

UNPUBLISHED

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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DEC 19 2016

DEC 19 2016

SC Court of Appeals

No. 06-4970

S.C. SUPREME COURT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

MUTTAQIN F. ABDULLAH, a/k/a King, a/k/a
Clayton Montray Pinckney,

Defendant - Appellant.

Appeal from the United States District Court for the District of
South Carolina, at Columbia. Margaret B. Seymour, District Judge.
(3:05-cr-00014-MBS-AL)

Submitted: June 29, 2007

Decided: July 13, 2007

Before MICHAEL and DUNCAN, Circuit Judges, and HAMILTON, Senior
Circuit Judge.

Affirmed by unpublished per curiam opinion.

W. Michael Duncan, AUSTIN, LEWIS & ROGERS, P.A., Columbia, South
Carolina, for Appellant. Reginald I. Lloyd, United States
Attorney, C. Todd Hagins, Robert F. Daley, Jr., Assistant United
States Attorneys, Columbia, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Mattaqin F. Abdullah appeals his conviction and life sentence imposed for being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C.A. §§ 922(g)(1), 924(a)(2), 924(e)(1) (West 2000 & Supp. 2007). On appeal, Abdullah argues that the district court erred in denying a motion for a mistrial after a Government witness briefly testified to a subject prohibited by an in limine ruling; erred in applying a first degree murder cross reference at sentencing when the jury did not find facts of murder; and erred in applying the first degree murder cross reference and finding that the murder was premeditated. Finding no error, we affirm.

On March 14, 2004, officers from the Sumter, South Carolina, Sheriff's Department responded to a report of shots fired at the Lion's Pit Nightclub. Abdullah was a bouncer employed by the club that night to provide security during a concert. Abdullah previously worked at the Lion's Pit on several occasions. Abdullah's counsel filed a motion in limine, which was granted by the court in part, to limit evidence regarding the shootings at trial. The court ruled that the Government may discuss "the pointing and presenting of a firearm" with regard to the charge, but that "no testimony or other evidence regarding the alleged murder or attempted murder on March 14, 2004, will be allowed." (J.A. 44-45).

The club closed in the early morning hours of March 14, 2004. It was customary for patrons at the club to sit in their vehicles in the parking lot waiting to leave. As they waited, they discharged celebratory gunfire into the air. The shots were not fired at the club. Abdullah testified that he had seen and heard gun shots while the club closed on previous occasions when he worked there.

The bouncers exited the club and stood by the doors so that no one could re-enter. Abdullah became agitated with the gunfire and said, "Man, they playing around, they are shooting in the air. I'm going to shoot for real." (J.A. 236). He also said, "I'm not going to shoot in the air, I'm going to shoot at somebody." (J.A. 123). While the patrons were shooting in the air, a bouncer went to his car to retrieve a handgun. Tommy Boyd testified that Abdullah told the bouncer, "Give me the gun . . . [j]ust give me the gun. . . . I know what to do." (J.A. 121). The bouncer gave Abdullah the firearm. As he did so, another bouncer, Coral Scott, became involved in an altercation with a patron. No firearms or weapons were involved. Thurston Lane, another bouncer, got between Scott and the patron. Scott then heard gunfire, looked back, and saw Abdullah firing the shots. Tommy Boyd and Thurston Lane confirmed that they observed Abdullah fire into a crowd of approximately forty to fifty people from twenty-five to thirty feet away. Boyd testified that Abdullah did not begin

shooting until approximately three to four minutes after the patrons stopped shooting in the air. Abdullah fired approximately eight or nine times to his left and right. One bullet hit David Way on the back of the head and exited through his forehead. He was pronounced dead at Toumey Hospital. Merrill McBride was also injured by a bullet striking his left side.

Lane testified that, after the shooting, he observed Abdullah return inside the club. Lane followed Abdullah and saw him enter the restroom. Abdullah later rejoined the group of bouncers who sat in front of the club waiting to be paid. Lane informed officers arriving on the scene that Abdullah was the shooter and directed them to the restroom Abdullah entered after the shooting.

Officers recovered a Taurus .45 caliber semi-automatic pistol from a hole in the restroom's ceiling. The firearm was loaded with six unfired Federal brand .45 caliber cartridges. Abdullah was arrested based on witness statements. Abdullah was searched and a .45 caliber Federal brand cartridge was found in his jacket pocket. Abdullah's fingerprint was found on the firearm's magazine. Both parties stipulated that David Way's "entrance wound was consistent with being caused by a large caliber bullet, consistent with either a .45 caliber bullet, .40 caliber bullet, or 10 millimeter bullet." In addition, both parties stipulated that

Way died due to "massive cerebral brain damage and hemorrhaging due to a gunshot wound to the back of the head." (J.A. 592).

Despite the Government's warning on the in limine issue, witness Coral Scott testified on direct examination that after the shootings he ran backwards to the club's door "and that's when people came out screaming, 'Somebody has been shot.'" (J.A. 176). Abdullah's counsel moved for a mistrial based on the witness's statement that someone had been shot. The Government argued that the witness's statement was that someone else said that someone had been shot, but was not direct testimony that someone was shot by Abdullah. Abdullah's counsel declined a curative instruction, because he thought it would draw more attention to the testimony, and instead stated that a mistrial was the only remedy. The court denied Abdullah's motion for a mistrial.

Abdullah and his counsel had an ex parte discussion with the court regarding whether Abdullah would testify. Counsel advised Abdullah not to testify; however, Abdullah decided to exercise his right. The court and counsel informed Abdullah that his testimony would be in the narrative form, that he was also bound by the court's in limine ruling, and that if he opened the door to the murder and injury, then the Government could pursue testimony about it.

Abdullah testified that he was outside in the parking lot when the club cleared out, but that he returned inside when he

heard the patrons' gunfire. He testified that he borrowed a jacket from another bouncer, and he did not know that there was ammunition in the jacket pocket. He testified that the crowd was very emotional and stated that "their home boy had been shot and one of the bouncers was accused of it in some way." (J.A. 547). Abdullah's testimony was that following the commotion regarding David Way's murder, someone came up to him and told him to check the bathroom because a toilet was broken. During cross-examination, Abdullah again denied firing shots or handling the firearm or ammunition.

Abdullah first argues that the district court erred in denying a mistrial based on Scott's testimony, because it was in violation of the court's ruling to exclude testimony about the murder and injury and no remedy short of a mistrial would provide him with a fair trial. He argues that he was compelled to testify that he was innocent of the shooting by the court's failure to grant a mistrial. The Government maintains that the remark was fleeting, Abdullah was not coerced into testifying, and no undue prejudice resulted from the remark.

We review the denial of a motion for a mistrial for an abuse of discretion. See United States v. Dorlouis, 107 F.3d 248, 257 (4th Cir. 1997). "In order for the trial court's ruling to constitute such an abuse of discretion, the defendant must show prejudice; no prejudice exists, however, if the jury could make

individual guilt determinations by following the court's cautionary instructions." United States v. Dorsey, 45 F.3d 809, 817 (4th Cir. 1995) (internal citation omitted).

We conclude that the Government witness's unexpected statement that patrons at the club said someone had been shot did not require a mistrial. The witness's statement was brief and isolated and was not purposely elicited by the Government. Moreover, the district court would have given an immediate curative instruction telling the jury to disregard the witness's statement, had Abdullah requested it. Abdullah chose for the court to refrain from issuing a curative instruction. The jury is presumed to follow curative instructions given by the court. Hinkle v. City of Clarksburg, 81 F.3d 416, 427 (4th Cir. 1996). Had Abdullah agreed to the remedy of a curative instruction, it would have been presumed that the jury would have followed the instruction.

Scott's reference to a person being shot was the only reference to the murder and injury during the four day trial until Abdullah testified. The Government presented fifteen witnesses. This demonstrates that the remark was indeed fleeting and incidental. See United States v. Vogt, 910 F.2d 1184, 1193 (4th Cir. 1990) (finding lack of prejudice to warrant mistrial where witness's impermissible testimony "came up incidentally, neither the witness nor the prosecution made any repeated reference to it,

and the court carefully instructed as to [the testimony's] permissible use.").

In addition, there was testimony from four eyewitnesses who saw Abdullah possess the firearm. There was also testimony that a bullet was found in Abdullah's jacket pocket matching the caliber and brand of bullets found in the firearm. Abdullah's fingerprints were also found on the firearm's magazine. We therefore conclude that Abdullah has not shown undue prejudice and the jury could have found sufficient evidence of firearm possession to convict Abdullah without relying on any inference from Scott's impermissible statement.

Next, Abdullah objects to the district court sentencing him based on a cross reference to first degree murder. He argues that sentencing on a murder cross reference violates his Sixth Amendment rights, relying on Apprendi v. New Jersey, 530 U.S. 466 (2000), Ring v. Arizona, 536 U.S. 584 (2002), and United States v. Booker, 543 U.S. 220 (2005). In Booker, the Supreme Court held that Blakely v. Washington, 542 U.S. 296 (2004), applies to the federal Sentencing Guidelines and that the mandatory Guidelines scheme, which provided for sentence enhancements based on facts found by the court by a preponderance of the evidence, violated the Sixth Amendment. See Booker, 543 U.S. at 226-27, 245. The Court remedied the constitutional violation by severing and excising the statutory provisions that mandate sentencing and appellate review

under the Guidelines, thus making the Guidelines advisory. 543 U.S. at 245.

However, in imposing a sentence post-Booker, courts still must calculate the applicable Guidelines range after making the appropriate findings of fact and consider the range in conjunction with other relevant factors under the Guidelines and 18 U.S.C.A. § 3553(a) (West 2000 & Supp. 2007). United States v. Moreland, 437 F.3d 424, 432 (4th Cir.), cert. denied, 126 S. Ct. 2054 (2006). Here, the district court sentenced Abdullah post-Booker and appropriately treated the Guidelines as advisory. The sentencing court properly made factual findings concerning sentencing factors by a preponderance of the evidence, including whether first degree murder was related to the count of conviction. See United States v. Morris, 429 F.3d 65, 72 (4th Cir. 2005), cert. denied, 127 S. Ct. 121 (2006). The court sentenced Abdullah after considering and examining the Sentencing Guidelines and the § 3553(a) factors, as instructed by Booker. Therefore, there is no Sixth Amendment error.

Finally, Abdullah argues that the evidence presented by the Government was not sufficient to support a finding of murder in the first degree by a preponderance of the evidence for sentencing purposes. U.S. Sentencing Guidelines Manual § 2K2.1 (2003) provides a cross-reference to the most analogous homicide guideline to be applied if death resulted from the firearm offense and the

cross reference would yield a higher offense level than the one which would otherwise apply. See USSG § 2K2.1(c)(1)(B). This court reviews a district court's factual findings supporting the applicability of the murder cross-reference for clear error. United States v. Crump, 120 F.3d 462, 467-68 (4th Cir. 1997). If the district court's findings "may rationally be said to be supported by a preponderance of the evidence, they may not be disturbed on appeal." Id. at 468. Abdullah maintains that the shooting was random and not premeditated. Abdullah submits that he should have been sentenced based only on second degree murder.

"Malice aforethought, as provided in 18 U.S.C.A. § 1111(a) (West Supp. 2007), is the distinguishing characteristic which, when present, makes a homicide murder rather than manslaughter." United States v. Fleming, 739 F.2d 945, 947 (4th Cir. 1984). To show that malice is present, the government is not required "to show an intent to kill or injure." United States v. Williams, 342 F.3d 350, 356 (4th Cir. 2003) (citing Fleming, 739 F.2d at 947). Instead, "malice aforethought may be established by evidence of conduct which is reckless and wanton and a gross deviation from a reasonable standard of care, of such a nature that a jury is warranted in inferring that defendant was aware of a serious risk of death or serious bodily harm." Id. (internal quotation and citation omitted).

The first degree murder cross reference applies in cases of premeditated killing. USSG § 2A1.1, cmt. (n.1). "'Premeditation' is a fully formed conscious purpose to kill that may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act." 40 Am. Jur. 2d Homicide § 44 (2007).

At sentencing, the Government stated that Abdullah stipulated to malice aforethought. The district court determined Abdullah acted with premeditation. The court cited Lane's statement that Abdullah said he was going to shoot for real and Boyd's testimony that Abdullah told him to give him the gun because he knew what to do with it. We find that these facts demonstrate that Abdullah consciously and maliciously fired into the crowd of people and the first degree murder cross reference was appropriate.

We therefore affirm the judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

Sumter County General Sessions
215 N. Harvin St. Sumter, S.C. 29150

Muttogin Fatir Abdullah Plaintiff, 12465-171

V

No. 2016A4310200130 Murder
No. 2016A4310200131 A.B.I.K.
No. 2016A4310200132 Weapons
No. 2016A4310200133 Weapons

H363891 Nolle Prosequi
H363611 Nolle Prosequi
H363893 Nolle Prosequi
H363892 Nolle Prosequi

Sumter County Sheriff's Office

RECEIVED Date: 3/21/16

DEC 19 2016 SC Court of Appeals

Now comes the Plaintiff in responds to a Detainer that was received on the date of 2/26/16 through Institutional mail from the Sumter County Sheriff's Office.

On the date of 3/14/14 the Plaintiff was charge with the above charges, and detained in Sumter County Detention Center, for a total of 10 months with no indictment by the state. On January 6, 2005 a federal grand jury returned a One Count Indictment alleging a violation of 18 U.S.C. 922(g) Felon in Possession of a gun, and 18 U.S.C. 924 (a) Possession of Ammunition.

On the date of January 31, 2005, agent Glover, first name Raymond, and another unknown agent who works for the Federal Bureau of Investigation came to Sumter County, to transport the defendant, Muhtagin Abdullah, into federal custody from Sumter County Detention Center. The defendant was taken to Alvin S. Glenn Detention Center, in Columbia, South Carolina, to stay over night.

On February 1, 2005, the U.S. Marshals transported the defendant from Alvin S. Glenn Detention Center, to the United States District Court House, in Columbia, South Carolina, to make his first appearance before a federal court judge, and counsel was appointed that day. After the court hearing, the U.S. marshals transported the defendant to the Lexington County Detention Center, in Lexington, South Carolina.

During the month of June 2005, the trial judge (Judge Seymour), gave an court order that the defendant shall be sent to Butner F.C.I. for psychological evaluation to make sure that the defendant was competent to stand trial.

After a two month evaluation, the defendant was brought back to Columbia, South Carolina's Alvin S. Glenn Detention Center, and begin trial on October 19, 2005. During the course of the three day trial, the defense attorney, John Hare, file a motion in limine before the court to exclude the evidence of a homicide and assault and battery with intent to kill.

The trial court judge granted the motion in limine. Even though the federal grand jury, in the indictment found reason to believe that the defendant used or possessed the firearm and ammunition in connection with the commission, and attempted commission of another offense, that is: First Degree Murder of David Way, United States Sentencing Guidelines 2A2.1(a) and 2A2.1(c).

This Federal Indictment will demonstrate the risk of unfair prejudice to the defendant, because the defendant was only on trial for being in possession of a firearm, and possession of ammunition by a felon, all in violation of Title 18 U.S.C. Section 922(g)(1), 924(a)(2), and 924(e)(1) not murder.

During the first day of the trial on Transcript page 149, the government made mention in his testimony that people came out screaming, somebody has been shot! During a bench conference outside the jury, the defense counsel moved for a mistrial on the basis that the witness stated that somebody has been shot.

The trial judge (Seymour), stated that she was looking at the transcript, and the witness said that people ran out screaming that someone had been shot, that's what he said. See:

Transcript page 150. The court offered to give a curative instruction to the jury about the witness statement that somebody was shot, but the defense attorney declined the curative instruction and moved for a mistrial, by stating it will draw more attention to his remark. See: Transcript page 152.

After the government had called their last witness, the defendant decided that he wanted to exercise his constitutional rights by taking the stand in his own defense, in an effort to explain the basis of the case to the jury.

The trial court (Judge Seymour) stated that the Reason she had granted the motion in limine, to exclude the homicide an attempted murder, was due to the fact that it would be highly prejudicial to the defendant. See: Page 14 of Transcript.

During the last day of the trial, the defense attorney motioned the court to be removed as counsel, claiming ethical problems between him and the defendant. See: Transcript page 22, of last day of trial. Also on the last day of trial, during recess, the trial attorney and the defendant went before the magistrate judge McLorey, to address the ethical problem which existed and to have himself removed as counsel.

The magistrate (Judge McLorey) granted counsel's motion to withdraw as counsel. The trial judge stated that Judge McLorey had advised her of what his ruling was, and that she is still denying the defense attorney's motion to be relieved as counsel. See: Transcript pages 3-23.

On the date of October 21, 2005, the jury found the defendant guilty of being a felon in possession of ammunition. During the impeachment hearings of Tommy Boyd, by defense counsel, Tommy Boyd, wrote a statement the night of this incident proclaiming that the defendant had a nine millimeter, but never mentioned Mr. Abdallah's name in the statement. See: Page 1-118.

After the defendant took the stand to testify on his own behalf, he stated that he never possessed the High Point 45. magnum pistol. The defense attorney presented evidence to the government that Cory Scott, had purchased a 45 caliber pistol, on February 28, 1997. See: Transcript Page 3-81. The defense attorney, presented this evidence in bench conference, outside the presence of the jury, only after Cory Scott, and the defendant had both taken the stand to testify.

On the date of September 12, 2006 the defendant was sentenced by the United States District Court, Judge Seymour with a cross reference to a first degree murder and attempted murder, to a term of life imprisonment.

Ground One: Evidence by the state that was use in federal court to prosecute a lesser offense, cannot be use in the state court to prosecute a greater offense, because it violates the Double Jeopardy Clause.

THE COURT: All right. With regard to the defendant's objection, the defendant has objected on the grounds that the presentence reports reference to murder is improper, and that the defendant was not tried or convicted on a murder charge. The Court has found that the murder reference was proper. The defendant also contends that the proper cross-reference was not first degree murder, but should be for second degree murder. In *Booker* the Supreme Court invalidated mandatory application of the United States sentencing guidelines, thereby making the guidelines effectively advisory.

Booker instructs the sentencing court to make individual sentencing decisions grounded in all of the factors that are set forth in Title 18 United States Code, Section 3553 (a). In calculating the proper guideline range this court must take into consideration appropriate findings of fact.

Therefore, a district court in calculating the proper guideline range in any case is still empowered to make findings outside of the jury verdict. Here the Court finds that the government has proven that the defendant shot into a crowd of people and struck two victims, fatally hitting one person.

As such, the Court finds that the ~~preference~~ reports cross-reference to murder in this case is proper. The Court also finds that a cross-reference to first degree murder is appropriate, as the record demonstrates, that in this case Mr. Abdullah's actions were premeditated.

Premeditation is a fully formed conscious purpose to kill that may be formed at a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act he's about to commit and the probable result of the act. There are a number of factors that the Court has taken into consideration that prove that Mr. Abdullah's actions were premeditated.

For example, Mr. Thurston Lane testified during the trial observing an agitated Abdullah, and that the defendant stated, men, they playing around, they are shooting in the air, I'm going to shoot for real. Mr. Abdullah was then observed by him and other witnesses emptying the ammunition clip and purposely firing into a crowd of people.

There was also testimony at the trial with regard to testimony by Mr. Boyd that Mr. Abdullah stated, give me the gun. The defendant's statements and actions show a premeditated purpose, and the Court finds that the defendant consciously and

maliciously fired into a crowd of people, and that the presentence reports cross-reference to first degree murder is appropriate. Therefore, the defendants' objection is overruled. See: Sentencing Transcript Page 18-19

Lambert v. Workman, 594 F3d 1260 (10th Cir. 2010)
Under double jeopardy principles, a defendant cannot be prosecuted for a greater offense following his conviction for a lesser included offense.

U.S. v. Johnson, 169 F3d 1092 (8th Cir. 1999)
A state prosecution that is merely a sham and a cover for a federal prosecution such that it is in essence a second federal prosecution may violate the double jeopardy clause.

U.S. v. Guzman, 85 F3d 823 (1st Cir. 1996)
Bartkus v. Illinois, 359 US 121, 131-33 3 LE2d 684, 79 SCT 676 (1959)
Defendants prosecuted by two sovereign governments for same conduct may on occasion be able to invoke double jeopardy protection.

In my conclusion: Detainer is asking the Sumter County General Session Court House, to carefully review this motion, and if you see that the Detainer has legitimate merits under the double jeopardy clause, detainer is requesting for all state charges to be dismissed as they were before the Federal government took over the case.

I declare under penalty of perjury that the foregoing is true, and correct, executed on the date of 3/2/16.

Signature: Mutegin Abdullah
Respectfully Submitted

THE STATE OF SOUTH CAROLINA
In The South Carolina Court of Appeals
Appeal From Sumter County
Court Of General Sessions
D. Craig Brown

CASE NO. 2016-002217

Date: 12-14-16

The State of South Carolina
Muttajin Fatir Abdellah

V.

Respondent
Appellant

Dear Clerk of Court

Enclose is a copy and exhibit of my eleven page motion
from the U.S. Court of Appeals For the fourth Circuit, to
substantiate my argument on a motion that I sent to you
a day before, which was 12-12-16.

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