

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-3003

September Term, 2019

FILED ON: March 20, 2020

UNITED STATES OF AMERICA,
APPELLEE

v.

TAI TAN NGUYEN,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:17-cr-00238-1)

Before: GRIFFITH and RAO, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*.

J U D G M E N T

This case was considered on the record from the United States District Court for the District of Columbia and the briefs of the parties. The Court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). For the reasons set out below, it is

ORDERED and **ADJUDGED** that the decision of the district court be **AFFIRMED**.

Federal law requires persons who leave the United States with more than \$10,000 in cash to file a customs form. *See* 31 U.S.C. § 5316. Tai Tan Nguyen, an employee of the Department of Homeland Security (DHS), flew from Hawaii to Thailand carrying \$82,000 without submitting the required form. When DHS agents interviewed Nguyen about his trip, he said that an associate carried the money into Thailand. Later in the interview, Nguyen admitted that he carried the cash into Thailand himself. A federal grand jury indicted Nguyen for failure to file a currency report, bulk cash smuggling, and making a false statement to DHS agents. *See* 31 U.S.C. §§ 5324(c)(1), 5332(a)(1); 18 U.S.C. § 1001(a)(2). After a three-day trial, a jury convicted him of making a false statement but acquitted him of the other two counts.

At sentencing, the district court found that the conduct underlying Nguyen's conviction

constituted obstruction of justice and applied the higher Sentencing Guidelines range for that crime, rather than the range for crimes of deceit in general. *See* U.S.S.G. § 2B1.1(c)(3) (stating that if a “defendant [is] convicted under a statute proscribing false, fictitious, or fraudulent statements or representations generally” and “the conduct set forth in the count of conviction establishes an offense specifically covered by another guideline,” the court should apply the more specific Guideline). The district court also said that circuit precedent allowed it to consider acquitted conduct when imposing a sentence. It found that Nguyen had failed to file a currency report and had engaged in bulk cash smuggling, notwithstanding his acquittal on those two counts. The court sentenced Nguyen to fifteen months’ imprisonment, the bottom of the Guidelines range for obstruction of justice. Nguyen appeals that sentence.

Nguyen says that the sentencing court’s consideration of acquitted conduct violated his Fifth Amendment due process right to a presumption of innocence and his Sixth Amendment right to a jury trial. Our precedent forecloses that argument. We have held that a defendant’s Fifth Amendment right to due process and Sixth Amendment right to a jury trial do not bar the use of acquitted conduct at sentencing. *See United States v. Dorcely*, 454 F.3d 366, 371-72 (D.C. Cir. 2006); *see also United States v. Settles*, 530 F.3d 920, 924 (D.C. Cir. 2008). If a defendant’s Fifth Amendment right to due process permits the use of acquitted conduct at sentencing, his more specific due process right to a presumption of innocence cannot bar the same.

Nguyen also argues that the district court misread *United States v. Hawkins*, 185 F. Supp. 3d 114 (D.D.C. 2016), another case applying the obstruction of justice Guideline to a defendant convicted of making a false statement. He says that *Hawkins* “makes it abundantly clear that acquitted conduct cannot be considered by the court to establish an enhanced offense” under the Guidelines. Nguyen Br. 38 n.6. But *Hawkins* says no such thing, because the defendant in that case wasn’t acquitted of anything. *See* 185 F. Supp. 3d at 116 (stating that *Hawkins* pleaded guilty). In any event, Nguyen fails to explain how the sentencing court’s alleged misreading of *Hawkins*, a district court decision with no precedential effect, could constitute reversible error.

For the foregoing reasons, we affirm the district court’s judgment imposing a sentence of fifteen months’ imprisonment.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41(a)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk