. Grady with him on the briefs), Federal Public Defender's Office, Denver, Colorado, for Defendant-Appellant.

Jennifer M. Rozzoni (John C. Anderson with her on the brief), United States Attorney's Office, Albuquerque, New Mexico, for Plaintiff-Appellee.

Before **TYMKOVICH**, Chief Judge, **EBEL** and **LUCERO**, Circuit Judges.

LUCERO, Circuit Judge.

Samuel Elliott pled guilty to three counts of producing child pornography, in violation of 18 U.S.C. § 2251(a), and four counts of possessing child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B). Each of the four possession counts concerns a different electronic device or medium on which Elliott stored his

collection of child pornography. On appeal, he argues three of the four possession counts are multiplicitous and thus violate the Double Jeopardy Clause. Elliott contends that because he possessed the different electronic devices containing child pornography in the same physical location and at the same time, he may not be convicted of distinct possession counts for each device. To this end, Elliott argues the rule of lenity requires a single possession conviction because the statute is ambiguous as to whether the unit of prosecution is a single device containing child pornography or the simultaneous possession of multiple devices containing child pornography. We agree that the statute's unit of prosecution is ambiguous, and thus conclude that the rule of lenity requires we construe § 2252A(a)(5)(B) to preclude distinct charges for each electronic device or medium simultaneously possessed. Exercising jurisdiction under 28 U.S.C. § 1291, we remand to the district court with instructions to vacate three of Elliott's possession convictions and sentences.

I

Execution of a search warrant on Elliott's residence on July 24, 2013, uncovered over 8,000 images of child pornography, including videos of Elliott sexually assaulting three different children, on five different devices. A federal grand jury returned an eight-count indictment against Elliott, charging him with three counts of producing child pornography and five counts of possessing child pornography. A superseding indictment charged that Elliott possessed five separate storage devices containing child pornography: an iPhone, a digital hard drive, a

Hewlett Packard desktop computer, an eMachines desktop computer,[1] and a Dropbox storage account. Each count alleged that Elliott possessed these devices "[o]n or about July 24, 2013, in Luna County, in the District of New Mexico."

Elliott moved to dismiss all but one of the possession counts as multiplicitous. This motion was denied. Also denied was Elliott's motion to suppress the evidence obtained in the search of his residence. In denying that motion, the district court issued a set of factual findings, including that the search discovered the iPhone, hard drive, and Hewlett Packard desktop computer in Elliott's bedroom.

Elliott pled guilty. In the admission of facts contained in his written plea agreement, Elliott acknowledged that each of the media contained images of child pornography. Elliott reserved the right to appeal the denial of his motion to dismiss for multiplicity and the reasonableness of his sentence.

The district court imposed a sentence of 170 years' imprisonment, composed of 360 months' imprisonment for each of the three production counts, to run consecutively, and 240 months' imprisonment for each of the four possession counts, also to run consecutively. Elliott timely appealed.

II

The Double Jeopardy Clause "protects a defendant against cumulative punishments for convictions on the same offense." United States v. Benoit, 713 F.3d 1, 12 (10th Cir. 2013) (quotation omitted). "Included in double jeopardy protections

[1] The count relating to this device was later dismissed.

are multiple punishments for the same offense based on the total punishment authorized by the legislature." United States v. Jackson, 736 F.3d 953, 955 (10th Cir. 2013). "We review claims of multiplicity de novo." Benoit, 713 F.3d at 12.

If "the same statutory violation is charged twice, the question is whether the facts underlying each count were intended by Congress to constitute separate 'units' of prosecution." United States v. Polouizzi, 564 F.3d 142, 154 (2d Cir. 2009). The "unit of prosecution" is "the minimum amount of activity a defendant must undertake, what he must do, to commit each new and independent violation of a criminal statute." United States v. Rentz, 777 F.3d 1105, 1109 (10th Cir. 2015) (en banc). Determining the unit of prosecution is "a matter of statutory interpretation." Id. at 1109 n.4. If, after employing the usual tools of statutory interpretation, we are left with a "grievous ambiguity or uncertainty" concerning the statute, we employ the rule of lenity. Muscarello v. United States, 524 U.S. 125, 139 (1998) (quotation omitted). As the Supreme Court instructed in Bell v. United States, 349 U.S. 81 (1955), if "Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses." Id. at 84.

Relevant provisions of the statute provide: "Any person who . . . knowingly possesses . . . any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography" shall be subject to the criminal penalties in question. § 2252A(a)(5)(B). We must determine whether Congress unambiguously defined the unit of prosecution in § 2252A(a)(5)(B) as each

individual device on which the defendant stores child pornography. We conclude that it did not. The statute of conviction contains the ambiguous modifier "any" preceding the enumerated list of storage materials. § 2252A(a)(5)(B). Both the Supreme Court and this court have determined that modifier creates sufficient ambiguity as to require lenity when interpreting numerous other statutes in the face of multiplicity challenges.

In Bell, the Supreme Court considered the Mann Act, which applies to the knowing transportation of "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose." 349 U.S. at 82 (quoting 18 U.S.C. § 2421). It held that the statute could be reasonably read to provide a unit of prosecution based on the number of transports or the number of women, and "the ambiguity should be resolved in favor of lenity." Id. at 83. A defendant thus could not be convicted on two separate counts for making a single trip with two women. Id. Similarly, in Ladner v. United States, 358 U.S. 169 (1958), the Supreme Court applied the rule of lenity to a statute that criminalizes interference with "any person" engaged in official federal duties. Id. at 170 n.1, 178 (quoting 18 U.S.C. § 254 (1940)). "If Congress desires to create multiple offenses from a single act affecting more than one federal officer," the Court held, "Congress can make that meaning clear." Id. at 178.

Our court has subsequently applied this reasoning to several other statutes. In United States v. Valentine, 706 F.2d 282 (10th Cir. 1983), we explained that "[u]ncertainty as to the unit of prosecution intended by Congress under the statutes in

question exists because of the use of the ambiguous word 'any' in defining the crimes." Id. at 292. The statutes in that case concerned convicted felons who "receive any firearm or ammunition" or "possess[] . . . any firearm." Id. (quoting 18 U.S.C. § 922(h) and 18 U.S.C. App. § 1202(a)). We concluded that the rule of lenity applies because the statutory language "permits both the conclusion that only one offense has been committed and the conclusion that two separate crimes have occurred" if "a convicted felon simultaneously possesses two guns." Id. at 293.

In United States v. Long, 787 F.2d 538 (10th Cir. 1986), we considered multiple convictions under a statute prohibiting possession of "any letter, postal card, package, bag, or mail, or any article or thing contained therein, which has been . . . stolen." Id. at 539 (quoting 18 U.S.C. § 1708). We explained that "[t]he use of the word 'any' under these circumstances creates an ambiguity." Id. The analysis contained in Valentine, we held, "is equally applicable to the use of the word 'any' to modify 'letter' in section 1708." Id.

A more recent holding from this court in United States v. Jackson, 736 F.3d 953 (10th Cir. 2013), is in accord. That case concerned a multiplicity challenge to separate counts for two deaths that occurred after a defendant committed a single bank robbery. Id. at 955. The statute at issue applies if a defendant "kills any person" in attempting to avoid apprehension for bank robbery. Id. at 956 (quoting 18 U.S.C. § 2113(e)). We ruled that the phrase "any person . . . could be interpreted either in the singular or plural, making it sufficiently ambiguous as to require lenity." Id. at 956.

Our sibling circuits have also recognized that the modifier "any" creates ambiguity between the singular and plural. See Polouizzi, 564 F.3d at 155 ("[T]he word 'any' . . . has typically been found ambiguous in connection with the allowable unit of prosecution, for it contemplates the plural, rather than specifying the singular." (quotations omitted)); United States v. Kinsley, 518 F.2d 665, 667 (8th Cir. 1975) (aggregating cases and explaining the word "'any' may be said to fully encompass (i.e., not necessarily exclude any part of) plural activity").

As in the statutes construed in Valentine, Long, and Jackson, use of the word "any" in § 2252A allows both the conclusion that only one offense and two separate offenses occurred if a defendant possessed a book and a magazine containing child pornography. See Oxford English Dictionary (3d ed. 2016) (stating "any" is "used to refer to an unspecified number or quantity of a thing or things, no matter how much or how many"). The plain text of the statute itself thus does not clearly define the appropriate unit of prosecution.

The government relies upon dicta from out of circuit cases interpreting a similar statute, § 2252(a)(4)(B), to support its reading of "any" as unambiguously adopting a per-device theory under § 2252A(a)(5)(B). In those cases, other circuits distinguished the phrase "[one] or more," which they conclude does not unambiguously authorize per-device charges, from "any." See, e.g., United States v. Chiaradio, 684 F.3d 265, 275 (1st Cir. 2012) ("The phrase 'one or more,' unlike the word 'any,' strongly suggests Congress's intent that multiple matters be included in a single unit of prosecution."). Based on these cases, the government argues that

§ 2252A(a)(5) must have a different unit of prosecution. But this argument cannot withstand closer scrutiny. Although those courts distinguish between the language of the statutes to conclude "[one] or more" plainly encompasses simultaneous possession of multiple devices, they did not conclude that "any" unambiguously establishes the unit of prosecution at a per-device level. Nor could they, as courts have explained that "any" is ambiguous on this score. See Chilaca, 909 F.3d at 285 (distinguishing between the phrases and noting other courts' holdings that "language criminalizing 'any' prohibited images is ambiguous as to the allowable unit of prosecution"); Polouizzi, 564 F.3d at 155 (although "the phrase '[one] or more' specifies the plural," the word "any" is ambiguous because it merely "contemplates the plural, rather than specifying the singular"). And the government fails to explain how the word "any" meaningfully differs from the phrase "[one] or more" in this context. Dictionary definitions treat them as synonymous. See Webster's Ninth New Collegiate Dictionary (1991) (defining "any" as "one or more").

Other tools of statutory interpretation also fail to cure the ambiguity. See Harbert v. Healthcare Servs. Grp., Inc., 391 F.3d 1140, 1147 (10th Cir. 2004) (tools of interpretation "include examination of the statute's text, structure, purpose, history, and relationship to other statutes"). We move from the foregoing analysis of the statute's text to an analysis of the statute's purpose. And our analysis of statutory purpose at least slightly favors Elliott. It is true that Elliott's reading of the statute could impose the same statutory penalties on two defendants, one with a large number of storage devices and one with a single device. Although, as Elliott notes,

the Sentencing Guidelines account for the number of images possessed. U.S.S.G. § 2G2.2(b)(7)(C). On the other hand, the government's theory would expose a defendant who possesses five images of child pornography on separate devices to five counts—and a sentence of 100 years, § 2252A(b)(2)—even though a defendant who possesses the same five images on a single device would face only a single count. It seems implausible that Congress could have intended to punish an individual who possesses five images of child pornography on five different devices five times more severely as an individual who possesses the same five images on one device.[2] Thus having exhausted the tools of statutory construction, we are left with grievous doubt as to the proper unit of prosecution and therefore conclude the rule of lenity applies.[3]

The government argues that we can affirm Elliott's convictions under a separate-receipt or separate-storage theory of possession even if § 2252A(a)(5)(B) precludes separate charges for each electronic device or medium simultaneously possessed. As the government notes, we have recognized that multiple possession

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[2] The government argues that prosecutorial discretion resolves any charging absurdities. But such broad discretion with significant sentencing implications is precisely the harm that the rule of lenity seeks to address. Bell, 349 U.S. at 83 ("When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.").

[3] Neither party cites any informative legislative history, nor have we uncovered any. See Christina M. Copsey, Comment, How Many is "Any"?: Interpreting § 2252A's Unit of Prosecution for Child Pornography Possession, 62 Am. U.L. Rev. 1675, 1729-31 (2013) (discussing legislative history).

charges may be proper under other statutes if there is evidence of separate receipt or separate storage of the contraband items. See United States v. Hutching, 75 F.3d 1453, 1460 (10th Cir. 1996) (upholding distinct convictions for separate storage of three firearms); Long, 787 F.2d at 539 (explaining "that in the absence of a showing of separate receipt or separate storage of the items, simultaneous possession of several pieces of stolen mail constitutes only one offense under section 1708"). The government contends Elliott may be convicted of multiple counts under either theory: the separate-storage theory because "the undisputed facts reveal separate storage containers for child pornography;" and the separate-receipt theory because it is clear Elliott "acquired the[] images on more than one occasion," given the number of images he possessed.

But the government errs by asking whether the images of child pornography were obtained through separate transactions or stored in different locations. Section 2252A(a)(5) criminalizes the act of "possess[ing] any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography." Possession of the storage device is the actus reus of the statute. Our inquiry is thus whether the media containing images of child pornography were possessed simultaneously.[4]

[4] In United States v. Planck, 493 F.3d 501 (5th Cir. 2007), the Fifth Circuit adopted the government's theory that each device containing illicit images may give rise to a separate count under § 2252A(a)(5)(B). Id. at 503-05. Because that court analyzed whether the images, rather than the storage devices, were simultaneously possessed, we conclude this out-of-circuit authority is not persuasive.

Moreover, even assuming the separate-receipt and separate-storage theories of possession from Hutching and Long apply in the child pornography context—an issue we expressly do not decide—the government's arguments would nevertheless fail. The government has not directed us to any evidence that Elliott separately received the media containing child pornography he was charged with possessing. See United States v. Jones, 841 F.2d 1022, 1025 (10th Cir. 1988) (holding "the government must be able to establish dates or specific acts or transactions of receipt"). And the prohibited devices—"material that contains an image of child pornography," as defined by § 2252A(a)(5)(B)—were found in the same physical location, Elliott's bedroom. Id. at 1024, 1025 (precluding multiple charges because the prohibited firearms were "all discovered on the same date and seized from the same location," the defendant's bedroom).

Elliott's Dropbox account complicates this analysis. That account allowed Elliott to access files stored on servers outside the state of New Mexico. And the statement of facts in Elliott's plea agreement stated that his Dropbox online storage account was "maintained on a number of servers throughout the United States and that none of these servers are located in New Mexico." But Elliott was charged with possession of a "Dropbox storage account," not possession of those servers. And the indictment alleges that he did so "[o]n or about July 24, 2013, in Luna County, in the district of New Mexico." The record indicates Elliott's iPhone was "synced" to the Dropbox account, and he accessed the account from the same location as the iPhone. Under these circumstances, we will take the same course as the Ninth Circuit and

assume that the Dropbox account qualifies as a medium absent argument to the contrary, and treat it as found in the same location as the device from which it is accessed. See Chilaca, 909 F.3d at 292 & n.2.

We conclude that the four counts of possession on which Elliott was convicted are multiplicitous. The appropriate remedy is vacatur of all but one of those convictions and resulting sentences.[5]

III

We **REMAND** to the district court with instructions to **VACATE** the convictions and sentences on all but one of Elliott's child pornography possession convictions. Because all counts of conviction were for devices containing more than 600 images of child pornography, it is immaterial which possession conviction remains.

[5] For preservation purposes, Elliott also argues the Sentencing Guidelines related to child pornography crimes are manifestly unreasonable and lacking in an empirical basis. But Elliott recognizes we have rejected this argument in United States v. Grigsby, 749 F.3d 908, 910-11 (10th Cir. 2014), and United States v. Franklin, 785 F.3d 1365, 1371 (10th Cir. 2015). We may not depart from those holdings "absent en banc reconsideration or a superseding contrary decision by the Supreme Court." Haynes v. Williams, 88 F.3d 898, 900 n.4 (10th Cir. 1996).

18-2105, *United States v. Elliott*
TYMKOVICH, Chief Judge, dissenting

Mr. Elliott was properly convicted on four separate counts of possession of child pornography. Under 18 U.S.C. § 2252A(a)(5)(B), a person who "knowingly possesses, or knowingly accesses with intent to view, *any* book, magazine, periodical, film, videotape, computer disk, or *any* other material that contains *an image* of child pornography . . ." will be subject to prosecution. (emphases added). Mr. Elliott pleaded guilty to possessing an extensive collection of child pornography—which, in the aggregate, contained over 8000 images and videos—across four separate storage devices. I am satisfied that § 2252A(a)(5)(B) permits four discrete convictions for possession under these circumstances.

But the majority opinion concludes the statutory term "any" creates an unacceptable ambiguity, such that discrete convictions premised upon each storage device will prove unconstitutional. This conclusion disregards a bevy of cases in which we have observed that proof of separate storage or receipt will support multiple convictions for the possession of contraband, regardless of whatever ambiguity the statutory term "any" may create.

For example, in *United States v. Long*, 787 F.2d 538, 539 (10th Cir. 1986), we examined the federal mail-theft statute, which applies to anyone who "unlawfully has in his possession, *any* letter . . ." (emphasis in original) (quoting 18 U.S.C. § 1708). We acknowledged "the use of the word 'any' under these circumstances creates an ambiguity." *Id*. (citing *United States v. Valentine*, 706 F.2d 282, 293 (10th Cir. 1983)).

And that, ordinarily, "[a]mbiguity in the definition of conduct to be punished by a criminal statute must be settled against turning a single transaction into multiple offenses." *Id*. (same). But—most importantly—we concluded this presumption could be overcome by "a showing of separate receipt or separate storage" of stolen mail. *Id*.

In *Valentine*, we likewise considered two statutes that dealt with firearms and convicted felons. The first prohibited convicted felons from "receiv[ing] *any* firearm or ammunition . . ." 706 F.2d at 292 (emphasis in original) (quoting 18 U.S.C. § 922(h)). And the second proscribed felons from "receiv[ing], possess[ing], or transport[ing] . . . *any* firearm . . ." *Id*. (emphasis in original) (quoting 18 U.S.C. § 1202(a)). Despite once again acknowledging *some* ambiguity in both statutes, we followed the guidance of "[o]ther courts [that] have uniformly reached the same conclusion" in observing "a showing of separate receipt or storage" can overcome the presumption against multiple convictions. *Id*. at 293.[1]

I would employ this same approach in construing 18 U.S.C. § 2252A(a)(5)(B) to foreclose Mr. Elliott's challenge. Mr. Elliott possessed four different storage devices that contained child pornography—an iPhone, a digital hard drive, a desktop computer, and a

[1] As the Supreme Court has reminded us, "[t]he simple existence of some statutory ambiguity . . . is not sufficient to warrant application of [the] rule [of lenity], *for most statutes are ambiguous to some degree*." *Muscarello v. United States*, 524 U.S. 125, 138 (1998) (emphasis added).

Dropbox storage account.[2] Nobody would dispute the inference that each device came into his possession separately, or that the storage and receipt of all 8000-plus proscribed images and videos did not take place at the same time.

I accordingly would follow the blueprint drawn up by the Fifth Circuit, which has held the possession of multiple devices under similar circumstances may support multiple charges under § 2252A(a)(5)(B). In *United States v. Planck*, 493 F.3d 501 (5th Cir. 2007), the court rejected a nearly identical challenge to multiple convictions for possession of child pornography under § 2252A(a)(5)(B). The defendant—who was found to have possessed thousands of images depicting child pornography across a desktop computer, laptop computer, and 223 computer diskettes—argued his three convictions were multiplicitous.

The court reasoned each instance of separate *storage* or *receipt* may support a unique conviction for possession, observing "the desktop, laptop, and diskettes [the defendant] possessed were three separate types of material or media, *each capable of independently storing images of child pornography*." *Id*. at 504 (emphasis added). Because "the *actus reus* is the possession of child pornography[,] the [g]overnment need only prove the defendant possessed the contraband at a single place and time to establish a single act of possession and, therefore, a single crime. Through different transactions,

[2] As the majority opinion notes, a fifth charge addressing another desktop computer that contained child pornography was eventually dismissed. Maj. Op. at 3, n.1.

Planck possessed child pornography in three separate places—a laptop and desktop computer and diskettes—and, therefore, committed three separate crimes." *Id*. at 505 (citations omitted). "A contrary result," the court noted "would allow amassing a warehouse of child pornographic material—books, movies, computer images—with only a single count of possession as a potential punishment." *Id*. at 504.[3]

The circumstances in this case are nearly identical. Four devices seized from Mr. Elliott's home contained—in the aggregate—several thousand images and videos. At a minimum, the inference that each device contained images or videos acquired through a distinct transaction is permissible. But it likewise necessarily follows that each device was, as in *Planck*, "capable of independently *storing* images of child pornography." *See id*. at 504 (emphasis added). That they were seized from the same room is therefore immaterial; for the law prohibits only the images and videos stored in each separate device, rather than the device itself.

The majority disputes this reasoning and accordingly disregards *Planck*, contending "[p]ossession of the *storage device* is the actus reus of the statute." Maj. Op. at 10, n.4 (emphasis in original). But this characterization ignores the reality that the

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[3] One panel member noted in concurrence that—to the extent he was skeptical that each device constituted its own location—the possession of several thousand prohibited images and videos nonetheless permits an appropriate inference of separate receipt: "Given the overwhelming number of images and movies stored on the computers and diskettes in [the defendant's] house, it would exceed credulity to conclude that [the defendant] acquired, *or could have acquired*, all the images and movies at the very same time." *Id*. at 506 (Wiener, J., specially concurring) (emphasis added).

images and the *videos* stored on the devices create the social harm Congress sought to proscribe. Absent the proscribed images and videos, possession of the storage devices alone would constitute no crime.

I would AFFIRM the judgment of the district court. I accordingly dissent.