

NONPRECEDENTIAL DISPOSITION

To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals**For the Seventh Circuit****Chicago, Illinois 60604**

Submitted October 3, 2023*

Decided October 4, 2023

BeforeMICHAEL B. BRENNAN, *Circuit Judge*MICHAEL Y. SCUDDER, *Circuit Judge*AMY J. ST. EVE, *Circuit Judge*

No. 22-3037

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,**v.*CHARLES KIRBY,
*Defendant-Appellant.*Appeal from the United States District Court
for the Southern District of Indiana,
Indianapolis Division.

No. 1:19-cr-00201-JMS-DLP-1

Jane Magnus-Stinson,
*Judge.***ORDER**

A jury found Kirby guilty of a drug trafficking conspiracy and attempting to possess heroin with the intent to distribute. 21 U.S.C. §§ 846, 841(a)(1), 841(b)(1)(A). Although the jury found him not guilty of carrying a deadly weapon during and in relation to these offenses, 18 U.S.C. § 924(c)(1), the district court concluded by a preponderance of the evidence that Kirby had possessed a firearm while attempting to

* By prior order (App. Dkt. 24), we vacated oral argument in this appeal. We have agreed to decide the case without oral argument because the dispositive issue has been authoritatively decided. FED. R. APP. P. 34(a)(2)(B).

accept a drug delivery. It therefore applied U.S.S.G. § 2D1.1(b)(1) to add two offense levels. With a total offense level of 32 and a criminal history category of I, Kirby's guidelines range was 121 to 151 months' imprisonment, and the court imposed the mandatory minimum sentence of 120 months.

Although Kirby did not object to the increase under § 2D1.1(b)(1), he now seeks plain-error review of that adjustment on constitutional grounds. He argues that the two-level increase to his offense level under the Sentencing Guidelines was unconstitutional by taking into account the conduct underlying an offense of which he was acquitted. But Kirby concedes that *United States v. Watts*, 519 U.S. 148 (1997), controls the outcome of his appeal. There, the Supreme Court of the United States held that a sentencing court may consider conduct underlying an acquitted charge without violating the Constitution. But, relying on five petitions for writs of certiorari pending when he filed his brief, Kirby argued that, if the Supreme Court granted the petitions and overruled *Watts*, as the petitioners asked, he would be entitled to at least a limited remand. He acknowledges, however, that "[i]f the Supreme Court denies the petitions or grants them and affirms the continued use of acquitted conduct in sentencing, Kirby's sentence should be affirmed."

On June 30, 2023, the Supreme Court denied all five petitions for writs of certiorari. *United States v. McClinton*, 23 F.4th 732 (7th Cir. 2022), *cert. denied*, 143 S. Ct. 2400 (2023); *United States v. Bravo*, 26 F.4th 387 (7th Cir. 2022), *cert. denied*, 143 S. Ct. 2690 (2023); *United States v. Shaw*, No. 18-50384, 2022 WL 636639 (9th Cir. Mar. 4, 2022), *cert. denied*, 143 S. Ct. 2689 (2023); *United States v. Karr*, No. 21-50219, 2022 WL 1499288 (5th Cir. May 12, 2022), *cert. denied*, 143 S. Ct. 2691 (2023); *United States v. Bullock*, 35 F.4th 666 (8th Cir. 2022), *cert. denied*, 143 S. Ct. 2691 (2023). Based on the Justices' statements accompanying the denials of the petitions, the Court appears willing to allow the U.S. Sentencing Commission to address the issue of acquitted conduct in the first instance.

Because the Court did not grant certiorari in *McClinton* and the companion cases, Kirby's arguments are effectively moot, and, as he acknowledges, *Watts* compels us to uphold the application of § 2D1.1(b)(1) when his only objection is the use of acquitted conduct. Whether or not we agree with Kirby's position, only the Court itself can overrule its decisions. *See State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989); *Cross v. United States*, 892 F.3d 288, 303 (7th Cir. 2018); *United States v. Elliott*, 703 F.3d 378, 383 (7th Cir. 2012).

Therefore, IT IS ORDERED that the judgment of the district court is AFFIRMED.