

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

United States v. York; United States v. Robinson

830 F.2d 885 (8th Cir. 1987) · No. Nos. 86-5096, 86-5097 · Decided October 29, 1987

SUMMARY

The Eighth Circuit affirmed the convictions and sentences of Perry York and Peter Andrew Robinson for armed credit-union robbery and related firearm offenses. The court rejected claims involving entrapment, government misconduct, firearm operability, the effective date of 18 U.S.C. § 924(c), use of Robinson's confession for impeachment, sentencing information, other-crimes evidence, an ex parte jury communication, and prosecutorial comment on York's silence.

CASE DETAILS

COURT	United States Court of Appeals for the Eighth Circuit
WRITING FOR THE COURT	Per curiam; Lay, Chief Judge; Wollman, Circuit Judge; David R. Hansen, District Judge, sitting by designation
JURISDICTION	Federal
DECIDED	October 29, 1987
DOCKET	Nos. 86-5096, 86-5097
DISPOSITION	affirmed
PROCEDURAL POSTURE	York and Robinson appealed final judgments entered after a joint jury trial in which they were convicted of armed credit-union robbery and related firearm offenses.
STANDARD OF REVIEW	Evidentiary rulings were reviewed for abuse of discretion; ex parte jury communications were evaluated under a presumption of prejudice rebuttable by clear evidence of no prejudice; sentencing information was reviewed under the applicable due-process and Rule 32 standards.
PRECEDENTIAL VALUE	Published precedential opinion of the United States Court of Appeals for the Eighth Circuit.
PARTIES	Perry York, Peter Andrew Robinson v. United States of America

TOPICS

- criminal procedure
- evidence
- due process
- sentencing
- appellate procedure

PRACTICE AREAS

criminal law

criminal procedure

evidence

sentencing

constitutional law

QUESTIONS PRESENTED

1. Whether the district court improperly excluded FBI administrative reports and related jury instructions concerning informant Quinn's agency and the government's responsibility for his conduct.
2. Whether the government's use of Quinn and his solicitation of the defendants violated due process or required adoption of a probable-cause prerequisite for government-created criminal opportunities.
3. Whether the handgun was a firearm under 18 U.S.C. § 921(a)(3) despite being inoperable and whether it was a dangerous weapon under 18 U.S.C. § 2113(d).
4. Whether 18 U.S.C. § 924(c), as amended by the Comprehensive Crime Control Act of 1984, was effective when applied to the September 1985 robbery.
5. Whether Robinson's allegedly involuntary confession was properly used after Robinson first introduced evidence concerning it.
6. Whether the district court properly considered uncorroborated hearsay and unprosecuted criminal activity at York's sentencing and complied with Federal Rule of Criminal Procedure 32(c)(3)(D).
7. Whether evidence of York's other robberies was admissible under Federal Rule of Evidence 404(b).
8. Whether the trial court's ex parte response to a jury question was prejudicial.
9. Whether the prosecutor improperly commented on York's post-arrest, post-Miranda silence.

HOLDINGS

1. The district court did not abuse its discretion by excluding duplicative FBI administrative reports or by refusing proposed instructions declaring Quinn a government agent as a matter of law and imposing general responsibility on the government for his conduct.
2. The entrapment issue was properly submitted to the jury, and the government's conduct did not violate due process or constitute conduct so outrageous that the convictions were barred as a matter of public policy.
3. A firearm need not be operable to satisfy 18 U.S.C. § 921(a)(3); it is sufficient that the weapon was designed to expel a projectile by the action of an explosive.
4. An unloaded or inoperable gun may constitute a dangerous weapon for purposes of 18 U.S.C. § 2113(d).
5. The 1984 amendment to 18 U.S.C. § 924(c) became effective on October 12, 1984, the date of enactment, because no explicit contrary effective date applied to that amendment.
6. Robinson could not obtain reversal based on use of his September 12 confession after he first elicited testimony about it and used it to support his entrapment or coercion theory.
7. The sentencing court properly considered hearsay and unprosecuted criminal activity because York had an opportunity to explain or rebut the information, and the court substantially complied with Rule 32(c)(3)(D).

8. The district court did not abuse its discretion in admitting evidence of York's other robberies because the evidence satisfied the clear-and-convincing requirement, was sufficiently probative, and was relevant to entrapment, predisposition, knowledge, intent, and common scheme or plan.
9. Although the trial court's communication with the jury in the absence of York and counsel was improper and presumptively prejudicial, the presumption was overcome because the court referred the jury to a neutral, correct aiding-and-abetting instruction and there was no reasonable possibility of prejudice.
10. The prosecutor's comment was properly understood as referring to York's pre-arrest, pre-Miranda silence, not protected post-arrest silence, and any potential confusion concerning the right not to testify was cured by the trial court's immediate admonition.

KEY QUOTATIONS

"Section 921(a)(3) does not require a firearm to be operable."

"We conclude that the instant case falls far short of presenting the court with a situation where the conduct of law enforcement agents was 'so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.'"

"Accordingly, we find no error requiring reversal on this point."

FACTUAL BACKGROUND

Robinson, York, and government informant James Patrick Quinn robbed the federally insured Carpenters Credit Union in St. Paul, Minnesota, on September 11, 1985. The defendants stipulated that they participated in the robbery; Robinson testified that he participated, while York's counsel conceded York's participation. Quinn testified for the government pursuant to a plea agreement, and the defense primarily concerned entrapment, coercion, evidentiary rulings, firearm status, sentencing, and alleged trial errors.

PROCEDURAL HISTORY

A jury convicted both appellants of armed robbery of the Carpenters Credit Union under 18 U.S.C. §§ 2113(a) and (d), and 2, with firearm sentence enhancements under 18 U.S.C. § 924(c). Robinson was additionally convicted under 18 U.S.C. § 922(h)(1). The United States District Court for the District of Minnesota entered convictions and consecutive sentences, and the Eighth Circuit affirmed.

DISPOSITION

affirmed

CASES CITED

- Hamling v. United States, 418 U.S. 87 (1974)
- Smith v. Firestone Tire and Rubber Co., 755 F.2d 129, 134 (8th Cir. 1985)
- United States v. Hoppe, 645 F.2d 630, 633 (8th Cir. 1981)
- United States v. Russell, 411 U.S. 423 (1973)

- *Sherman v. United States*, 356 U.S. 369 (1958)
- *United States v. Lard*, 734 F.2d 1290 (8th Cir. 1984)
- *United States v. Quinn*, 543 F.2d 640, 648 (8th Cir. 1976)
- *Rochin v. California*, 342 U.S. 165 (1952)
- *United States v. Harris*, 792 F.2d 866, 868 (9th Cir. 1986)
- *United States v. Goodheim*, 686 F.2d 776 (9th Cir. 1982)
- *McLaughlin v. United States*, 476 U.S. 1 (1986)
- *United States v. Doffin*, 791 F.2d 118, 121 (8th Cir. 1986)
- *United States v. Shaffer*, 789 F.2d 682, 686 (9th Cir. 1986)
- *United States v. Affleck*, 765 F.2d 944, 948 (10th Cir. 1985)
- *United States v. Steele*, 610 F.2d 504, 505 (8th Cir. 1979)
- *United States v. Drake*, 542 F.2d 1020, 1022 (8th Cir. 1976), cert. denied, 429 U.S. 1050 (1977)
- *Mitchell v. Wyrick*, 698 F.2d 940, 943 (8th Cir. 1983)
- *United States v. Papajohn*, 701 F.2d 760, 763 (8th Cir. 1983)
- *Farrow v. United States*, 580 F.2d 1339, 1360 (9th Cir. 1978)
- *United States v. Pierce*, 792 F.2d 740, 743 (8th Cir. 1986)
- *United States v. Nabors*, 761 F.2d 465, 470-471 (8th Cir. 1985)
- *Llach v. United States*, 739 F.2d 1322, 1327 (8th Cir. 1984)
- *United States v. Mesteth*, 528 F.2d 333, 335 (8th Cir. 1976)
- *United States v. Treatman*, 524 F.2d 320, 323 (8th Cir. 1975)
- *Jackson v. Hutto*, 508 F.2d 890, 892 (8th Cir. 1975)
- *Rice v. United States*, 356 F.2d 709, 716-717 (8th Cir. 1966)
- *Doyle v. Ohio*, 426 U.S. 610 (1976)