

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

August 16, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KENNETH ROY GIBSON,
a/k/a John Worth,

Defendant - Appellant.

No. 18-8083
(D.C. No. 2:18-CR-00070-NDF-1)
(D. Wyo.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, Chief Judge, **BALDOCK** and **HARTZ**, Circuit Judges.

Kenneth Roy Gibson pleaded guilty to one count of failing to register and to update his registration as required by the Sex Offender Registration and Notification Act (SORNA), 34 U.S.C. § 20913, in violation of 18 U.S.C. § 2250(a). The district court sentenced him to 21 months' imprisonment and five years' supervised release.

Mr. Gibson's conditional plea allowed him to appeal from the district court's denial of his motion to dismiss the indictment. In that motion Mr. Gibson had

* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

argued, among other things, that 34 U.S.C. § 20913(d) violates the constitutional nondelegation doctrine by allowing the Attorney General to decide whether the registration requirement applies to offenders convicted before SORNA was enacted. Mr. Gibson recognized that his argument was foreclosed by this circuit's precedent. *See United States v. Nichols*, 775 F.3d 1225, 1231-32 (10th Cir. 2014), *rev'd on other grounds*, 136 S. Ct. 1113, 1118-19 (2016). But he sought to preserve the argument in light of the Supreme Court's grant of certiorari to consider whether § 20913(d) violates the nondelegation doctrine. *See United States v. Gundy*, 695 F. App'x 639 (2d Cir. 2017), *cert. granted*, 138 S. Ct. 1260 (2018) (No. 17-6086). The district court denied the motion to dismiss, citing *Nichols* and further noting that this court, on direct appeal, had "specifically rejected Gibson's argument that his prior conviction should not qualify because it predated SORNA's enactment." R. Vol. I at 54.

Mr. Gibson's appeal raises only the nondelegation argument. After the parties filed their briefs, the Supreme Court held that § 20913(d) does not violate the nondelegation doctrine. *See Gundy v. United States*, 139 S. Ct. 2116, 2121, 2129 (2019). This court thus directed the parties to file supplemental memorandum briefs addressing *Gundy's* impact on this appeal. Mr. Gibson concedes his appeal was contingent on the success of the petitioner in *Gundy*, and *Gundy's* outcome therefore precludes his appeal. The government agrees.

Because *Gundy* decided Mr. Gibson's only appeal point adversely to him, the district court's judgment is affirmed.

Entered for the Court

Harris L Hartz
Circuit Judge