FILED
United States Court of Appeals
Tenth Circuit

October 28, 2021

Christopher M. Wolpert
Clerk of Court

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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UNITED STATES OF AMERICA,

Plaintiff - Appellee.

v.

MICHAEL AGUAYO,

Defendant - Appellant.

No. 21-1009
(D.C. Nos. 1:20-CV-03858-RBJ &
1:13-CR-00088-RBJ-1)
(D. Colo.)

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**ORDER AND JUDGMENT***

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Before **TYMKOVICH**, Chief Judge, **KELLY**, and **HOLMES**, Circuit Judges.

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Michael Aguayo filed a 28 U.S.C § 2255 motion challenging his conviction for being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1). He claimed his guilty plea was invalid under *Rehaif v. United States*, 139 S. Ct. 2191 (2019), because the district court failed to advise him that the government had to prove, as an element of the offense, that he knew his prohibited status—*viz.*, that he was a felon, at the time he possessed the firearm. The district court denied the motion, ruling the

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

claim was procedurally defaulted, but granted a certificate of appealability (COA). Exercising jurisdiction under 28 U.S.C. §§ 1291 and 2255(d), we now affirm.

I

This case began when a Colorado sheriff's deputy observed Mr. Aguayo drive erratically on an interstate highway and then careen into an embankment. As the car left the roadway, the deputy saw something thrown from the vehicle. Outside the vehicle, the deputy recovered two blocks of methamphetamine and a loaded Ruger firearm. It was later determined that Mr. Aguayo "had a dangerously high amount of methamphetamine in his system." R., vol. 1 at 68. He also had two prior felony convictions for possession of controlled substances and felony vandalism.

Mr. Aguayo pleaded guilty to possession with intent to distribute 50 grams or more of methamphetamine, 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(viii) ("trafficking count"), and being a felon in possession of a firearm, 18 U.S.C. § 922(g)(1). In exchange for his guilty plea, the government dismissed a third count for possession of a firearm in furtherance of a drug trafficking crime, *see id.,* § 924(c), which carries a consecutive five-year mandatory minimum sentence, *see id.*, § 924(c)(1)(A)(i). At the change of plea hearing, the district court advised Mr. Aguayo that the government had to prove the following elements to convict him under § 922(g)(1):

> [F]irst, that you were previously convicted of a crime punishable by a term of imprisonment exceeding one year – basically, you have a previous felony. And, second, that despite that, you knowingly possessed a firearm which had been transported in interstate commerce.

R., vol. 1 at 66. Mr. Aguayo did not object to the advisement, and he admitted he was guilty of a crime with these elements. The district court accepted the plea and sentenced Mr. Aguayo to 141 months on the trafficking count, which was later reduced to 140 months, and a concurrent 120-month term on the § 922(g)(1) count. As provided in the plea agreement, Mr. Aguayo did not appeal.

When the district court advised Mr. Aguayo on the elements of § 922(g)(1), the law did not require the government to prove he knew his status as a felon to obtain a conviction. *See, e.g., United States v. Silva*, 889 F.3d 704, 711 (10th Cir. 2018). Six years later, however, the Supreme Court held in *Rehaif* that a defendant's knowledge of his prohibited status is an element of a § 922(g) offense. 139 S. Ct. 2199-2200. Consequently, Mr. Aguayo filed his § 2255 motion, claiming under *Rehaif* that his guilty plea should be vacated because the district court failed to advise him that the government was required to prove he knew he was a felon when he possessed the firearm.[1] The district court denied the motion, ruling the claim was procedurally defaulted because Mr. Aguayo failed to raise it on direct appeal, and although he showed cause for failing to raise the claim, he could not show prejudice.[2] The district court granted a COA, however, and Mr. Aguayo appealed.

[1] We assume without deciding that *Rehaif* applies retroactively in an initial § 2255 motion.

[2] The district court also determined Mr. Aguayo waived his right to collaterally attack his conviction and sentence in his plea agreement. Although Mr. Aguayo challenges that determination, the government does not seek to enforce the § 2255 waiver, *see* Aplee. Br. at 10 n.1, and we do not consider the issue.

II

"In a § 2255 appeal, we review the district court's findings of fact for clear error and its conclusions of law de novo." *United States v. Lewis*, 904 F.3d 867, 870 (10th Cir. 2018) (internal quotation marks omitted). "A plea of guilty is constitutionally valid only to the extent it is voluntary and intelligent." *Bousley v. United States*, 523 U.S. 614, 618 (1998) (internal quotation marks omitted). "[A] plea does not qualify as intelligent unless a criminal defendant first receives real notice of the true nature of the charge against him." *Id.* (internal quotation marks omitted). Both the government and the district court acknowledged that Mr. Aguayo was not advised that knowledge of his status as a felon was an element of the crime. Nonetheless, the "intelligence of a guilty plea can be attacked on collateral review only if first challenged on direct review." *Id.* at 621. Failure to raise a claim on direct appeal results in procedural default, which precludes relief on habeas review unless "the defendant can first demonstrate [both] cause and actual prejudice." *Id.* at 621-22 (internal quotation marks omitted).[3, 4]

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[3] A movant may also assert an actual-innocence theory, *see, e.g., United States v. Hisey*, 12 F.4th 1231, 1235 (10th Cir. 2021), but Mr. Aguayo asserts no such theory. Although he says it is "reasonably probable that [he] actually didn't violate § 922(g)," this statement appears in the context of his prejudice argument, in which he claims he may not have known he was a felon at the time he possessed the gun. *See* Aplt. Br. at 15.

[4] Mr. Aguayo sought to preserve an argument that he need not show prejudice because the *Rehaif* error requires relief regardless of whether he would have pleaded guilty. *See* Aplt. Br. at 10-11. However, he has since conceded in a notice to us filed under Fed. R. App. P. 28(j) that this argument is foreclosed by *Greer v. United States*, which held that "*Rehaif* errors fit comfortably within the general rule that a

We need not decide whether Mr. Aguayo can show cause because he cannot establish he was prejudiced by the district court's failure to advise him under *Rehaif*. *See United States v. Frady*, 456 U.S. 152, 168 (1982) (declining to consider cause because petitioner could not show prejudice). Prejudice requires "an error of constitutional dimensions that worked to his actual and substantial disadvantage." *United States v. Snyder*, 871 F.3d 1122, 1128 (10th Cir. 2017) (internal quotation marks omitted). The mere "possibility of prejudice" is not enough. *Frady*, 456 U.S. at 170 (italics omitted). He must show "there is a reasonable probability that, but for [the error], he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). He may establish prejudice with "evidence tending to show that had he been advised [properly], he would have elected to proceed to trial." *United States v. Harms*, 371 F.3d 1208, 1212 (10th Cir. 2004).

Mr. Aguayo fails to meet his burden. *See Frady*, 456 U.S. at 170 (recognizing it is the movant's burden to show prejudice). He first says he was prejudiced by the *Rehaif* error because the government's evidence was weak on the knowledge-of-status element. He points out that his prior felony convictions did not result in a sentence of more than one year in prison, and thus "the record does not inspire confidence that [he] would have pleaded guilty had he been properly advised of the knowledge-of-status element," Aplt. Br. at 12. But by relying on the lack of certainty

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constitutional error does not automatically require reversal of a conviction," 141 S. Ct. 2090, 2100 (2021) (internal quotation marks omitted).

in the record, this argument attempts to improperly shift the burden to the government to establish he would not have gone to trial if he had been correctly advised. It is Mr. Aguayo's burden—not the government's—to demonstrate a reasonable probability that but for the *Rehaif* error, he would have demanded to go to trial. *See Hill*, 474 U.S. at 59; *Frady*, 456 U.S. at 170. And even if the government may have had some difficulty establishing his knowledge of his prohibited status, that alone does not show a reasonable probability that he would have gone to trial.

Mr. Aguayo also disputes the district court's conclusion that it was not "probable or even plausible" that he would have gone to trial because the government had substantial evidence that he possessed two pounds of methamphetamine and a loaded firearm. R., vol. 1 at 120. Given this evidence, the court noted that even without the § 922(g) count, it was "highly likely" that if Mr. Aguayo had gone to trial, he would have been convicted on both the trafficking and the § 924(c) counts. *Id.* The court also recalled that he was "particularly concerned" about avoiding the consecutive mandatory minimum five-year sentence on the § 924(c) count. *Id.* Rather than offering evidence to suggest that, under these circumstances, he would have insisted on going to trial but for the *Rehaif* error, Mr. Aguayo speculates that in exchange for his guilty plea on the trafficking count, he might have persuaded the government to dismiss both the § 922(g) and the § 924(c) counts. But he offers nothing to support that scenario.

Instead, Mr. Aguayo attempts to diminish the benefits he received by pleading guilty. He asserts that if he had been convicted at trial on both the trafficking and the

§ 924(c) counts, the additional five-year term he would have received on a § 924(c) conviction would have been offset by the elimination of a two-level weapons enhancement that he incurred by pleading guilty to the trafficking count. Under this scenario, he says the risk of receiving a longer sentence if he had been convicted at trial might "'have been worth the potential gain of an acquittal.'" Aplt. Br. at 19 (quoting *United States v. Guzman-Merced*, 984 F.3d 18, 21 (1st Cir. 2020)). The government responds that it would have been illogical for Mr. Aguayo to forgo a three-point reduction in his offense level for acceptance of responsibility, which he received by pleading guilty, to avoid a two-point weapons enhancement. More importantly, Mr. Aguayo offers no evidence to demonstrate he would have made that choice.

The government also correctly points out that this case is not like *Guzman-Merced*, where the defendant faced a single § 922(g) count and weighed the benefit of a lower sentence by pleading guilty against the risk of going to trial and receiving no sentence at all, *see* 984 F.3d at 21. Mr. Aguayo faced three different counts. Although he argues that going to trial might have given him a chance of acquittal on all three counts, it also might have led to his conviction. Given the government's evidence, which included more than two pounds of methamphetamine and a loaded firearm recovered at the scene by the sheriff's deputy, Mr. Aguayo's calculus must have accounted for the prospect of an additional, consecutive five-year mandatory minimum sentence on the § 924(c) count if he had insisted on going to trial, which he eliminated by pleading guilty to the trafficking and § 922(g) counts. Indeed, by

pleading guilty, he reduced his exposure from a combined mandatory minimum sentence of fifteen years on the trafficking and § 924(c) counts to a mandatory minimum sentence of ten years on the trafficking count, *see* 18 U.S.C. § 841(b)(1)(A)(viii). Mr. Aguayo offers no evidence indicating a reasonable probability that he would have accepted the risk of conviction by going to trial if he had been advised that the government needed to prove he knew about his prohibited status.

Perhaps the reason Mr. Aguayo provides no evidence of prejudice is because the record strongly suggests he knew he was a felon at the time he unlawfully possessed the firearm. The plea agreement notified him the government was obliged to prove as an element of the § 922(g) offense that he had "been previously convicted of a crime punishable by a term of imprisonment exceeding one year." R., vol. 1 at 14. And he stipulated that he had been previously convicted of a felony. In his reply brief, he urges us not to consider his stipulation because it does not establish that he knew he was a felon at the critical time he possessed the gun. *See* Reply Br. at 10-11. While not conclusive, a defendant's stipulation to his prior felony permits the inference that he did know of his prohibited status. *See United States v. Arthurs*, 823 F. App'x 692, 696 (10th Cir. 2020) (noting a defendant's stipulation to his prior felony, "though not dispositive, can provide a basis for a jury to infer that the defendant knew of his or her prohibited status");[5] *see also United States v. Raymore*,

[5] We may cite unpublished decisions for their persuasive value. *See* Fed. R. App. P. 32.1; 10th Cir. R. 32.1(A).

965 F.3d 475, 485-86 (6th Cir. 2020) (recognizing on plain-error review that, "while [the defendant's] stipulation does not automatically establish [his] knowledge of his status, it is strongly suggestive of it" (brackets and internal quotation marks omitted)). Indeed, the Supreme Court recently evaluated a pair of *Rehaif* claims under the plain-error standard governing unpreserved claims raised on direct appeal and observed that, ordinarily, a felon knows he is a felon:

> In a felon-in-possession case where the defendant was in fact a felon when he possessed firearms, the defendant faces an uphill climb in trying to satisfy the substantial-rights prong of the plain-error test based on an argument that he did not know he was a felon. The reason is simple: If a person is a felon, he ordinarily knows he is a felon. Felony status is simply not the kind of thing that one forgets. That simple truth is not lost upon juries. Thus, absent a reason to conclude otherwise, a jury will usually find that a defendant *knew* he was a felon based on the fact that he *was* a felon.

*Greer v. United States*, 141 S. Ct. 2090, 2097 (2021) (internal quotation marks and citation omitted).

Here, Mr. Aguayo cites no evidence indicating he did not know he was a felon when he possessed the gun. *See id.* at 2098 (noting defendants did not argue or represent "that they would have presented evidence at trial that they did not in fact know they were felons when they possessed firearms"). He stipulated that he had been previously convicted of a felony when he pleaded guilty to the § 922(g) violation. And his burden on collateral review is even more onerous than the "difficult" plain-error standard that governed in *Greer,* 141 S. Ct. at 2097 (internal quotation marks omitted). *See United States v. Bailey*, 286 F.3d 1219, 1222-23 (10th Cir. 2002) (concluding that appellant could not show actual prejudice for

purposes of obtaining collateral relief where he failed to satisfy the less onerous standard of plain-error review).

Additionally, one can infer from the location where the firearm was recovered—ten feet outside of the vehicle Mr. Aguayo was driving—that he attempted to discard the gun because he knew he was a felon prohibited from possessing it. *See United States v. Innocent*, 977 F.3d 1077, 1083 (11th Cir. 2020) (noting defendant "behaved in a way that suggested he knew he was not allowed to possess a gun when he immediately dropped the gun into someone else's car and left the scene when he saw police approaching"). Against this evidence, Mr. Aguayo offers no argument or evidence that establishes a reasonable probability he would have gone to trial but for the *Rehaif* error. Under these circumstances, he fails to show prejudice to overcome the procedural default.[6]

III

Accordingly, the judgment of the district court is affirmed.

Entered for the Court

Jerome A. Holmes
Circuit Judge

[6] In light of our disposition, we do not consider the parties' harmless-error arguments.