FILED
United States Court of Appeals
Tenth Circuit

September 29, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ANDRE REESE,

Defendant - Appellant.

No. 23-1022
(D.C. No. 1:22-CR-00151-PAB-1)
(D. Colo.)

ORDER AND JUDGMENT*

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

In a bench trial based upon joint stipulations of fact, Mr. Reese was convicted of being a felon in possession of a firearm, 18 U.S.C. § 922(g)(1), and was sentenced to 37 months' imprisonment and three years' supervised release. On appeal, he argues that his prior Colorado state conviction for attempted first degree murder was not a "crime of violence" under either subsection of U.S.S.G. § 4B1.2(a), which defines the term and contains an "elements clause" and an "enumerated offenses

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

clause." Because the prior state conviction qualified as a crime of violence, Mr. Reese was sentenced based upon an enhanced base level offense of 20. U.S.S.G. § 2K2.1(a)(4)(A). Although the district court agreed with Mr. Reese that the prior state conviction was not a crime of violence under the elements clause, U.S.S.G. § 4B1.2(a)(1), 3 R. 30–35, it concluded that the conviction qualified under the enumerated offenses clause, U.S.S.G. § 4B1.2(a)(2), 3 R. 35–37, given the commentary which explains that a crime of violence includes "attempting to commit such offenses," U.S.S.G. § 4B1.2 cmt. n.1.[1]

Our jurisdiction arises under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). Whether a prior conviction constitutes a crime of violence under the Sentencing Guidelines is reviewed de novo. United States v. Benton, 876 F.3d 1260, 1262 (10th Cir. 2017). On appeal, Mr. Reese concedes that this claim is foreclosed by Tenth Circuit precedent.[2] Aplt. Br. 1 n.2, 5 n.3. The argument that application note 1 to § 4B1.2 is inconsistent with the plain text of the guideline, and therefore invalid, is foreclosed by our contrary rulings in United States v. Maloid, 71 F.4th 795, 803–05 (10th Cir. 2023), and United States v. Martinez, 602 F.3d 1166, 1173–74 (10th Cir. 2010). Mr. Reese's argument that we should apply Kisor deference to guidelines commentary is also foreclosed by our ruling in Maloid. 71 F.4th at 805–08

[1] We limit our review to the enumerated offenses clause but note that in United States v. Maloid this court held the commentary applies to both the elements clause and the enumerated offenses clause. 71 F.4th 795, 814 (10th Cir. 2023).

[2] The government agrees and informed us it would not file a brief absent a change in the law while the appeal was pending.

(discussing Kisor v. Wilkie, 139 S. Ct. 2400, 2413–16 (2019)); see also United States v. Coates, No. 22-2132, --- F.4th ---, 2023 WL 6053540, at *2 (10th Cir. Sept. 18, 2023) (Kisor does not apply to guidelines commentary).

"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). Given the lack of contravening Supreme Court or en banc authority on the issue, we are bound by our prior cases.

AFFIRMED.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge