

14-1929-cr

United States v. McCrimon

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

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4
5 August Term, 2014
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7 (Submitted: March 31, 2015

Decided: June 4, 2015)

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9 Docket No. 14-1929
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13 UNITED STATES OF AMERICA,
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16 *Appellee,*
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18 v.
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20 JOSEPH McCRIMON,¹
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22 *Defendant-Appellant.*
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26 Before: POOLER, LOHIER, and CARNEY, *Circuit Judges.*
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¹ The Clerk of the Court is directed to amend the caption as above.

1 York (Briccetti, *J.*), sentencing him principally to 63 months' imprisonment for
2 bank robbery, in violation of 18 U.S.C. § 2113(a). McCrimon pleaded guilty
3 pursuant to a plea agreement, which acknowledged the parties' dispute over the
4 applicability of the U.S.S.G. § 3C1.2 sentencing enhancement for reckless
5 endangerment during flight.² Because we conclude that Application Note 5 to
6 U.S.S.G. § 3C1.2, not Section 1B1.3(a)(1)(B), provides the proper standard for
7 applying the enhancement based on a co-defendant's conduct, we remand for
8 resentencing.

9 BACKGROUND

10 The district court made the following factual findings at sentencing.
11 McCrimon left the scene of the bank robbery in a getaway car driven by his
12 co-defendant, James Sherrod. Soon after, police attempted to stop the car.
13 Following a brief pause, the vehicle fled, leading police on a chase through busy
14 streets at speeds of up to one hundred miles per hour, sometimes on the wrong
15 side of the road. The getaway car hit at least one vehicle and endangered other

² U.S.S.G. § 3C1.2 provides, "If the defendant recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer, increase by 2 levels."

1 individuals, including a second passenger in the getaway car, before it ultimately
2 crashed.

3 Although the Government submitted testimony that McCrimon
4 encouraged Sherrod to flee from the police and to increase his speed during the
5 chase, the district court declined to make any factual findings based on the
6 proffered evidence. It reasoned that this determination was unnecessary to its
7 sentencing analysis, because, under the relevant conduct rules of U.S.S.G.

8 § 1B1.3(a)(1)(B), it was sufficient that McCrimon could have reasonably foreseen
9 that his co-defendant would drive the getaway car in a manner that would
10 recklessly endanger others in furtherance of the bank robbery. Based on that
11 conclusion, the district court calculated McCrimon's Guidelines range to include
12 a two-level enhancement under U.S.S.G. § 3C1.2 for "recklessly creat[ing] a
13 substantial risk of death or serious bodily injury to [others] in the course of
14 fleeing from a law enforcement officer."

15 McCrimon timely appealed, asserting that the district court erred in
16 applying the two-level enhancement under U.S.S.G. § 3C1.2 because Sherrod's
17 reckless driving would not have been reasonably foreseeable to McCrimon due
18 to McCrimon's extremely diminished cognitive abilities. With McCrimon's

1 consent, the Government now moves to remand for resentencing on the basis
2 that the district court applied the incorrect standard in determining whether
3 McCrimon's sentence could be enhanced based on his co-defendant's conduct.

4 DISCUSSION

5 I. Standard of Review

6 We review a sentence for procedural and substantive reasonableness,
7 which is akin to a "deferential abuse-of-discretion standard." *United States v.*
8 *Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (internal quotation marks omitted).
9 Procedural error occurs when, for example, the district court "makes a mistake in
10 its Guidelines calculation." *Id.* at 190. We review the district court's interpretation
11 of the Guidelines de novo and its factual findings for clear error. *United States v.*
12 *Richardson*, 521 F.3d 149, 156 (2d Cir. 2008).

13 Because McCrimon did not object to the district court's use of the
14 reasonable foreseeability standard set forth in Section 1B1.3(a)(1)(B), we review
15 for plain error. *See United States v. Dorvee*, 616 F.3d 174, 179 (2d Cir. 2010). Under
16 that standard, an appellant must demonstrate that "(1) there is an error; (2) the
17 error is clear or obvious, rather than subject to reasonable dispute; (3) the error
18 affected the appellant's substantial rights, which in the ordinary case means it

1 affected the outcome of the district court proceedings; and (4) the error seriously
2 affects the fairness, integrity or public reputation of judicial proceedings.” *United*
3 *States v. Marcus*, 560 U.S. 258, 262 (2010) (internal quotation marks and alterations
4 omitted). “[T]he plain error doctrine should not be applied stringently in the
5 sentencing context, where the cost of correcting an unpreserved error is not as
6 great as in the trial context.” *United States v. Wernick*, 691 F.3d 108, 113 (2d Cir.
7 2012) (internal quotation marks omitted).

8 For the reasons set forth below, we conclude that the district court
9 committed plain error in its calculation of McCrimon’s Guidelines range.

10 II. Analysis

11 The Sentencing Guidelines provide a general rule governing application of
12 its provisions based on a co-defendant’s conduct: “Unless otherwise specified, . .
13 . adjustments . . . shall be determined on the basis of[,] . . . in the case of a jointly
14 undertaken criminal activity . . . , all reasonably foreseeable acts and omissions of
15 others in furtherance of the jointly undertaken criminal activity. . . .” U.S.S.G.
16 § 1B1.3(a)(1)(B). The general rule therefore applies “unless otherwise specified.”
17 *Id.* A special conduct rule governing the reckless endangerment enhancement of
18 Section 3C1.2 is set forth in Application Note 5, which states, “[u]nder this

1 section, the defendant is accountable for the defendant's own conduct and for
2 conduct that the defendant aided or abetted, counseled, commanded, induced,
3 procured, or willfully caused." U.S.S.G. § 3C1.2 cmt. n.5. Thus, by the plain
4 language of the Guidelines, the district court may not apply the Section 3C1.2
5 enhancement unless it finds that the defendant himself "recklessly created a
6 substantial risk of death or serious bodily injury to another person in the course
7 of fleeing from a law enforcement officer" or that he "aided[,] abetted," or
8 otherwise contributed to the creation of such a risk in one of the enumerated
9 ways. *Id.*; see also *Stinson v. United States*, 508 U.S. 36, 38 (1993) ("[C]ommentary in
10 the Guidelines Manual that interprets or explains a guideline is authoritative
11 unless it violates the Constitution or a federal statute, or is inconsistent with, or a
12 plainly erroneous reading of, that guideline."). The district court therefore erred
13 by applying the enhancement based merely on a finding that McCrimon could
14 have reasonably foreseen that his co-defendant would recklessly endanger others
15 while fleeing from the police in furtherance of the crime.

16 Every other circuit to consider the issue has held that "some form of direct
17 or active participation which is consistent with Note 5 is necessary in order for
18 § 3C1.2 to apply." *United States v. Cespedes*, 663 F.3d 685, 690 (3d Cir. 2011)

(internal quotation marks and alterations omitted); *see also United States v. Johnson*, 694 F.3d 1192, 1196 (11th Cir. 2012); *United States v. Franklin*, 321 F.3d 1231, 1237 (9th Cir. 2003); *United States v. Chong*, 285 F.3d 343, 346 (4th Cir. 2002); *United States v. Conley*, 131 F.3d 1387, 1390 (10th Cir. 1997). It follows that “[k]nowingly participating in an armed robbery in which getaway vehicles are part of the plan is insufficient as a matter of law, without more, to allow a district court to impose this enhancement on individuals not directly committing the acts amounting to reckless endangerment.” *Franklin*, 321 F.3d at 1237. Given the plain meaning of the provision’s language and the widespread agreement among our sister circuits, the appropriate standard for applying Section 3C1.2 is not “subject to reasonable dispute,” *Marcus*, 560 U.S. at 262, and the district court’s error was clear.

The third and fourth prongs of plain error review may be satisfied where the district court commits an error in its Guidelines calculation, the “starting point in selecting a sentence.” *Wernick*, 691 F.3d at 117 (internal quotation marks omitted). Here, if the district court had not applied the enhancement, McCrimon’s Guidelines range would have been 51 to 63 months’ imprisonment, rather than 63 to 78 months’ imprisonment. *See* U.S.S.G. Ch. 5 Pt. A. The court’s

error therefore had a “potentially serious impact on the sentence imposed.”
Wernick, 691 F.3d at 117. Because of the significant impact on the Guidelines
range, the resulting possibility that the court imposed a longer term of
imprisonment than it would otherwise have chosen, and the relatively low cost
of correcting the error, failing to permit the district court to correct the error
would negatively affect the fairness of the proceedings.

CONCLUSION

For the foregoing reasons, we conclude that the district court plainly erred
in applying the Section 3C1.2 sentencing enhancement based solely on a finding
that McCrimon reasonably could have foreseen that his co-defendant would
recklessly endanger others while fleeing from the scene of his bank robbery. We
express no view as to the other features of McCrimon’s sentence. Accordingly,
the sentence is VACATED and REMANDED for resentencing consistent with this
opinion.