FILED
United States Court of Appeals
Tenth Circuit

August 22, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSEPH EUGENE DIX,

Defendant - Appellant.

No. 23-3035
(D.C. No. 5:22-CR-40018-EFM-1)
(D. Kan.)

ORDER AND JUDGMENT*

Before **MORITZ**, **BALDOCK**, and **KELLY**, Circuit Judges.

Joseph Eugene Dix entered a conditional plea of guilty to one count of being a convicted felon in possession of a firearm and ammunition in violation of 18 U.S.C. § 922(g)(1). In relevant part, § 922(g)(1) makes it unlawful for a convicted felon to "possess in or affecting commerce, any firearm or ammunition." In exchange for Dix's plea, the government agreed he could appeal (1) the district court's denial of his motion to dismiss the count on the ground that the passage of § 922(g)(1)

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

exceeded Congress's Commerce Clause power;[1] and (2) the district court's denial of his motion for a pretrial determination regarding his proposed jury instruction, which would have required the jury to find his possession of the firearm or ammunition contemporaneously affected interstate commerce.[2] In each ruling, the district court concluded that it was bound by precedent to reject Dix's arguments.

On appeal, Dix concedes that this court's precedents foreclose success on both of his arguments, explaining that he presents them to preserve further review. We agree with Dix's concession. Dix's argument that possession of a firearm or ammunition, as described in § 922(g)(1), requires a contemporaneous affect on interstate commerce is foreclosed by precedents of this court applying *Scarborough v. United States*, 431 U.S. 563 (1977), to § 922(g)(1). *See, e.g.*, *United States v. Campbell*, 603 F.3d 1218, 1220 n.1 (10th Cir. 2010); *United States v. Patton*, 451 F.3d 615, 634–35 (10th Cir. 2006); *United States v. Dorris*, 236 F.3d 582, 584–86 (10th Cir. 2000). Dix's argument that the "affecting commerce" element of § 922(g)(1) exceeds Congress's powers under the Commerce Clause is also foreclosed by this circuit's precedent. *See, e.g.*, *Campbell*, 603 F.3d at 1220 n.1;

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[1] The Commerce Clause, U.S. Const. art. I, § 8, cl. 3, provides: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]"

[2] The district court also overruled Dix's objection to the government's proposed instruction, which would have required the jury to find only that the firearm or ammunition had moved in interstate or foreign commerce at any time after manufacture. The parties agreed that the firearm and ammunition "had been shipped and transported in interstate or foreign commerce," R., Vol. 1 at 60, but not that Dix had shipped or transported them.

United States v. Urbano, 563 F.3d 1150, 1154 (10th Cir. 2009); *Patton*, 451 F.3d at 634–35; *Dorris*, 236 F.3d at 584–86; *United States v. Farnsworth*, 92 F.3d 1001, 1006 (10th Cir. 1996); *United States v. Bolton*, 68 F.3d 396, 400 (10th Cir. 1995).

"We are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court." *United States v. Manzanares*, 956 F.3d 1220, 1225 (10th Cir. 2020) (internal quotation marks omitted). Neither condition is satisfied here. Consequently, exercising jurisdiction under 28 U.S.C. § 1291, we affirm the district court's judgment. We decline Dix's invitation "to weigh in on the merits in anticipation of further review," Aplt. Reply Br. at 1.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge