

“THE FEDERAL CORNER”

The White Supremacist Who Talked Too Much

Buck Files

White Supremacist. When I see the term, I can see the faces of the angry white men as they marched in a torchlight parade in Charlottesville, Virginia. When I hear the term, I can hear the chants of these angry white men as they shouted, “Jews shall not replace us.” This could *not* have been happening in a city in the United States, but it was. What I saw and heard reminded me of the films that I had watched of the torchlight parades that took place in Nuremberg, Germany, eighty years ago.

This explains why I smiled when I came across *United States v. Erik C. Schmidt*, 930 F.3d 858 (7th Cir. 2019) [Panel: Circuit Judges Ripple, Kanne and Rovner. (Opinion by Judge Ripple)]. In *Schmidt*, a panel of that Circuit held that the district court could consider the defendant’s white supremacist beliefs at sentencing, as bearing on his future dangerousness, a permissible sentencing factor, and on his disrespect for the law.

Schmidt was not before the court on a hate crime; rather, he had pled guilty before Chief Judge William C. Griesbach of the Eastern District of Wisconsin, to a violation of 18 U.S.C. § 922(g)(1), possession of a firearm by a convicted felon,.

Judge Ripple’s opinion reads, in part, as follows:

[The Presentence Report]

In preparation for Mr. Schmidt’s sentencing, the probation office prepared a presentence report, which calculated a guidelines range of 51 to 63 months’ imprisonment based on a total offense level of 17 and a criminal history category of VI. According to that report, Mr. Schmidt had 17 adult criminal convictions, including 3 felony convictions under Wisconsin law for bail jumping, child abuse, and taking and driving a vehicle without the owner’s consent. His other prior convictions included unlawful use of the phone to threaten harm, criminal damage to property, carrying a concealed weapon, and multiple convictions for disorderly conduct and resisting an officer. None of his prior convictions involved hate crimes.

[From Schmidt’s Interview With the Probation Officer]

During his interview with the probation officer, Mr. Schmidt told the officer of his belief in white supremacy and of his desire to return to Germany to embrace his Nazi heritage.

[The Probation Officer’s Recommendation]

Consequently, in his sentencing recommendation, the probation officer wrote:

[Mr. Schmidt] is a self-avowed white supremacist, who readily and reprehensibly articulated his bigoted hatred for minority races during the presentence interview, *despite advice to the contrary from counsel*. Mr. Schmidt further indicated a strong desire to leave the United States, a country he repeatedly professed his hatred for due to its allowance of these same minorities to have civil rights, and proclaimed a strong desire to relocate to Germany to retrace his Nazi ancestral heritage. (emphasis added)

The probation officer added that Mr. Schmidt ‘has shown repeated disrespect and disregard to individuals in positions of authority, to include law enforcement officers; and has readily embraced and openly expressed viewpoints of prejudice and intolerance, and a gregarious hatred for the United States.’ Mr. Schmidt also admitted having a tattoo of a swastika on his back.

[The Sentencing Hearing in the District Court]

On January 26, 2018, the district court conducted a sentencing hearing. The Government recommended a sentence of 36 months’ imprisonment; Mr. Schmidt requested a sentence of probation. After adopting the presentence report’s guidelines recommended range of 51 to 63 months, the district court observed that the guidelines range was a ‘starting point’ and that ‘the real sentencing determination is made ... from considering two factors, the nature and circumstances of the offense and the history and character of the Defendant.’

Regarding the seriousness of the offense of conviction, the court observed that Mr. Schmidt is a three-time convicted felon. Further, the court noted, ‘Congress is trying to send a very clear message that people that have engaged in ... the type of conduct that lands a person in prison ... are not to possess firearms because of the very dangerous nature of those particular types of devices and weapons.’

Moving to Mr. Schmidt’s history and character, the district court began by stating: ‘I think the ideas that are reflected in the Presentence Report and particularly in the introduction are dangerous and they make a person who holds them and *with a history like this* dangerous.’ The court further elaborated that ‘when asked to assess the seriousness of an offense and the character of the Defendant,’ the sentencing judge ‘appropriately looks at the motivating ideas or the ideas that a person has in trying to assess that person’s character’ and ‘whether that person represents a danger to the public.’ In this case, the court indicated that it did not ‘put a great deal of weight’ on Mr. Schmidt’s white supremacist beliefs ‘because this offense ... does not involve the use of the gun for this purpose.’ The court observed, however, that it was alarmed ‘that a person holding these ideas has so little respect for the law.’ (emphasis added in the Court’s opinion)

Next, the court considered Mr. Schmidt's criminal history, which began at age 18 and involved 17 criminal convictions over the past 15 years. Further, the court observed that Mr. Schmidt's white supremacist beliefs were evidence of his continued dangerousness:

He's now 32. These aren't the words of a youthful offender... [T]hese are the words of someone who has—at this point in life ought to know better and they represent a threat and if he holds those ideas and people—as I said, ideas matter. People do things based on their ideas and if these are his ideas, *he is a very dangerous person.* (emphasis added)

Now, as I said, I'm sentencing him for an offense, not for his ideas but I am—it seems to me I appropriately can consider those in deciding an important factor which is whether he represents a threat ... to the community and whether he is a future danger.

Based on the nature of the offense, Mr. Schmidt's history and character, and the need for deterrence, the district court imposed a sentence of 48 months' imprisonment, followed by a three-year term of supervised release. The court summarized its determination by saying:

I have not put great weight on the guidelines but I certainly think that the nature of this offense, a possession of a firearm as a convicted felon—three-time convicted felon and with a history of violence and the kinds of threats that have been issued by this person to others throughout the course of his life and the absence of ties, really, to a community make the sentence appropriate and a reasonable approach.

I think it's necessary also for deterrent purposes. These are the types of crimes, the possession of firearms by people convicted is something every community tries to stop. We have a Constitutional right to possess firearms assuming we have not forfeited that right by virtue of criminal conduct and this is—the possession and—of a gun in this fashion is a serious matter. I also think it's—so I think it serves deterrence, it's punishment and, of course, protection of the public.

Following the entry of final judgment, Mr. Schmidt timely appealed.

[Schmidt's Argument on Appeal]

Mr. Schmidt contends that the district court violated his First Amendment rights because it sentenced him 'in part based upon his abstract belief in white supremacy that bore no relation to the offense of conviction.'

* * *

[The Court's Analysis]

The propriety of Mr. Schmidt's sentence turns on whether his white supremacist beliefs were 'relevant to the crime or to legitimate sentencing considerations.' ... The court sentenced Mr. Schmidt for being a felon in possession of a firearm, a crime that can implicate a variety of underlying offense conduct. Moreover, none of the felonies subjecting him to this restriction, nor his purpose in carrying a handgun into the forest on this specific occasion, involved or was otherwise motivated by his white supremacist beliefs. Indeed, the sentencing judge acknowledged as much, stating that he did not 'put a great deal of weight' in Mr. Schmidt's ideas 'because this offense ... does not involve the use of the gun for this purpose.' (emphasis added)

[The § 3553 Factors]

Because Mr. Schmidt did not commit a 'bias-motivated crime,'... we must examine next whether the district court's discussion of his white supremacist ideas was based on another legitimate sentencing consideration. ... Section 3553(a) of Title 18 sets forth the factors relevant to the imposition of sentence. These include 'the nature and circumstances of the offense and the history and characteristics of the defendant' and 'the need for the sentence imposed' to 'reflect the seriousness of the offense,' 'promote respect for the law,' 'afford adequate deterrence,' and 'protect the public from further crimes of the defendant.' *Id.* § 3553(a)(1), (2).

[Chief Judge Griesbach Expressed A Concern About
Future Dangerousness]

In examining these factors, the district court was well aware that Mr. Schmidt had a firmly established pattern of violence, anger, threatening behavior, and an inability to control his impulses. On the basis of these observations, the district court expressed particular concern about Mr. Schmidt's threat of future dangerousness. It commented that 'the ideas that are reflected in the Presentence Report and particularly in the introduction are dangerous and they make a person who holds them and *with a history like this* dangerous.' Noting Mr. Schmidt's 17 criminal convictions in the past 15 years and observing that, at age 32, Mr. Schmidt is no longer a 'youthful offender,' the court continued:

Now as I said, I'm sentencing him for an offense, not for his ideas but I am—it seems to me I appropriately can consider those in deciding an important factor which is whether he represents a threat ... to the community and whether he is a future danger.

The court's comments make clear that that the district court did not sentence Mr. Schmidt based on his 'mere abstract beliefs.' ... Rather, ... the court properly considered Mr. Schmidt's white supremacist ideas and hatred for the United States as evidence that he 'present[s] a threat of future dangerousness to the community.' ... Mr. Schmidt's radical belief in the superiority of one race over all others, and his communication of that belief to the probation officer, against the advice of counsel, during his presentence interview, revealed the danger of returning him to society. *The district court therefore considered Mr. Schmidt's beliefs not for the impermissible purpose of demonstrating general moral reprehensibility, but for the legitimate sentencing purpose of determining his likelihood of future dangerousness.* (emphasis added)

[Chief Judge Griesbach's Expressed A Concern
About Promoting Respect for the Law]

In addition to its consideration of Mr. Schmidt's future dangerousness, the district court expressed concern with the need, in light of Mr. Schmidt's earlier actions, to 'promote respect for the law.' ... The court noted the probation office's sentencing recommendation, which indicated that Mr. Schmidt 'repeatedly professed his hatred' for the United States 'due to its allowance of ... minorities to have civil rights' and 'proclaimed a strong desire to relocate to Germany to retrace his Nazi ancestral heritage.' The court noted its 'great alarm that a person holding these ideas has so little respect for the law.' Indeed, quite aside from his future dangerousness to others, the expression of these desires, combined with a record of repeated violations of law, evinced a willingness to continue on a path of lawlessness in the absence of significant correction.

[Conclusion]

In the end, Mr. Schmidt's statements, when viewed in light of his criminal history and his continued disrespect for the law, raised a serious question in the sentencing judge's mind as to whether he posed a threat of violent or anti-social conduct to the community. *There was no error, plain or otherwise, in the district court's assessment that Mr. Schmidt's beliefs were reasonably related to a legitimate sentencing purpose.* (Emphasis added)

My Thoughts

- This is one of those cases that shows that our system of justice really works. Schmidt was, in my opinion, a disgusting human being. In spite of this, though, he deserved to be treated fairly – and he was. Chief Judge Griesbach could have imposed a harsher sentence than he did and it would probably have been affirmed on appeal – but he didn't. Considering Schmidt's prior criminal record and the comments that he had made to the probation officer, a 48 month sentence seems most appropriate. Not too much; not too little; but, just right.

- We have all had clients who just didn't know when to shut up. Schmidt was one of those clients. He chose to ignore the advice of his attorney and talk and talk and talk about white supremacy. He made his bed and now he has to lie in it.

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 234th 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.