

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT

United States v. Tony Burke

888 F.2d 862, 281 U.S. App. D.C. 165 (D.C. Cir. 1989) · No. No. 88-3179 · Decided October 31, 1989

SUMMARY

The United States Court of Appeals for the District of Columbia Circuit held that the two-level firearm-possession enhancement under U.S.S.G. § 2D1.1(b) requires proof of scienter. The court concluded that the government must establish by a preponderance of the evidence that the defendant possessed the firearm intentionally, recklessly, or with criminal negligence, and remanded for resentencing.

CASE DETAILS

COURT	United States Court of Appeals for the District of Columbia Circuit
WRITING FOR THE COURT	Harry T. Edwards; Abner J. Mikva; John A. Williams
JURISDICTION	Federal
DECIDED	October 31, 1989
DOCKET	No. 88-3179
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Burke pleaded guilty to possession of heroin with intent to distribute and appealed the sentence imposed after the district court enhanced his offense level for firearm possession under U.S. Sentencing Guidelines § 2D1.1(b).
STANDARD OF REVIEW	The court reviewed the legal interpretation of the Sentencing Guidelines de novo. It declined to conduct de novo factfinding regarding whether Burke knew of the firearm.
PRECEDENTIAL VALUE	Published federal circuit opinion; precedential
PARTIES	Tony Burke v. United States of America

TOPICS

- sentencing guidelines
- sentencing
- mens rea
- statutory interpretation
- appellate procedure

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether Sentencing Guidelines § 2D1.1(b) permits a two-level firearm-possession enhancement without proof of scienter.
2. What mental state satisfies the scienter requirement for a § 2D1.1(b) enhancement.
3. Whether the firearm must be operable or used in connection with the drug offense for the enhancement to apply.
4. What burden and standard of proof govern facts supporting the enhancement.
5. Whether the court of appeals could independently determine from the record that Burke knew of the firearm.

HOLDINGS

1. Section 2D1.1(b) does not authorize a two-level sentencing enhancement for mere, unwitting possession of a firearm; the enhancement requires proof of scienter.
2. The enhancement applies when the defendant possessed the firearm or dangerous weapon intentionally, recklessly, or by criminal negligence.
3. Knowing constructive possession may satisfy § 2D1.1(b), because constructive possession involves knowing dominion and control; the weapon must also be in reasonable proximity to the scene of the drug offense.
4. The enhancement does not depend on the firearm being operable or being used, or intended to be used, to advance the drug offense.
5. The prosecution bears the burden of proving the factual prerequisites for a § 2D1.1(b) enhancement by a preponderance of the evidence, not by clear and convincing evidence.

KEY QUOTATIONS

“Under either circumstance, a scienter requirement must be met.” (¶ 22)

“In resentencing Burke, the District Court should impose the increments authorized by section 2D1.1(b) only if it finds that the prosecution has established, by a preponderance of the evidence, that Burke possessed the firearm found in his tote bag “intentionally, recklessly or by criminal negligence.”” (¶ 30)

FACTUAL BACKGROUND

Burke traveled by train from New York to Washington, D.C., carrying a tote bag. After consenting to a search, officers found heroin in the bag; a later search at the police station uncovered additional heroin and a firearm. Burke pleaded guilty to possessing heroin with intent to distribute, and the district court enhanced his sentence by two levels based on firearm possession even though it did not find that he knowingly possessed the gun.

PROCEDURAL HISTORY

Burke was indicted on drug and firearm charges. After the district court denied his suppression motion, he pleaded guilty to the drug charge in exchange for the recommended dismissal of the weapons charges. The district court imposed a 92-month sentence, including a two-level firearm-possession enhancement, without finding that Burke knowingly, recklessly, or criminally negligently possessed the firearm. The court of appeals reversed the sentencing determination and remanded for further proceedings.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The district court must resentence Burke and impose the § 2D1.1(b) enhancement only if the prosecution proves by a preponderance of the evidence that he possessed the firearm intentionally, recklessly, or by criminal negligence.

CASES CITED

- United States v. Otero, 868 F.2d 1412 (5th Cir. 1989)
- United States v. Rinaldi, 808 F.2d 1579, 1582 n.3 (D.C. Cir. 1987) (per curiam)
- United States v. Batchelder, 442 U.S. 114, 121 (1979)
- Morissette v. United States, 342 U.S. 246, 250-63 (1952)
- United States v. United States Gypsum Co., 438 U.S. 422, 438 (1978)
- Liparota v. United States, 471 U.S. 419, 426-27 (1985)
- United States v. Nofziger, 878 F.2d 442, 452-53 (D.C. Cir. 1989)
- United States v. Freed, 401 U.S. 601, 607, 609 (1971)
- United States v. Park, 421 U.S. 658, 671-72 (1975)
- United States v. Dotterweich, 320 U.S. 277, 280-82 (1943)
- United States v. Dancy, 861 F.2d 77, 80-81 (5th Cir. 1988)
- United States v. Anderson, 881 F.2d 1128, 1141 (D.C. Cir. 1989)
- United States v. Hewin, 877 F.2d 3, 5 (5th Cir. 1989)
- United States v. Vasquez, 874 F.2d 250, 251 (5th Cir. 1989)
- United States v. Morales, 880 F.2d 827, 827-28 (5th Cir. 1989)
- United States v. York, 830 F.2d 885, 891 (8th Cir. 1987), cert. denied, 484 U.S. 1074 (1988)
- McLaughlin v. United States, 476 U.S. 16, 17-18 (1986)
- Southern Pacific Communications Co. v. American Telephone & Telegraph Co., 740 F.2d 980, 984 (D.C. Cir. 1984), cert. denied, 470 U.S. 1005 (1985)
- United States v. Urrego-Linares, 879 F.2d 1234, 1237-39 (4th Cir. 1989)
- United States v. Wright, 873 F.2d 437, 441-42 (1st Cir. 1989)

- United States v. Wilson, 884 F.2d 1355, 1357 (11th Cir. 1989)
- United States v. Williams, 879 F.2d 454, 457 (8th Cir. 1989)
- United States v. White, 875 F.2d 427, 433 (4th Cir. 1989)
- United States v. Whitfield, 629 F.2d 136, 143 (D.C. Cir. 1980), cert. denied, 449 U.S. 1086 (1981)

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