

FILED
United States Court of Appeals
Tenth Circuit

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UNITED STATES COURT OF APPEALS

Christopher M. Wolpert
Clerk of Court

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee/Cross-
Appellant,

Nos. 17-3223 & 17-3245

v.

DUSTIN E. ASH,

Defendant - Appellant/Cross-
Appellee.

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 2:15-CR-20054-CM-1)

Daniel T. Hansmeier (Melody Brannon with him on the briefs), Kansas Federal Public Defender, Kansas City, Kansas, for Defendant - Appellant/Cross-Appellee.

James A. Brown (Stephen R. McAllister with him on briefs), United States Attorney's Office, Topeka, Kansas, for Plaintiff - Appellee/Cross-Appellant.

Before **TYMKOVICH**, Chief Judge, **LUCERO**, Senior Circuit Judge, and
MATHESON, Circuit Judge.

LUCERO, Senior Circuit Judge.

This matter is before us upon remand from the Supreme Court. As detailed in United States v. Ash, 917 F.3d 1238 (10th Cir. 2019), Defendant Dustin Ash pled

guilty to two counts of felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The parties disputed whether Ash’s prior Missouri conviction for second-degree robbery and Kansas conviction for reckless aggravated battery qualified as “crimes of violence” under U.S.S.G. § 4B1.2(a). See Mo. Rev. Stat. § 569.030; Kan. Stat. Ann. § 21-3414(a)(2)(B) (2010). Ash contended that neither were crimes of violence, making his base offense level 14 under § 2K2.1(a)(4)(A), whereas the government contended that both were crimes of violence and his base offense level should consequently be 24 pursuant to § 2K2.1(a)(2). The district court determined that Ash’s Kansas reckless aggravated battery conviction qualified as a crime of violence but his Missouri second-degree robbery conviction did not, resulting in a base offense level of 20. On cross-appeal, we reversed on the robbery issue, affirmed on the reckless aggravated battery issue, and remanded for resentencing.

Ash filed a petition for a writ of certiorari on June 10, 2019, seeking review of “whether reckless crimes, like Mr. Ash’s Kansas reckless aggravated battery conviction, qualify as crimes of violence under USSG § 4B1.2.” On June 21, 2021, the Supreme Court granted the petition, vacated our judgment, and remanded for further consideration in light of Borden v. United States, 593 U.S. ___, 141 S. Ct. 1817 (2021). We have now revisited the reckless aggravated battery issue and see no meaningful basis upon which to distinguish Borden from the case before us. Borden definitively foreclosed counting Kansas reckless aggravated assault as a crime of violence, concluding that “[o]ffenses with a mens rea of recklessness do not qualify as violent felonies under the ACCA.” 593

U.S. at ___, 141 S. Ct. at 1834. Accordingly, we hold that Kansas reckless aggravated battery is not a crime of violence.

Borden only addressed offenses with a minimum mens rea of recklessness. Thus, we will not reconsider our first holding that Missouri second-degree robbery is a crime of violence because it requires the perpetrator to overcome victim resistance. We reaffirm the sections of Ash, 917 F.3d 1238 pertaining to Missouri second-degree robbery. See id. at 1241-46.

We **REVERSE** the judgment below on both issues and **REMAND** for further proceedings consistent with this opinion.