

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

August 28, 2023

FOR THE TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DONOVAN T. PHELPS,

Defendant - Appellant.

No. 23-3012
(D.C. No. 5:21-CR-40098-TC-1)
(D. Kan.)

ORDER AND JUDGMENT*

Before **TYMKOVICH, EID, and CARSON**, Circuit Judges.

Donovan T. Phelps appeals his conviction for being a felon in possession of a firearm under 18 U.S.C. § 922(g). He contends § 922(g)(1) violates the Commerce Clause, which he says requires a showing that his possession had a substantial effect on interstate commerce—that is, Phelps contends the government must show not only that he possessed a firearm that previously traveled in interstate commerce, but that he possessed it when it traveled in interstate commerce. Phelps acknowledges,

* 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

however, that our cases have soundly rejected these arguments. *See* Aplt. Br. at 2 n.3; *id.* at 5, n.4. Indeed, both this court and the Supreme Court have held that a sufficient nexus to interstate commerce exists if the firearm traveled across state lines at some time. *See Scarborough v. United States*, 431 U.S. 563, 577 (1977) (addressing predecessor statute to § 922(g) and observing that “Congress sought to reach possessions broadly, with little concern for when the nexus with commerce occurred”); *United States v. Urbano*, 563 F.3d 1150, 1154 (10th Cir. 2009) (“[I]f a firearm has traveled across state lines, the minimal nexus with interstate commerce is met and the statute can be constitutionally applied.”); *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009) (recognizing this court has “explicitly rejected” the argument that “§ 922(g) violates the Commerce Clause where . . . the crime’s only connection to interstate commerce is the firearm’s crossing of state lines”); *United States v. Dorris*, 236 F.3d 582, 584-86 (10th Cir. 2000) (rejecting argument that the government must prove a substantial effect on interstate commerce and holding that post-*Scarborough* Supreme Court cases did not require overturning this court’s precedent); *United States v. Farnsworth*, 92 F.3d 1001, 1006 (10th Cir. 1996) (rejecting argument that the government must prove a substantial effect on interstate commerce and upholding conviction where evidence indicated “gun had been manufactured in a different state from that in which it was found”); *United States v. Bolton*, 68 F.3d 396, 400 (10th Cir. 1995) (“Section 922(g)’s requirement that the firearm have been, at some time, in interstate commerce is sufficient to establish its constitutionality under the Commerce Clause.”); *see also United States v. Campbell*,

603 F.3d 1218, 1220 n.1 (10th Cir. 2010) (rejecting “Commerce Clause challenge to [§] 922(g)(1)’s prohibition of felons’ intrastate possession of ammunition that once traveled in interstate commerce”); *United States v. Patton*, 451 F.3d 615, 634-36 (10th Cir. 2006) (relying on *Scarborough* to reject Commerce Clause challenge to prohibition on felons in possession of body armor that “moved across state lines at some point in its existence”). Given these authorities, Phelps’ arguments are unavailing.

Accordingly, the district court’s judgment is affirmed.

Entered for the Court

Timothy M. Tymkovich
Circuit Judge