

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

July 7, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SHANE DUANE BLACKBURN,

Defendant - Appellant.

No. 22-8029
(D.C. No. 1:22-CR-00012-SWS-1)
(D. Wyo.)

ORDER AND JUDGMENT*

Before **EID**, **EBEL**, and **KELLY**, Circuit Judges.**

In this sentencing appeal, Shane Duane Blackburn argues that the district court erroneously enhanced his offense level under U.S.S.G. § 3C1.2 when calculating his sentence. Reviewing for plain error, we conclude that the district court did not err because Mr. Blackburn created a substantial risk of serious bodily injury while resisting arrest, as the enhancement requires. Exercising jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), we AFFIRM.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

** 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.

BACKGROUND

On November 24, 2021, Mr. Blackburn assaulted an eighty-two-year-old man who was giving him a ride. At the time, Mr. Blackburn was in the midst of a methamphetamine-induced psychotic break. When the victim pulled his minivan over to the side of U.S. Highway 287, Mr. Blackburn pushed him out of the car and continued to beat him on the side of the road. When another motorist stopped to intervene and call 911, Mr. Blackburn got in the victim's minivan and drove away. Bureau of Indian Affairs ("BIA") officers subsequently apprehended Mr. Blackburn in the parking lot of a local casino and returned him to the site of the assault so the victim could positively identify him.

Sitting in the back of a police cruiser at the site of the assault, Mr. Blackburn began screaming at BIA Officer Adrian Lopez and, using both feet, kicked the cruiser's door with such force that it began to bend. A second BIA Officer, Steven Young-Fisher, opened the door and sprayed Mr. Blackburn with OC spray. Mr. Blackburn forced his way out of the cruiser and onto the ground, where he kicked in the direction of the officers. One of his kicks successfully struck Officer Lopez in the lower torso. Officer Young-Fisher then punched and tased Mr. Blackburn, who reentered the cruiser and exited through the other side. The officers eventually subdued Mr. Blackburn. The next day, while in jail, Mr. Blackburn punched a corrections officer in the jaw.

Mr. Blackburn was charged with one count of carjacking resulting in serious bodily injury, 18 U.S.C. § 2119(2), one count of assault resulting in serious bodily

injury, 18 U.S.C. §§ 113(a)(6) and 1153, and one count of assaulting a federal officer (the corrections officer), 18 U.S.C. § 111(a)(1). He agreed to plead guilty to carjacking resulting in serious bodily injury and to assaulting a federal officer. The government estimated that Mr. Blackburn's carjacking offense would result in an offense level of 25, which, when combined with Mr. Blackburn's criminal history category of VI, resulted in a corresponding guideline range of 110 to 137 months in prison.

The Presentence Investigation Report (PSR), however, added a two-level enhancement under U.S.S.G. § 3C1.2, which applies “[i]f 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.” Applying the enhancement to Mr. Blackburn's post-arrest conduct at the site of the assault resulted in an offense level of 27. So, the PSR calculated a guideline range of 130 to 162 months in prison for the carjacking offense. Mr. Blackburn did not object to the enhancement.¹

The court adopted the PSR calculations in full. The court ultimately adjusted Mr. Blackburn's carjacking offense level down one level, to 26, in “recognition of the fact that Mr. Blackburn, on this day, was certainly not in the right mind.” R. Vol. 3 at 51–52. The court concluded that the carjacking offense thus carried an advisory guideline range of 120 to 150 months. The court sentenced Mr. Blackburn to a term

¹ Mr. Blackburn's counsel represented to the court that he thought about challenging the enhancement on the grounds that Mr. Blackburn lacked the proper mens rea but ultimately decided not to contest the issue.

of 148 months as to the carjacking offense, as well as a concurrent term of 96 months for the assault charge.

DISCUSSION

Mr. Blackburn argues for the first time on appeal that the undisputed facts in the PSR were legally insufficient for U.S.S.G. § 3C1.2 to apply.² We review forfeited arguments for plain error. United States v. Rosales-Miranda, 755 F.3d 1253, 1257–58 (10th Cir. 2014). Mr. Blackburn must show “(1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings.” United States v. Gonzalez-Huerta, 403 F.3d 727, 732 (10th Cir. 2005) (en banc) (quotation omitted).

Under § 3C1.2, “[i]f 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.” United States v. Conley, 131 F.3d 1387, 1389 (10th Cir. 1997) (quoting U.S.S.G. § 3C1.2). For purposes of § 3C1.2, the concept of “flight” is “construed broadly” to include “preparation for flight” and

² The government argues that Mr. Blackburn’s appeal fails because he is challenging the factual basis for the sentencing enhancement, and factual disputes “concerning the applicability of a particular guideline . . . do[] not rise to the level of plain error.” Aple. Br. at 8 (quoting United States v. Lewis, 594 F.3d 1270, 1288 (10th Cir. 2010)). But in light of Davis v. United States, 140 S. Ct. 1060 (2020), we have recently recognized that some factual errors may rise to the level of plain error. See United States v. Cristerna-Gonzalez, 962 F.3d 1253, 1262 (10th Cir. 2020). Moreover, we understand Mr. Blackburn to be arguing that the district court erred as a matter of law. Cf. United States v. Young, 893 F.3d 777, 779 (10th Cir. 2018) (concluding, outside the plain-error context, that an argument “that the facts are insufficient as a matter of law to warrant the [§ 3C1.2] enhancement” is reviewed de novo, rather than for clear error).

“conduct [that] occurs in the course of resisting arrest.” U.S.S.G. § 3C1.2, cmt. 3. Therefore, the issue is whether Mr. Blackburn created a substantial risk of death or serious bodily injury while he was resisting arrest.³

The district court did not err in applying the enhancement. Based on the record before us, we think it is clear that Mr. Blackburn created a “substantial risk” of serious bodily injury. U.S.S.G. § 3C1.2. Because of his methamphetamine use, Mr. Blackburn was in no position to regulate the force of his kicks when he kicked Officer Lopez. In fact, he had kicked the door of the police cruiser with sufficient force that it had bent. Kicking a human in the lower torso with a similar amount of force could certainly cause “extreme physical pain” or result in “medical intervention such as surgery, hospitalization, or physical rehabilitation,” and therefore cause serious bodily injury under the guidelines. U.S.S.G. § 1B1.1, cmt. 1(M) (defining serious bodily injury). Given the likely force of Mr. Blackburn’s kicks and the placement of the kick of Officer Lopez, the district court did not err in concluding that he created a substantial risk of serious bodily injury when he kicked Officer Lopez.

Mr. Blackburn is correct that our prior cases applying § 3C1.2 involved factual situations that posed a greater risk of harm. See, e.g., Conley, 131 F.3d at 1389 (“[D]efendants engaged in a high-speed car chase with law enforcement officials on

³ Because Mr. Blackburn’s counsel below conceded that he acted recklessly and Mr. Blackburn does not argue differently on appeal, we consider the enhancement’s mens rea requirement to be satisfied.

an icy road, passed two rolling road blocks, and attempted to ram a police officer's vehicle”); United States v. Young, 893 F.3d 777, 780 (10th Cir. 2018) (defendant threatened to shoot officers with hollow-point bullets, led them on a high-speed automotive chase, and refused to surrender during a four-hour standoff); United States v. Brown, 314 F.3d 1216, 1221 (10th Cir. 2003) (defendant left a gun where it was accessible to school-age children who found the gun and reported it to authorities). But these cases do not strictly limit the application of § 3C1.2 to high-speed chases and similar situations. Nor do they, as a matter of law, set a lower limit for what conduct can constitute a substantial risk of serious bodily injury.⁴

CONCLUSION

Because the district court did not err in applying § 3C1.2, we need not consider Mr. Blackburn’s remaining arguments. We **AFFIRM**.

Entered for the Court

David M. Ebel
Circuit Judge

⁴ We agree with Mr. Blackburn that United States v. Petersen is not persuasive. 902 F.3d 1016, 1023 (9th Cir. 2018). Petersen involved a defendant who tried to kick out the window of a police cruiser moving at high speed on an interstate. Id. Had Mr. Petersen successfully escaped, he could have caused an accident that would have put others at risk of death or serious bodily harm. Id. But while Mr. Blackburn also kicked at the doors of a police cruiser, he did so while the cruiser was parked. Therefore, he could not have caused a traffic accident had he successfully kicked the door open. So, while we conclude that Mr. Blackburn caused a substantial risk of serious bodily injury, we do not rely on Petersen in reaching our conclusion.