

“THE FEDERAL CORNER”

A Great Case of First Impression on a Drug-and-Gun Sentencing Enhancement Issue

Buck Files

In the olde days, I believed that taking a common sense and fair play approach to any criminal law issue would give you the correct answer. Then, I realized that this did not always work. With that as a background, imagine my happiness when I read a *per curiam* opinion of the United States Court of Appeals for the Eleventh Circuit in which the Court held that: “[1] as matter of first impression, the *mere proximity* between defendant’s gun and two alprazolam tablets could *not* support sentencing enhancement for use or possession of firearm in connection with another felony offense; [2] enhancement for use or possession of firearm in connection with another felony offense was not warranted; and [3] error in applying enhancement was not harmless.” (emphasis added) *United States v. Gibbs*, 2018 WL 5096319 (11th Cir. October 18, 2018) [Panel: Circuit Judges Wilson, Jordan and Higginbotham.]

The opinion reads, in part, as follows:

[The Facts In The Case]

The facts of this case are straightforward. Its roots lie in the decision of the Escambia County Sheriff’s Office to search Bruce Gibbs’ home pursuant to a warrant relying upon disclosures by an informant that Gibbs had sold cocaine on two separate dates—April 24, 2015 and April 29, 2015. On executing the warrant, the sheriff’s office found two blue pills that officers identified as alprazolam, a metal grinder with marijuana residue inside, and a baggie with traces of white powder later determined to be cocaine, all in the kitchen, and a Glock pistol with a magazine enhanced to hold 31 rounds, loaded and in the attic. The attic was accessible through a panel in the house’s hallway; the firearm was clean and lacked signs of dust, suggesting that it was well-maintained and recently placed. It was also identified as stolen.

[The Defendant’s Record And The Charged Offense]

Gibbs had been convicted of various crimes in the past, including possession with intent to distribute more than 20 grams of marijuana, driving after his license was revoked, and battery, each of which was punishable by a term exceeding one year. This record made his firearm possession unlawful under 18 U.S.C. § 922(g)(1) and exposed Gibbs to imprisonment under 18 U.S.C. § 924(a)(2). He pled guilty on December 22, 2016.

[In The District Court]

At sentencing, Gibbs raised a number of objections to the Pre-Sentence Report. The ‘primary objection to the calculation’ concerned an enhancement of four levels under U.S.S.G. § 2K2.1(b)(6)(B) for Gibbs’ possession of a firearm in connection with another felony—namely, his possession of the two alprazolam pills without a prescription. The district court rejected Gibbs’ several arguments that the enhancement should not apply. It focused upon the loaded gun, Gibbs’ addiction to the alprazolam tablets, and their relatively high street value, concluding that the gun facilitated his possession and applying the enhancement over his objection.

The district court sentenced Gibbs to 72 months of imprisonment, noting that the sentence stood just above the top end of the range that would obtain in the absence of the enhancement—55 to 71 months—but below the bottom of the range that obtained with the application of the enhancement—84 to 105 months.

[The Question On Appeal]

Gibbs timely appealed. The sole question on appeal is the legitimacy of the enhancement under U.S.S.G. § 2K2.1(b)(6)(B).

[The Standard Of Review]

This enhancement requires a sentencing judge find, by a preponderance of evidence, that the defendant ‘used or possessed any firearm or ammunition in connection with another felony offense.’¹ In challenges to sentencing decisions, we review the district court’s determinations of law de novo and its findings of fact for clear error. A district court’s determination that a defendant possessed a gun ‘in connection with’ another felony is a finding of fact. Under this standard of clear error, we ‘must affirm the district court unless review of the entire record leaves us “with the definite and firm conviction that a mistake has been committed.” ’

[The Evidence Of Drug Trafficking Offenses In The Record]

There is evidence in the record that Gibbs committed both drug trafficking offenses (selling cocaine to a confidential informant on two occasions) and drug possession offenses (possessing alprazolam tablets without a prescription, and leaving marijuana and cocaine residue in his home).

[The Question Of The Sufficiency Of The Evidence]

The question is the sufficiency of the evidence connecting the gun to either of these categories of offenses. The government argues that Gibbs possessed the firearm ‘in connection with’ both felony drug possession and drug trafficking offenses.

[The Court's Conclusion]

We conclude that the district court erred in footing the enhancement on Gibbs' drug possession. Because we agree with the district court that the enhancement could not be supported on drug-trafficking grounds, we therefore determine that there was no permissible justification for the court to impose the enhancement.

[The District Court's Factual Determination
And The Court's Acceptance Of That Determination]

The government argues, and the district court decided, that Gibbs possessed two alprazolam tablets without a prescription—a felony under Florida law. ... We therefore proceed under the assumption that Gibbs possessed alprazolam tablets in his apartment.

[The Sentencing Commission's Application Notes]

The Sentencing Commission's application notes are binding when they do not contradict the Sentencing Guidelines' plain meaning. The notes to U.S.S.G. § 2K2.1(b)(6)(B) provide that a firearm is generally held 'in connection with' another felony 'if the firearm ... facilitated, or had the potential of facilitating, another felony offense.'

[The Central Issue Before The Court]

The central issue is therefore whether Gibbs' possession of the firearm *facilitated or had the potential to facilitate* his possession of alprazolam, or whether any relation between the two resulted from 'accident or coincidence.' (emphasis added)

[The Undecided Proximity Problem]

The question remains, however, of what evidence may sufficiently establish that a firearm facilitated or had the potential to facilitate another felony. *We have not yet decided whether proximity between firearm and drug is sufficient to trigger U.S.S.G. § 2K2.1(b)(6)(B) when the felony serving as the basis for the enhancement is drug possession.* The application notes also provide that the enhancement automatically applies 'in the case of a drug trafficking offense in which a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia.' (emphasis added)

[Other Circuits' Conclusions On This Issue
And This Court's Agreement With Those Circuits]

Several circuits have concluded that by treating 'close proximity' as sufficient to show a 'connection' for drug trafficking offenses, the Commission by implication

required something beyond proximity when the offense does not involve drug trafficking. We agree that mere proximity between Gibbs' gun and the alprazolam tablets could not support the enhancement, without a conclusion that the gun facilitated or could facilitate Gibbs' possession.

[The District Court's Reliance On These Factors]

This said, the district court did not rest the enhancement on spatial proximity between the gun and the alprazolam tablets alone. It specifically relied on three factors beyond proximity to conclude that the gun facilitated or had the potential to facilitate Gibbs' drug possession. First, Gibbs' gun was modified to hold more ammo, and it was loaded. Second, Gibbs was addicted to alprazolam. And third, the district court concluded that alprazolam tablets have a relatively high street value. We therefore must determine whether these facts adequately supported the enhancement.

[Several Principles From The Opinions Of The Other Circuits]

In review of this fact-bound inquiry, we can extract several principles from other circuits' opinions. In general, if a gun emboldens or has the potential to embolden the defendant, or if the defendant uses or could use the gun to protect the drugs, the enhancement is more likely to be appropriate. Relevant here, courts will look to the quantity of the drugs and their street value to determine whether possession of a gun was likely to achieve these purposes; for smaller amounts or less valuable drugs, a gun is less likely to be necessary to facilitate possession. Some will further consider whether the gun and drug possession occurred in public, since there, a weapon could be more useful in emboldening or protecting the defendant. And, as we have explained, physical and temporal proximity—including ease of access to the firearm—may be relevant but will typically not be determinative.

[The Court's Analysis Of The Three Factors]

The relationship between Gibbs' gun and the drugs was more akin to 'accident or coincidence.' The government presented evidence that Gibbs possessed two alprazolam tablets at the time the gun was found, each worth about \$20, and a bag with trace amounts of cocaine. While not negligible, a total value of \$40 or \$50 does not lend itself to a strong inference that Gibbs required the gun to protect his supply. Both the gun and the tablets were located within his home, and there was no evidence that he took them outside separately or together. While the gun was accessible from the hallway, it was not immediately accessible from the kitchen where the drugs were found. Gibbs' addiction does weigh in favor of a connection, since it increases the possibility that he would have chosen to use the gun to protect the alprazolam.

[The Court's Conclusion]

In total, though, we conclude that the district court clearly erred in finding that the gun facilitated Gibbs' drug possession. Connecting a Glock handgun modified to hold 31 rounds to two prescription pills found in a different part of the house—in proximity—is a reach too far.

[The Government's Argument On "Close Proximity"
Which The District Court Had Rejected]

The government suggests that even if Gibbs' drug possession could not ground the enhancement, we may affirm based on a connection between the gun and drug trafficking—which only requires a showing of 'close proximity.' The district court rejected this argument at sentencing, and we agree for substantially the same reasons. The government presented evidence that Gibbs had engaged in drug trafficking about two weeks before the gun was found in his attic, but no evidence that he possessed the gun at the time of those sales. At the sentencing hearing, Gibbs said that he had only acquired the firearm the night before the search and it was not related to drug trafficking. And the two drug trafficking transactions the government identified occurred outside Gibbs' home, and there was no evidence that Gibbs had the firearm on him at either time. We cannot conclude that the district court erred—let alone erred clearly—in finding no connection.

[The District Court's Error Was Not Harmless]

Having concluded that the district court erred in imposing the sentencing enhancement, we must address whether this error was harmless, or whether it was reasonably likely to have affected Gibbs' substantial rights. At sentencing, the district court explained its deliberate choice to give a sentence between the non-enhanced and enhanced ranges, and specifically took into account the fact that Gibbs had been '[driven into] that next higher guideline range.' And the court did not indicate that it would have given Gibbs the same sentence even if the enhancement were not applicable, certainly not explicitly. The application of the sentencing error was not harmless, and Gibbs is entitled to resentencing.

[Conclusion]

Because the district court erred in enhancing Gibbs' sentence for use or possession of a firearm in connection with a felony, we vacate the district court's sentencing decision and remand for resentencing without application of the four-level enhancement.

[My Thoughts]

- In *Gibbs*, the Court refers to cases from other circuits. In the footnotes, these are cases from the United States Courts of Appeal for the Third, Fourth, Fifth, Sixth,

- Eighth and Eleventh Circuits and should be reviewed if you are going to need to prepare a memorandum of law on a proximity issue.
- The Fifth Circuit case referred to is *United States v. Jeffries*, 587 F.3d 690 (5th Cir. 2009). It is mentioned in footnote 11 and reads, “If the comment had intended to allow a ‘mere proximity’ argument to suffice for all drug crimes, it would have said so. It did not.” [Note: In *Jeffries*, the Court held that the discovery of a firearm and a single rock of crack cocaine during the search of a vehicle did not support the imposition of a four-level enhancement for possessing a firearm in connection with another felony offense.]
 - It’s so nice to read a common sense/fair play opinion – even if it is only a *per curiam* one from another circuit.
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Buck Files is a member of TDCLA’s Hall of Fame and a former President of the State Bar of Texas. In May, 2016, TDCLA’s Board of Directors named Buck as the *author transcendent* of the Texas Criminal Defense Lawyers Association. This is his 330th column or article. He practices in Tyler with the law firm of Bain, Files, Jarrett and Harrison, P.C., and can be reached at bfiles@bainfiles.com.