

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

United States v. Kenny Eugene Smart

Smart · No. Nos. 22-1129, 22-1131 · Decided February 21, 2023

SUMMARY

The Eighth Circuit affirmed Kenny Eugene Smart’s convictions for being a felon in possession of a firearm and possessing a firearm in furtherance of a drug-trafficking crime. The court rejected challenges concerning sufficiency of the evidence, evidentiary rulings, jury instructions, alleged Brady violations, and supervised-release revocation. Based on an intervening armed-career-criminal decision, the court remanded for resentencing.

CASE DETAILS

COURT	United States Court of Appeals for the Eighth Circuit
WRITING FOR THE COURT	Loken, Circuit Judge; Gruender, Circuit Judge; Grasz, Circuit Judge
JURISDICTION	Federal
DECIDED	February 21, 2023
DOCKET	Nos. 22-1129, 22-1131
DISPOSITION	vacated
PROCEDURAL POSTURE	Smart appealed his federal convictions, 360-month sentence under the Armed Career Criminal Act, and consecutive supervised-release-revocation sentence. The Eighth Circuit affirmed the convictions and supervised-release revocation but vacated the sentence and remanded for further sentencing proceedings.
STANDARD OF REVIEW	Sufficiency of the evidence was reviewed de novo, viewing the evidence in the light most favorable to the verdict. Denial of a new trial based on the weight of the evidence, admission of evidence, Brady claims, and supervised-release revocation were reviewed for abuse of discretion. Jury-instruction issues were reviewed for abuse of discretion, and unpreserved evidentiary objections were reviewed for plain error. The ACCA predicate-offense issue was reviewed de novo. Ineffective-assistance claims on direct appeal were considered only in exceptional cases.
PRECEDENTIAL VALUE	Published Eighth Circuit opinion; precedential, subject to later treatment.

PARTIES

Kenny Eugene Smart v. United States of America

TOPICS

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PRACTICE AREAS

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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to prove that Smart constructively possessed a firearm in furtherance of a drug-trafficking crime.
2. Whether the district court abused its discretion or otherwise erred in admitting prior convictions, recorded jail calls, witness testimony, and a posed photograph.
3. Whether the district court improperly refused requested addict-informer and mere-presence jury instructions.
4. Whether alleged suppression of pole-camera footage and a witness interview violated *Brady v. Maryland* and required a new trial.
5. Whether Smart's ineffective-assistance claims were reviewable and meritorious on direct appeal.
6. Whether Smart's Iowa drug convictions qualified as Armed Career Criminal Act predicate offenses.
7. Whether the district court abused its discretion by revoking supervised release based on the convictions.

HOLDINGS

1. The evidence was sufficient to support Smart's convictions for being a felon in possession of a firearm and possessing a firearm in furtherance of a drug-trafficking crime.
2. The district court did not abuse its discretion in denying a new trial because the evidence did not weigh heavily against the verdict and no miscarriage of justice occurred.
3. The district court did not abuse its discretion in admitting Smart's prior convictions to prove permissible issues including felon status, knowledge, intent, and possession; any error was harmless.
4. The district court did not abuse its discretion in admitting the recorded jail calls or Brian Larson's testimony concerning Smart's attempts to influence or intimidate a witness.
5. The district court did not abuse its discretion in excluding the prior theft convictions of government witnesses because Smart did not establish that the convictions involved dishonesty or false statement, and the convictions were more than ten years old.
6. Admission of the photograph did not warrant reversal because the photograph had an adequate foundation, any Rule 403 objection was at most plain error, and any error was harmless.
7. The district court did not abuse its discretion by refusing to give a standalone addict-informer instruction.

8. The district court did not abuse its discretion by refusing to give a separate mere-presence instruction because the instructions as a whole required more than mere presence or proximity.
9. The government's post-trial disclosure of the pole-camera footage did not warrant a new trial because Smart failed to show materiality sufficient to undermine confidence in the verdict.
10. The government's failure to disclose the later Turner interview did not warrant a new trial because the information was not materially different from information already disclosed to the defense.
11. The court declined to address Smart's ineffective-assistance claims on direct appeal because this was not an exceptional case and the record was not sufficiently developed.
12. In light of *United States v. Perez*, the case had to be remanded for further proceedings on whether Smart's Iowa drug convictions qualified as ACCA predicate offenses; the court did not decide the merits.
13. The district court did not abuse its discretion in revoking Smart's supervised release because the underlying convictions were affirmed.

KEY QUOTATIONS

"The testimony of Loggins, Kipnusu, and Welch alone, if credited by the jury, was sufficient evidence that Smart possessed the Ruger handgun in furtherance of a drug trafficking crime." (at 3)

"A criminal defendant may not threaten a family member of a government witness on the eve of trial and then cry unfair surprise when the government calls that person to testify." (at 8)

"For the foregoing reasons, we vacate Smart's sentence and remand to the district court for further sentencing proceedings not inconsistent with this opinion. In all other respects, the judgment of the district court is affirmed." (at 17-18)

FACTUAL BACKGROUND

Law enforcement executed a search warrant at a Des Moines duplex based on probable cause to believe it was used to manufacture and distribute crack cocaine. Smart and his girlfriend exited a bedroom where officers found a loaded Ruger pistol in plain view; Smart's DNA matched DNA recovered from the firearm, and witnesses testified that he possessed the gun while cooking and selling crack cocaine. The jury also heard recorded jail calls and testimony concerning Smart's efforts to influence or intimidate a potential witness. The district court treated Smart's prior convictions as qualifying ACCA predicates and imposed a 360-month sentence, followed by a consecutive 54-month sentence for supervised-release revocation.

PROCEDURAL HISTORY

A jury convicted Smart of being a felon in possession of a firearm and possessing a firearm in furtherance of a drug-trafficking crime. The Southern District of Iowa denied his motion for a new trial, sentenced him as an armed career criminal to 360 months' imprisonment, revoked his supervised release, and imposed a consecutive 54-month sentence. On appeal, the Eighth Circuit rejected his sufficiency, evidentiary, jury-instruction, Brady, ineffective-assistance, and supervised-release arguments, but remanded for resentencing in light of *United States v. Perez*.

DISPOSITION

vacated

REMAND INSTRUCTIONS

Vacate Smart's sentence and remand to the Southern District of Iowa for further sentencing proceedings not inconsistent with the opinion, including reconsideration of whether the Iowa convictions qualify as ACCA predicates. The convictions and supervised-release revocation were affirmed in all other respects.

CASES CITED

- United States v. Harris-Thompson, 751 F.3d 590 (8th Cir.), cert. denied, 574 U.S. 965 (2014)
- United States v. Dunn, 723 F.3d 919, 925 (8th Cir. 2013)
- United States v. Vore, 743 F.3d 1175, 1181 (8th Cir. 2014)
- Old Chief v. United States, 519 U.S. 172, 191 (1997)
- United States v. Bragg, 44 F.4th 1067, 1073-75 (8th Cir. 2022)
- United States v. Drew, 9 F.4th 718, 722, 725 (8th Cir. 2021), cert. denied, 142 S. Ct. 1159 (2022)
- United States v. Turner, 781 F.3d 374, 391 (8th Cir.), cert. denied, 577 U.S. 889 and 577 U.S. 980 (2015)
- United States v. Mejia-Uribe, 75 F.3d 395, 399 (8th Cir.), cert. denied, 519 U.S. 855 (1996)
- United States v. Cross, 888 F.3d 985, 990 (8th Cir.), cert. denied, 139 S. Ct. 351 (2018)
- United States v. Yeo, 739 F.2d 385, 387 (8th Cir. 1984)
- United States v. Stoltz, 683 F.3d 934, 940 (8th Cir. 2012)
- United States v. Skarda, 845 F.3d 370, 377-78 (8th Cir. 2016)
- United States v. Castleman, 795 F.3d 904, 915 (8th Cir. 2015), cert. denied, 577 U.S. 1109 (2016)
- Schmidt v. City of Bella Villa, 557 F.3d 564, 569 (8th Cir. 2009)
- United States v. Jefferson, 975 F.3d 700, 706 (8th Cir. 2020), cert. denied, 141 S. Ct. 2820 (2021)
- United States v. McPike, 512 F.3d 1052, 1055 (8th Cir. 2008)
- United States v. Gianakos, 415 F.3d 912, 920 (8th Cir.), cert. denied, 546 U.S. 1045 (2005)
- United States v. Janis, 995 F.3d 647, 650 (8th Cir. 2021), cert. denied, 142 S. Ct. 483 (2021)
- United States v. Gladney, 474 F.3d 1027, 1032 (8th Cir. 2007)
- United States v. Franklin, 960 F.3d 1070, 1072 (8th Cir. 2020)
- Brady v. Maryland, 373 U.S. 83 (1963)
- United States v. Garrett, 898 F.3d 811, 816 (8th Cir. 2018), cert. denied, 139 S. Ct. 1226 (2019)
- United States v. Delgrossi, 852 F.3d 821, 827 (8th Cir. 2017)
- United States v. Robinson, 809 F.3d 991, 996 (8th Cir. 2016)
- Kyles v. Whitley, 514 U.S. 419, 435 (1995)
- Pederson v. Fabian, 491 F.3d 816, 826 (8th Cir. 2007)
- Clay v. Bowersox, 367 F.3d 993, 1000 (8th Cir. 2004)

- United States v. Sanchez-Gonzalez, 643 F.3d 626, 628-29 (8th Cir. 2011)
- United States v. Hernandez, 281 F.3d 746, 749 (8th Cir. 2002)
- McNeill v. United States, 563 U.S. 816, 820, 823 (2011)
- United States v. Perez, 46 F.4th 691, 698-99 (8th Cir. 2022)
- United States v. Montgomery, 532 F.3d 811, 814 (8th Cir. 2008)

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