FILED
United States Court of Appeals
Tenth Circuit

April 10, 2023

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

EUSEBIO IKE DEVARGAS,

Defendant - Appellant.

No. 22-2064

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. 1:21-CR-00857-JB-1)

Nicholas T. Hart, Harrison, Hart & Davis, LLC, Albuquerque, New Mexico, appearing for Appellant

Tiffany L. Walters, Assistant United States Attorney (Alexander M.M. Uballez, United States Attorney, with her on the brief), Office of the United States Attorney for the District of New Mexico, Albuquerque, New Mexico, appearing for Appellee

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Before **MORITZ**, **BRISCOE**, and **ROSSMAN**, Circuit Judges.

BRISCOE, Circuit Judge.

Defendant Eusebio DeVargas was indicted on two counts of being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. §§ 922(g)(1) and 924. DeVargas moved to dismiss the indictment, arguing that neither of his two

previous felony convictions could serve as predicate offenses under § 922(g)(1) because his civil rights were fully restored after he completed the sentences for each of those convictions. DeVargas also moved to suppress evidence that was seized at his residence at the time of his arrest, as well as post-arrest statements that he made to a law enforcement officer. After the district court denied both of his motions, DeVargas pleaded guilty to a single count of being a felon in possession of a firearm and ammunition and, under the terms of his plea agreement, reserved the right to appeal the district court's denial of his motion to dismiss and his motions to suppress. DeVargas now challenges those rulings on appeal. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we reject DeVargas's arguments and affirm the judgment of the district court.

I

A. DeVargas's prior criminal history

On February 3, 1992, DeVargas was charged with "an open count of murder . . . in the First Judicial District Court in New Mexico." ROA, Vol. I at 25. DeVargas subsequently pleaded guilty to one count of second-degree murder. On December 17, 1992, DeVargas was sentenced to a total term of imprisonment of six years, to be followed by a two-year term of parole. DeVargas also received six months and twenty-four days of presentence confinement credit. According to DeVargas, this "resulted in [his] term of imprisonment being complete no later than May 24, 1998," and his "term of parole was complete no later than May 25, 2000." *Id*. at 26.

On June 4, 2018, DeVargas was charged by criminal complaint in the Metropolitan Court for Bernalillo County, New Mexico, with one count of aggravated assault upon a police officer and one count of aggravated fleeing a law enforcement officer. On November 2, 2018, DeVargas pleaded guilty to one count of aggravated fleeing a law enforcement officer. DeVargas was sentenced to a term of imprisonment of one year, five months, and twenty-eight days. But, pursuant to the terms of his written plea agreement, that sentence was suspended and DeVargas was placed under the supervision of the probation division. The period of suspension expired on December 8, 2019, without revocation. Consequently, the New Mexico Corrections Department issued an "Order of Discharge on Suspended Sentence" that stated, in pertinent part, that DeVargas was "relieved of any further supervision" and was "eligible for restoration of voting rights." *Id*. at 60.

B. The January 7, 2021 traffic stop

On January 7, 2021, Rio Rancho (New Mexico) Police Department Officer Petross observed a Nissan truck with an expired registration. Petross performed a traffic stop on the Nissan truck and identified DeVargas as the driver. During the course of the stop, Petross noticed an odor of alcohol emanating from inside the Nissan truck. DeVargas told Petross that he had one shot of vodka approximately two hours before the stop. Petross proceeded to conduct a field sobriety test on DeVargas; before doing so, Petross asked DeVargas if he had any weapons on him. DeVargas stated that he was in possession of a firearm. Petross took the firearm from DeVargas before conducting the field sobriety test. After DeVargas showed no

signs of impairment during the sobriety test, Petross returned the firearm to DeVargas and informed DeVargas he was free to leave the scene. Shortly after releasing DeVargas from the scene, Petross realized that DeVargas had a prior felony conviction and was therefore likely prohibited from possessing the firearm. DeVargas, however, could not be located by law enforcement officials.

C. The April 10, 2021 stop

Shortly after midnight on April 10, 2021, Bernalillo County (New Mexico) Sheriff's Office Field Services Deputy Alfred Duchaussee was in his marked patrol car conducting patrol in the area of 2nd Street and Candelaria in Albuquerque, New Mexico. Duchaussee observed a man wearing a black shirt and jean shorts riding a bicycle without a front-mounted headlight or rear reflector. According to Duchaussee, the man on the bicycle was riding southbound in the northbound lanes of 2nd Street. The man on the bicycle turned from 2nd Street NW east onto Veranda Street, which is a dead-end street. Duchaussee followed the man on the bike and initiated the emergency equipment on his vehicle in order to conduct a traffic stop. The man on the bicycle, later identified as DeVargas, appeared to yell at Duchaussee, started to pedal his bicycle faster, and then made a sudden U-turn back towards Duchaussee's vehicle. Duchaussee stopped his vehicle, exited and told DeVargas to stop. DeVargas did not comply with Duchaussee's command and instead pedaled past Duchaussee and his vehicle "yelling he did nothing wrong." *Id*. at 88. Duchaussee again told DeVargas to stop, but DeVargas ignored that command and continued pedaling his bicycle westbound on Veranda Street towards 2nd Street.

Duchaussee reentered his vehicle and followed DeVargas. As Duchaussee approached DeVargas, DeVargas got off of his bicycle, turned towards Duchaussee, and yelled again that he had done nothing wrong. Duchaussee told DeVargas to stop and keep his hands up. As Duchaussee walked towards DeVargas, DeVargas first backed away from Duchaussee and then stated that he had a gun on him. Duchaussee approached DeVargas and handcuffed him. Based upon information provided by DeVargas, Duchaussee recovered a firearm from DeVargas's front pocket.

DeVargas was charged in New Mexico state court with being a felon in possession of a firearm, as well as resisting, evading, or obstructing an officer. He was later released from custody and the state charges were dismissed in lieu of federal prosecution.

D. DeVargas's arrest and the search of his residence

Between 2019 and 2021, the Federal Bureau of Investigation's (FBI's) Violent Crime Gang Task Force and the Albuquerque Police Department's Gang Unit conducted an investigation of the Brew Town Locos (BTL) gang, "a predominantly Hispanic, multigenerational . . . gang founded in the late 1970s in the North Valley area of Albuquerque." *Id*. at 112. By 2021, case agents, with the assistance of a number of confidential informants, learned that BTL members and associates were distributing controlled substances on the streets of Albuquerque, as well as within the Cibola County Correctional Center in Milan, New Mexico. Case agents believed that DeVargas was a heroin addict who was a member of the BTL and involved in an ongoing conspiracy with other BTL members to distribute controlled substances.

In late May 2021, law enforcement agents sought and obtained from a federal magistrate judge a search warrant for DeVargas's residence in Albuquerque. DeVargas's residence was described in the warrant application "as a single-wide mobile home with white siding and green trim." *Id*. at 143. The warrant application also noted that "[t]he numbers 2327 [we]re posted on neighboring buildings located on the same property and on a sign in front of the premises." *Id*. at 143–44.

On June 2, 2021, law enforcement agents submitted an amended application for a search warrant, effectively asking the magistrate judge to expand the scope of the search to include "all units and structures located within" a chain-link fenced lot. *Id*. at 101. The amended application noted that "Bernalillo County records . . . listed" three separate addresses located within that fenced area. *Id*. at 151. One of those addresses was associated with a "red warehouse/garage," and the other two addresses were associated with a "white trailer with two doors." *Id*. The amended application further noted that "[o]n June 1, 2021, while preparing for the execution of the search warrant, agents gathered information indicating all units/structures" within the fenced lot were "associated with the business 'Superior Automotive,' which appear[ed] to be a shop involved in auto repair and auto-related work." *Id*. at 151–52. The affiant stated in the amended application that she was "aware that gang members and drug traffickers often utilize businesses, specifically car repair shops, to further their criminal activities." *Id*. at 285 (internal quotation marks omitted). The amended application also included the following photograph of the described premises:

Id. at 152. DeVargas was alleged to be living in the left side of the white and green mobile home and using all of the buildings located on the premises.

The magistrate judge issued a new search warrant on June 2, 2021. Law enforcement agents, including a SWAT team, then executed the search warrant shortly after it was issued. An armored vehicle was used to break down the chain link fence and agents entered on foot behind the armored vehicle. As agents entered the property, they announced their presence. DeVargas and a woman came out of the trailer immediately in response to the agents' announcement. Agents arrested DeVargas and took him into custody.[1] During the ensuing search of DeVargas's trailer, agents discovered a rifle leaning against a wall in one of the bedrooms. Agents also discovered a disassembled handgun, ammunition, and a spent casing.

[1] On May 17, 2021, a federal magistrate issued a warrant for DeVargas's arrest. DeVargas was arrested pursuant to that warrant on June 2, 2021, during the execution of the search warrant for his residence.

E. The post-arrest interview of DeVargas

After DeVargas was arrested, a task force officer conducted a recorded interview with DeVargas. At the outset of that interview, the following exchange occurred between the task force officer and DeVargas:

> *Task Force Officer*: Okay, so um, I'm a task force officer with the FBI and, obviously, we're executing a search warrant at your house. Um . . . and I have an arrest warrant for you for the incident back in April, but before I want to talk to you about that and kinda get the bigger picture, I need to read you your rights. Have you ever had your rights read to you before?
>
> *DeVargas*: Yes, ma'am.
>
> *Task Force Officer*: Yeah? I'm going to switch over to that side because the . . . it's kinda loud here.
>
> ***
>
> *Task Force Officer*: So, before I ask you any questions, you have to understand your rights, right. So you have the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions. You have the right to have a lawyer . . .
>
> *DeVargas*: I have an attorney on this case.
>
> *Task Force Officer*: What's that?
>
> *DeVargas*: I have an attorney on this case.
>
> *Task Force Officer*: Hold on. Um so that's a, that's a state side attorney for your state charges. You haven't been arrested for your federal charges so it's a different ballgame. Does that make sense?
>
> *DeVargas*: Yes ma'am.
>
> *Task Force Officer*: Okay. So you have the right to talk to a lawyer for advice before we ask you any questions. You have the right to have a lawyer with you during questioning. If you cannot afford a lawyer one will appointed for you before any questioning if you wish. If you decide to answer questions now without a lawyer present you have the right to stop answering at any time. Um do you have any questions about what I read to you?
>
> *DeVargas*: No ma'am.
>
> *Task Force Officer*: Is there anything that I need to clarify for you?
>
> *DeVargas*: No ma'am.
>
> *Task Force Officer*: Okay.
>
> *DeVargas*: I know my rights.

Task Force Officer. Yea, yea, so we're going to proceed. Is that okay?

DeVargas: That's fine.

Id. at 220–21.

During the ensuing ten-minute interview with the Task Force Officer, DeVargas admitted that he was a convicted felon, owned the firearms found inside the trailer, obtained one of the firearms in January 2021, and obtained the other firearm approximately a year earlier.

II

These federal criminal proceedings began on May 17, 2021, approximately two weeks prior to the search of DeVargas's residence and his related arrest. On that date, the government filed a complaint charging DeVargas with a single count of being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. §§ 922(g)(1) and 924. That charge pertained to the January 7, 2021 traffic stop.

On June 23, 2021, a federal grand jury returned an indictment charging DeVargas with one count of being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. §§ 922(g)(1) and 924. The indictment alleged that the possession occurred on or about April 10, 2021, in Bernalillo County, New Mexico. The indictment included a forfeiture allegation pertaining to the "firearms and ammunition involved in the commission of the offense, including, but not limited to, a Bersa Thunder .380 handgun . . . and assorted ammunition." ECF No. 17 at 1.

On October 26, 2021, a grand jury returned a superseding indictment charging DeVargas with two counts of being a felon in possession of a firearm and

ammunition, in violation of 18 U.S.C. §§ 922(g)(1) and 924. Count 1 alleged that on or about April 10, 2021, DeVargas knowingly possessed a firearm and ammunition in Bernalillo County, New Mexico. Count 2 alleged that on or about June 2, 2021 (i.e., the date of his arrest at his residence), DeVargas knowingly possessed a firearm and ammunition in Bernalillo County, New Mexico. The superseding indictment also included a forfeiture allegation pertaining to three firearms and related ammunition.

DeVargas moved to dismiss the superseding indictment. DeVargas argued in support that (1) "his 1992 conviction" for second-degree murder could not "serve as a predicate offense under § 922(g) that prohibits him from possessing a firearm because all of his . . . civil rights were restored following that conviction no later than June of 2010," and (2) his 2018 "conviction for aggravated fleeing a law enforcement officer" could not "serve as a predicate offense under § 922(g) because he received a fully suspended sentence for that conviction which resulted in a judicial pardon that fully restored his civil rights upon completion of the suspended sentence." ROA, Vol. I at 26–27.

DeVargas also moved to suppress "the statement he gave during his June 2, 2021 arrest," and the evidence seized during the search of his residence. *Id*. at 62. With respect to his post-arrest statement, DeVargas argued that the "interrogation . . . which occurred while he was handcuffed and taken into custody based upon an arrest warrant . . . violated his *Miranda* rights and his right to counsel when the arresting Task Force Officer continued to question him after he asserted his right to counsel." *Id*. As for the evidence seized during the search of his residence, DeVargas argued

that the "search-warrant affidavit . . . not only failed to establish probable cause justifying the search, but was so wholly lacking in factual basis as to render reliance on the warrant unreasonable." *Id*. at 70 (emphasis omitted).

The district court held a hearing on DeVargas's motion to dismiss and his motions to suppress, and subsequently issued written orders denying all of the motions.

On January 11, 2022, DeVargas entered into a written plea agreement with the government. Under the terms of the plea agreement, DeVargas agreed to plead guilty to Count 2 of the superseding indictment, which charged him, based upon the seizure of evidence from his residence on June 2, 2021, with being a felon-in-possession of a firearm and ammunition, in violation of 18 U.S.C. §§ 922(g)(1) and 924. DeVargas waived his right to appeal his convictions and any sentence, but specifically reserved his right to appeal the district court's adverse rulings on his motion to dismiss the superseding indictment and his motions to suppress.

On April 11, 2022, the district court sentenced DeVargas to time served, plus a three-year term of supervised release. Final judgment in the case was entered on May 12, 2022.

DeVargas filed a timely notice of appeal.

III

In his appeal, DeVargas challenges the district court's denial of his motion to dismiss the superseding indictment and his motions to suppress evidence. For the

reasons that follow, we reject all of DeVargas's challenges and affirm the judgment of the district court.

A. The motion to dismiss the superseding indictment

In his first issue on appeal, DeVargas challenges the district court's denial of his motion to dismiss the superseding indictment. "We generally review a district court's denial of a motion to dismiss an indictment for an abuse of discretion." *United States v. Mobley*, 971 F.3d 1187, 1194–95 (10th Cir. 2020). But where, as here, "'the sufficiency of a charge is challenged, we review the district court's decision de novo.'" *Id*. at 1195 (quoting *United States v. Ambort*, 405 F.3d 1109, 1116 (10th Cir. 2005)).

The superseding indictment in this case charged DeVargas with two counts of being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. §§ 922(g)(1) and 924. Section 922(g)(1) makes it "unlawful for any person . . . who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." 18 U.S.C. § 922(g)(1). The phrase "crime punishable by imprisonment for a term exceeding one year" does not include "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored . . . , unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive

firearms." 18 U.S.C. § 921(a)(20). We have "held that the rights to vote, serve on a jury, and hold public office, as well as the right to possess firearms, must all be restored under § 921(a)(20) before a prior conviction may be excluded on the basis of restoration of civil rights." *United States v. Flower*, 29 F.3d 530, 536 (10th Cir. 1994) (emphasis omitted); *see United States v. Maines*, 20 F.3d 1102, 1104 (10th Cir. 1994) (original holding on this point).

DeVargas argued in his motion to dismiss the superseding indictment "that neither his 1992 second-degree murder conviction nor his 2018 aggravated fleeing from law enforcement officer conviction can serve as a predicate offense under 18 U.S.C. § 922(g), because" all four of these "civil rights were restored following both convictions." ROA, Vol. I at 306. We need not determine whether all four of these civil rights were restored following both of DeVargas's convictions because we conclude that, at a minimum, DeVargas's right to possess firearms was not restored at any point after the expiration of the suspended sentence imposed for his 2018 conviction.

By statute, it is unlawful in the State of New Mexico for a "felon" "to receive, transport or possess a firearm . . . in th[e] state." N.M. Stat. Ann. § 30-7-16(A)(1). Notably, this statute defines the term "felon" as follows:

> "felon" means a person convicted of a felony offense by a court of the United States or of any state or political subdivision thereof and:
>
> (a) less than ten years have passed since the person completed serving a sentence or period of probation for the felony conviction, whichever is later;

(b) the person has not been pardoned for the felony conviction by the proper authority; and

(c) the person has not received a deferred sentence.

Id. § 30-7-16(E)(3).

In this case, it is undisputed that more than ten years have passed since DeVargas completed serving the sentence and term of parole for his 1992 felony conviction. Consequently, his 1992 felony conviction does not render him a "felon" for purposes of § 30-7-16(E)(3) and, in turn, the 1992 felony conviction does not bar him from possessing firearms in the State of New Mexico.

But that leaves the question of whether DeVargas's 2018 conviction renders him a "felon" for purposes of § 30-7-16(E)(3), and in turn renders him unable to possess firearms in the State of New Mexico. It is beyond dispute that "less than ten years have passed since" the suspended sentence imposed for the 2018 conviction expired, DeVargas has "not been pardoned for th[at] felony conviction by the proper authority," and he "has not received a deferred sentence" for the 2018 conviction. *Id*. § 30-7-16(E)(3). Thus, under the plain language of § 30-7-16(E)(3), he is considered a "felon" and is therefore ineligible to possess a firearm under § 30-7-16(A)(1).

1) The decision in Reese

DeVargas contends, however, "that his right to possess a firearm, and in fact all four of the *Maines* rights, were restored, according to" the New Mexico Supreme Court's decision in *United States v. Reese*, 326 P.3d 454 (N.M. 2014), "upon the completion and discharge from his suspended sentence." Aplt. Br. at 21.

Reese arose from a certified question issued by this court in a federal criminal appeal. The defendant in the case, James Reese, pleaded "no contest" in 1992 to a New Mexico state charge of tampering with evidence. *United States v. Reese*, 505 F. App'x 733, 735 (10th Cir. 2012). "When the state court entered a conviction pursuant to the parties' plea agreement, it deferred imposition of [his] sentence for eighteen months, placing him on probation in the meantime." *Id*. "When [he] completed this period of deferred adjudication without incident, the court dismissed the criminal charge as provided by N.M. Stat. Ann. § 31-20-9." *Id*. Many years later, in 2009, federal agents raided Reese's home in New Mexico and seized over thirty firearms. That led to federal charges being brought against Reese and, in turn, Reese agreeing to plead guilty to a single count of being a felon in possession of firearms, in violation of 18 U.S.C. § 922(g)(1). "The predicate felony conviction on which this charge rested was . . . Reese's 1992 state deferred adjudication." *Id*. As part of his plea agreement, Reese reserved the right to appeal the district court's denial of his motion to dismiss the § 922(g)(1) charge.

Reese appealed to this court. Central to his appeal was "whether New Mexico state law restored [his] right to hold public office." *Id*. at 736. "[T]he parties agree[d] state law ha[d] . . . restored to . . . Reese the right to vote, serve on a jury, and possess firearms under state law." *Id*. "Only [his] right to hold public office remain[ed] in doubt, and on that question turn[ed] his right to possess firearms under federal law." *Id*. "The only possibly viable avenue" this court could "discern for . . . Reese" was "in the potential conflict between" N.M. Stat. Ann. § 31-13-1(E) on the

one hand, and Article VII [of the New Mexico Constitution] and" N.M. Stat. Ann. § "31-13-1(A)(1), on the other." *Id*. at 738. "Because this question [wa]s dispositive of [the] appeal, [wa]s close, and implicate[d] serious state legal policy questions," this court certified the following question to the New Mexico Supreme Court:

> If an otherwise-qualified person has completed a deferred sentence for a felony offense, is that person barred from holding public office without a pardon or certificate from the governor, as required by N.M. Stat. Ann. § 31-13-1(E), or is that person's right to hold office automatically restored by Article VII, §§ 1, 2 of the New Mexico Constitution and N.M. Stat. Ann. § 31-13-1(A)(1)?

Id.

The New Mexico Supreme Court (NMSC) accepted certification. *Reese*, 326 P.3d at 457. In answering the certified question, the NMSC expressed its "belie[f] that this [wa]s first a question of statutory interpretation that require[d] [it] to explore the meaning of the deferred sentencing scheme under New Mexico law." *Id*. at 458. The NMSC noted that the New Mexico legislature first authorized deferred sentencing in 1963 "for less serious felonies." *Id*. at 459. This option, the NMSC noted, "took place after plea or conviction but *before* any sentence was imposed" and "[d]eferment, if successfully completed, would result in no actual sentence being imposed and ultimately in a dismissal of the charges." *Id*. The NMSC in turn noted that "[i]f a sentence is never imposed and the charges are then dismissed, then logically it would appear that civil rights, suspended during the period of deferment, would be restored automatically by operation of law without the intervention of the governor." *Id*.

The NMSC further noted that "[i]n 1963, the same year the Legislature enacted the deferred sentencing statute, it also altered the restoration of citizenship statute, the former NMSA 1941, Section 42-1711 (1941) and the predecessor of Section 31-13-1." *Id*. at 460. "Significantly," the NMSC noted, "the restoration of civil rights under this statute could only be accomplished, as before, by 'completion of an individual's sentence' followed by the governor's pardon." *Id*. (quoting N.M. Stat. Ann. § 40A-29-14(C) (1963)). This meant, the NMSC noted, that if the statute was "read . . . literally, then a sentence never imposed could never be pardoned nor civil rights restored, an obvious absurdity." *Id*. This "strongly suggest[ed]," the NMSC noted, "that the restoration of civil rights under § 31-13-1(E) was never intended to apply to deferred sentences, because it was not necessary; restoration occurred by operation of law upon satisfactory completion of the conditions of deferment and dismissal of the criminal charges." *Id*. "Thus," the NMSC concluded, "from the very beginning there appear to have been at least two pathways to restoring civil rights: the predecessor of Section 31-13-1 for those who received and completed criminal *sentences*, and the predecessor of Section 31-20-9 for those who received deferred sentences and had no sentences to complete."[2] *Id*.

The NMSC noted that in 1966, "at the time deferred sentencing first appeared," it held "that 'deferment of sentence . . . is an act of [judicial] clemency.'"

[2] Section 31-20-9 states: "Whenever the period of deferment expires, the defendant is relieved of any obligations imposed on him by the order of the court and has satisfied his criminal liability for the crime, the court shall enter a dismissal of the criminal charges." N.M. Stat. Ann. § 31-20-9.

Id. (alterations in original) (quoting *State v. Serrano*, 417 P.2d 795 (N.M. 1966)). The NMSC further noted that "[t]he general purpose of deferred sentencing assumes that the public interest and the interest of a defendant are best served where the court believes it is possible and preferable to rehabilitate the defendant without imposing a sentence." *Id*. In other words, the NMSC stated, "[t]he Legislature intended to give courts the authority to defer sentencing if, in the court's opinion, the defendant could be rehabilitated without imposing punishment" and, "[i]f this proved the case, the court could reinstate the defendant to civic life with the same rights and privileges as if the conviction had never occurred." *Id*.

The NMSC also took note, in pertinent part, of a 1973 opinion and a 1988 opinion issued by the New Mexico Attorney General (NMAG). In the 1973 opinion, the NMAG "analyzed the effect of a felony conviction on a person's right to vote and concluded that the effect of satisfying a deferred sentence is different from completing other sentences." *Id*. at 461. The 1973 opinion stated, in part, that "'[i]t is thus apparent that a person seeking restoration of [the right to vote] after a suspended sentence must go to the Governor for relief, but that a dismissal order [following a deferred sentence] is intended to restore the right to vote automatically.'" *Id*. (alterations in original) (quoting NMAG Opinion 73-44 at 87). In the 1988 opinion, the NMAG "addressed the question whether the successful completion of a deferred sentence automatically restored firearms privileges." *Id*. at 462. "Given New Mexico's historical understanding that the dismissal of charges following the successful completion of a deferred sentence equated to an automatic

restoration of civil rights, the opinion concluded that firearms privileges were automatically restored." *Id*.

The NMSC noted that, although these NMAG opinions lacked the force of law, "they persuasively establish what New Mexico has consistently understood the law to be with regard to deferred sentencing." *Id*. at 462. "Since at least 1973, if not since the enactment of the first deferred sentence statute in 1963," the NMSC stated, "New Mexico has understood that civil rights, including the right to hold public office, are restored automatically by operation of law upon satisfaction of the conditions of deferment and dismissal of the charges, without any action required of the governor." *Id*. "Thus," the NMSC stated, "satisfying a deferred sentence has functioned as the judicial equivalent of a pardon." *Id*.

The NMSC next looked to the 2001 and 2005 amendments to Section 13-13-1 "to see if the Legislature clearly signaled any change to this decades-old understanding that satisfying the conditions of a deferred sentence automatically restored civil rights." *Id*. After examining those amendments, the NMSC "conclude[d] that they did not." *Id*. "Rather," the NMSC concluded, "Sections 31-13-1(C) (2001) and (E) (2005), referring to the restoration of the right to hold public office, merely repeat what had been said for the past 40 years, namely, that any criminal sentence imposed must be completed before asking the governor for a pardon." *Id*. at 462–63. "The statute," the NMSC noted, "remains silent about restoration of the right to hold public office for those who do *not* receive a sentence and thus, could never submit evidence of its completion." *Id*. at 463.

For all of these reasons, the NMSC "h[e]ld that upon the successful completion of his deferred sentence and dismissal of all State charges, Reese's civil rights, including the four *Maines* rights, were restored automatically by operation of law." *Id*. The NMSC emphasized, "in answer to the Tenth Circuit's certified question, [that] this included his right to hold public office." *Id*.

2) Would the NMSC apply Reese to cover suspended sentences?

DeVargas argues that "[w]hile *Reese* examines the restoration of rights following a deferred rather than a suspended sentence, application of those principles to a suspended sentence leads to the same result." Aplt. Br. at 25. "This is because," DeVargas argues, "a deferred sentence and a suspended sentence are virtually identical in function as relates to restoration of rights." *Id*. In support, DeVargas asserts that "deferred and suspended sentences operate procedurally in an almost identical manner, presenting subtle procedural but no substantive differences." *Id*. "[T]he only difference between a deferred sentence and a suspended sentence," he argues, "is the time a sentence is pronounced: otherwise, every element of the sentence—the delay in imposing a term of imprisonment while a defendant serves a term of supervised release—is identical." *Id*. at 25–26.

We reject DeVargas's arguments. Although suspended sentences were not at issue in *Reese*, the NMSC did at several points in its decision effectively distinguish suspended sentences from deferred sentences. To begin with, the NMSC noted in *Reese* that deferred sentences did not exist in New Mexico prior to 1963, whereas suspended sentences did. 326 P.3d at 459. Regarding suspended sentences, the

NMSC noted that "the trial court . . . imposed the sentence but held it in abeyance (suspension), as long as that person obeyed the terms and conditions of the suspension." *Id*. (citing N.M. Stat. Ann. § 42-1701 (1941)). Relatedly, the NMSC noted that "[a]lso before 1963, New Mexico statutes did not provide for a restoration of civil rights without first completing the sentence imposed and then securing a gubernatorial pardon." *Id*. In other words, the NMSC concluded that "[b]efore 1963, . . . executive clemency was the only pathway to restoring civil rights, and a prerequisite to that act of clemency was the completion of a criminal sentence." *Id*. Although the NMSC did not directly say so, the implication of these statements, in our view, is that a defendant sentenced to a suspended sentence, just like a defendant sentenced to confinement, could only have all of his or her civil rights fully restored by securing a pardon from the governor.[3]

In discussing the nature of a deferred sentence, the NMSC emphasized that "[d]eferment, if successfully completed, would result in no actual sentence being imposed and ultimately in a dismissal of the charges." *Id*. That obviously contrasts with the NMSC's earlier description of a suspended sentence, which it noted is "imposed" by the trial court "but [then] held in abeyance . . . as long as [the defendant] obey[s] the terms and conditions of the suspension." *Id*.

[3] The parties agree that DeVargas, after completing each of his sentences for his two prior felony convictions, had his voting rights automatically restored to him by way of N.M. Stat. Ann. § 31-13-1(A)(1) and (C), and his right to serve on a jury automatically restored to him by way of N.M. Stat. Ann. § 38-5-1(B). The parties disagree, however, regarding whether DeVargas, after completing his suspended sentence, regained his rights to possess firearms and to hold public office.

The NMSC also concluded that "from the very beginning there appear to have been at least two pathways to restoring civil rights: the predecessor of Section 31-13-1 for those who received and completed criminal *sentences*, and the predecessor of Section 31-20-9 for those who received deferred sentences and had no sentences to complete." *Id*. at 460. As noted, the NMSC's description of a suspended sentence makes quite clear that such a sentence is actually imposed on a criminal defendant, and in turn is effectively "completed" when the defendant successfully obeys the terms and conditions of the suspended sentence. *Id*. Thus, the NMSC's discussion of the two "pathways" makes clear that the first pathway, i.e., the one outlined in Section 31-13-1 and its predecessor, governs suspended sentences but not deferred sentences. *Id*.

The NMSC also, in response to arguments made by Reese, discussed a New Mexico Court of Appeals' decision from 1982 that expressly distinguished "between deferring a sentence and suspending a sentence." *Id*. at 461 (citing *State v. Kenneman*, 653 P.2d 170 (N.M. Ct. App. 1982)). In that decision, the New Mexico Court of Appeals stated, in pertinent part:

> In the case of a suspended sentence, if the defendant satisfactorily completes the term of suspension, he has satisfied his liability for the crime and may be eligible for pardon. In the case of deferral of sentence, if the defendant satisfactorily completes the period of deferment, he has satisfied his liability for the crime and the charges shall be dismissed. In the case of suspension, if probation is revoked, the court may require the defendant to serve the balance of the sentence previously imposed but suspended, or any lesser sentence. In the case of deferral, if probation is revoked, the court may impose any sentence which might originally have been imposed.

> Thus the difference between suspension and deferral is that suspension involves a sentence imposed while deferral does not. Suspension always subjects the defendant to criminal consequences, although he may be pardoned, while deferral ordinarily results in the charges being dismissed. With suspension, the sentence having been imposed, the court cannot later alter the sentence upwards. With deferral, no sentence having been imposed, the court may give any sentence it could originally have given.

653 P.2d at 172–73 (citations omitted). Notably, the NMSC in *Reese* did not reject or otherwise disapprove of anything that was stated in *Kenneman*. Nor has the NMSC since rejected these statements in *Kenneman*.

Finally, the NMSC in *Reese* discussed, with apparent approval, an opinion issued by the NMAG in 1973 and an advisory letter issued by the NMAG in 1985. In the 1973 opinion, the NMAG stated, in pertinent part, "'[i]t is thus apparent that a person seeking restoration [of the right to vote] after a suspended sentence must go to the Governor for relief, but that a dismissal order [following a deferred sentence] is intended to restore the right to vote automatically.'" 326 P.3d at 461 (alterations in original) (quoting NMAG Opinion 73-44 at 87). In the 1985 advisory letter, the NMAG, in discussing a New Mexico statutory prohibition on felons possessing firearms,

> focused on the distinction between (1) completing a suspended sentence, whereby "a defendant is entitled to a certificate . . . that . . . may be presented to the Governor who may . . . restor[e] full rights of citizenship," and (2) satisfying the condition of a deferred sentence, whereby "a defendant . . . [is] restored to his rights to vote and to hold office automatically, without having to seek the governor's pardon."

Id. at 462 (alterations in original) (quoting NMAG Advisory Letter to David A. Lane, Sixth Judicial District Attorney at 1–2 (Nov. 12, 1985)).

Because the NMSC recognizes a clear distinction between suspended sentences and deferred sentences, we conclude that the distinctions between the two would lead the NMSC to decline to extend its holding in *Reese* to suspended sentences. More specifically, we are persuaded the NMSC would conclude that the completion of a suspended sentence does not result in the automatic restoration of a defendant's civil rights, and that, instead, such a defendant must seek relief from the governor by way of a pardon or the restoration of civil rights.

We therefore reject DeVargas's arguments that the completion of his suspended sentence for the 2018 conviction resulted in the automatic restoration of his right to possess firearms. We in turn conclude that DeVargas's right to possess a firearm was never restored following the completion of his suspended sentence for the 2018 conviction because there is no evidence that he sought and obtained relief from the New Mexico governor. As a result, DeVargas remained a "felon" for purposes of § 922(g)(1) and was properly charged in this case, and the district court correctly denied DeVargas's motion to dismiss the superseding indictment.[4]

[4] In its written decision denying DeVargas's motion to dismiss the superseding indictment, the district court addressed whether all four of DeVargas's civil rights were restored after the completion of each of his sentences. In addressing DeVargas's right to hold public office, the district court concluded that two New Mexico statutes that address whether persons with felony convictions may hold public office, N.M. Stat. Ann. § 10-1-2 and N.M. Stat. Ann. § 31-13-1(E), "are unconstitutional under the New Mexico Constitution" and that, consequently, "DeVargas can hold public office." ROA, Vol. I at 306. Given our disposition here, we need not and do not pass on the district court's constitutional ruling.

B. The motion to suppress DeVargas's custodial statements

In his second issue on appeal, DeVargas argues that the district court erred when it failed to suppress the statements he made during his post-arrest interview. "In reviewing the denial of a motion to suppress, we examine the district court's legal determinations de novo and its factual findings for clear error." *United States v. Woody*, 45 F.4th 1166, 1173 (10th Cir. 2022). "We also view the evidence in the light most favorable to the district court's factual finding[s]." *Id*. (internal quotation marks and brackets omitted).

DeVargas asserts that "there is no doubt that [he] was undergoing a custodial interview at the time he asserted his right to counsel." Aplt. Br. at 32. DeVargas notes in support that, at the time he spoke with the Task Force Officer, he had just been arrested pursuant to an arrest warrant issued by a federal magistrate judge and was in handcuffs. DeVargas in turn asserts that "[t]here is also no doubt . . . that [he] asserted his right to counsel when he stated twice to the Task Force Officer that he had 'an attorney on this case.'" *Id*. at 33. Those statements, DeVargas asserts, "are sufficient to invoke the right to counsel." *Id*. at 34.

The government does not dispute that DeVargas was in custody at the time of his interview with the Task Force Officer. But the government does dispute DeVargas's assertion that he invoked his right to counsel. The government notes that, "[t]o invoke the right to counsel," a suspect's "statement must reflect an unequivocal desire to speak with an attorney before proceeding." Aple. Br. at 51. For example, the government notes that in *Davis v. United States*, 512 U.S. 542

(1994), the Supreme Court concluded that a suspect's "remark to [law enforcement] agents—"Maybe I should talk to a lawyer"—was not a request for counsel." *Id*. at 462. The government argues that DeVargas's "statement, 'I have an attorney on this case,' was nothing more than a factual statement (or misstatement as the case may be)" and "did not convey a present desire to speak with counsel." Aple. Br. at 53 (internal quotation marks omitted).

It is well established "that a suspect is entitled to the assistance of counsel during custodial interrogation," and "if the suspect invokes the right to counsel at any time, the police must immediately cease questioning him until an attorney is present." *Davis*, 512 U.S. at 462. That said, the Supreme Court has refused "to create a third layer of prophylaxis to prevent police questioning when the suspect *might* want a lawyer." *Id*. Thus, "[u]nless the suspect actually requests an attorney, questioning may continue." *Id*. "[W]hen a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney." *Id*. at 461. But officers are not required "to ask clarifying questions." *Id*. "If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him." *Id*. at 461–62.

The Task Force Officer in this case began the encounter with DeVargas by advising him of his rights. She stated, "So you have the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions. You have the right to have a

lawyer . . . .” ROA, Vol. I at 221. DeVargas interrupted the Task Force Officer and stated, “I have an attorney on this case.” *Id*. The Task Force Officer stated, “What’s that?” *Id*. DeVargas then repeated his statement, “I have an attorney on this case.” *Id*. The Task Force Officer responded by stating, “Hold on. Um so that’s a, that’s a state side attorney for your state charges. You haven’t been arrested for your federal charges so it’s a different ballgame. Does that make sense?” *Id*. Notably, in response to the Task Force Officer’s question, “Does that make sense?,” DeVargas responded, “Yes ma’am.” *Id*. The Task Force Officer then proceeded on and advised DeVargas,

> So you have the right to talk to a lawyer for advice before we ask you any questions. You have the right to have a lawyer with you during questioning. If you cannot afford a lawyer one will be appointed for you before any questioning if you wish. If you decide to answer questions now without a lawyer present you have the right to stop answering at any time.

Id. The Task Force Officer then asked DeVargas, “[D]o you have any questions about what I read to you?” *Id*. Notably, DeVargas stated, “No ma’am.” *Id*. The Task Force Officer also asked DeVargas, “Is there anything that I need to clarify for you?” *Id*. DeVargas responded, “No ma’am,” and “I know my rights.” *Id*. With that statement from DeVargas, the Task Force Officer stated, “so we’re going to proceed. Is that okay?” *Id*. To which DeVargas responded, “That’s fine.” *Id*.

Contrary to DeVargas’s arguments in this appeal, his two statements to the Task Force Officer that “I have an attorney on this case” were not unequivocal requests to speak with his lawyer before talking further to the Task Force Officer. *Id*.

Instead, considering the context in which the statements were made, we conclude that DeVargas was simply informing the Task Force Officer that he already had an attorney representing him. Notably, the Task Force Officer asked for clarification of the statement after DeVargas first made it, and, in response, DeVargas repeated his statement. It is also important to note that after the Task Force Officer fully advised DeVargas of his rights, she asked him if he had any questions or needed any clarification of his rights and DeVargas responded "No" and "I know my rights." *Id*. Finally, when the Task Force Officer stated to him, "so we're going to proceed. Is that okay?," DeVargas stated, "That's fine" and did not ask to speak to an attorney. *Id*. Thus, considering the exchange in its entirety, we conclude that DeVargas did not unequivocally invoke his right to speak to an attorney before speaking with the Task Force Officer.

DeVargas also argues, as part of his second issue on appeal, that he "did not waive his right to counsel during the reading of his *Miranda* rights." Aplt. Br. at 36. We disagree. In our view, DeVargas's responses to the Task Force Officer "I know my rights," and "That's fine," together clearly indicate a voluntary, knowing, and intelligent decision on DeVargas's part to proceed with the interview without first speaking to an attorney. ROA, Vol. I at 221; *see United States v. Brown*, 287 F.3d 965, 973 (10th Cir. 2002) ("A suspect who has been advised of his right against self-incrimination may waive that right 'provided the waiver is made voluntarily, knowingly, and intelligently.'") (quoting *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)).

In sum, we conclude that the district court did not err in denying DeVargas's motion to suppress the statements he made to the Task Force Officer.

C. The motion to suppress evidence seized from DeVargas's residence

In his third and final issue on appeal, DeVargas argues that the district court erred in denying his motion to suppress evidence, in particular firearms and ammunition, that was seized during the search of his residence. According to DeVargas, the district court erred in concluding that (1) the search warrant was supported by probable cause, (2) in any event, the good faith exception to the exclusionary rule would apply, and (3) also in any event, the firearms and ammunition would have inevitably been discovered upon DeVargas's arrest. Because we agree with the district court that the good faith exception to the exclusionary rule would apply in this case, we find it unnecessary to address the other two conclusions reached by the district court.

"In general, evidence 'obtained as a direct result of an unconstitutional search or seizure is plainly subject to exclusion.'" *United States v. Suggs*, 998 F.3d 1125, 1140 (10th Cir. 2021) (quoting *Segura v. United States*, 468 U.S. 796, 804 (1984)). "Under the good faith exception" to the exclusionary rule, however, "even if a warrant is not supported by probable cause, evidence seized in good-faith reliance on that warrant is not subject to suppression." *United States v. Xiang*, 12 F.4th 1176, 1182 (10th Cir. 2021) (internal quotation marks omitted). More specifically, "the evidence seized pursuant to the warrant need not be suppressed if the executing officer acted with an objective good-faith belief that the warrant was properly issued

by a neutral magistrate." *United States v. Edwards*, 813 F.3d 953, 970 (10th Cir. 2015). "When officers rely on a warrant, we presume they acted in objective good faith . . . . because '[i]t is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment.'" *Id*. (second alteration in original) (citations omitted) (quoting *United States v. Leon*, 468 U.S. 897, 921 (1984)).

"[T]he presumption of good faith," however, "is not absolute" and "an officer's reliance on a warrant is not reasonable in four situations." *Id*. Those four situations are as follows: (1) "when the issuing magistrate was misled by an affidavit containing false information or information that the affiant would have known was false if not for his reckless disregard of the truth"; (2) "when the issuing magistrate wholly abandon[s her] judicial role"; (3) "when the affidavit in support of the warrant is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; and (4) "when a warrant is so facially deficient that the executing officer could not reasonably believe it was valid." *Id*. Thus, "[t]he inquiry on the good-faith exception requires not only an examination of the warrant's text but also a careful consideration of the totality of the circumstances to determine whether officers reasonably relied on the invalid warrant." *Suggs*, 998 F.3d at 1140.

DeVargas argued in his motion to suppress that the third of these situations exists here, i.e., that the "warrant affidavit lacks any indicia of probable cause because it is devoid of facts that would reliably suggest or provide a basis of

knowledge to believe that there was a reason to search [his] residence." Supp. ROA, Vol. I at 100 (internal quotation marks omitted) (quoting Def.'s 2d Mot. to Suppress Evid. at 2).

The district court rejected this argument. In doing so, the district court noted that "the search warrant affidavit contains specific information from" a CHS who was "DeVargas'[s] close associate, that DeVargas is a BTL member who acted as a lookout for BTL and who, on at least one occasion, led police away from a BTL drug house." *Id*. at 101. "Moreover," the district court noted, "the search warrant affidavit also establishes that, based on the affiant officer's experience, BTL members are expected to carry firearms, and gang members often keep firearms at their homes." *Id*. The district court in turn concluded that the executing "officers reasonably relied on the facts in the affidavit that establish that DeVargas is a BTL member, that BTL members are expected to possess firearms, and that gang members often keep firearms in their residences." *Id*.

In his appeal, DeVargas challenges the district court's determination, arguing that "the warrant does not connect any firearms to [his] residence" and, instead, "can simply be described as seeking to search [his] residence, with no evidence of illegal activity or a crime having occurred within, simply because a single confidential informant stated [that] DeVargas[] drew law enforcement away from a [BTL] drug house two months prior to the search of the residence." Aplt. Br. at 44. DeVargas's arguments, however, overlook the information in the affidavit cited by the district court, i.e., the information indicating that (a) DeVargas was in possession of a

firearm on the night that he lured Deputy Duchaussee away from the BTL drug house, (b) that DeVargas is a BTL member, (c) that BTL members are expected to carry firearms, and (d) that in the affiant's experience, gang members typically keep firearms at their homes. In light of this information, we agree with the district court that, even assuming the warrant application and supporting affidavit were insufficient to establish probable cause to search DeVargas's residence for firearms and ammunition, the good faith exception would apply and prevent the suppression of the items seized from his residence.

IV

The judgment of the district court is AFFIRMED.