United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-3020 **September Term, 2019**

FILED ON: June 26, 2020

UNITED STATES OF AMERICA,
APPELLEE

v.

ORLANDO BELL,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:17-cr-00234-7)

Before: HENDERSON, WILKINS and KATSAS, *Circuit Judges*

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs of the parties. *See* FED. R. APP. P. 34(a)(2); D.C. CIR. R. 34(j). The Court has afforded 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 stated below, it is

ORDERED AND ADJUDGED that the judgment of the District Court be **AFFIRMED.**

Following a jury trial, Orlando Bell was convicted of Unlawful Possession with Intent to Distribute Cocaine Base, in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(C), and of Using, Carrying, and Possessing a Firearm During a Drug Trafficking Offense, in violation of 18 U.S.C. § 924(c)(1). **J.A. 529.** The jury acquitted Bell of the charge of Conspiracy to Distribute and Possess with Intent to Distribute Cocaine Base and Heroin, 21 U.S.C. § 846. **J.A. 529.** The District Court sentenced Bell to seventy months of incarceration on the drug charge and to sixty months of incarceration on the firearm charge, to be served consecutively. **J.A. 517-19.** Bell raises four issues on appeal; we find merit in none of them.

Bell first contends that the District Court erred in denying his motion to dismiss the firearm charge and in granting the government's motion to amend the superseding indictment. **Blue Br. 5-13.** Specifically, the original indictment listed the possession charge as Count Thirty-Six and the firearms charge as Count Thirty-Seven. **J.A. 31.** The grand jury issued a superseding indictment, which listed Bell's possession charge as County Thirty-Seven and the firearms charge as Count Thirty-Eight. **J.A. 48.** Count Thirty-

Eight, the firearms charge in the superseding indictment, still referenced the predicate drug offense (the possession charge) as "Count Thirty-Six," even though the drug offense had been renumbered as Count Thirty-Seven. **J.A. 49.** The District Court denied Bell's motion to dismiss Count Thirty-Eight of the superseding indictment, and granted the government's motion to amend the superseding indictment to correct the numeration error. **J.A. 305-09.** The government then filed a "Retyped Indictment," **J.A. 285-302**, which, in Count Thirty-Eight, identified Count Thirty-Seven as the predicate offense**, *id.* 300**. Bell now argues that the amendment violated the Grand Jury Clause of the Fifth Amendment. **Blue Br. 5-13.**

It is a "settled rule in the federal courts that an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form." *Russell v. United States*, 369 U.S. 749, 770 (1962); *see* U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."). "An amendment of form and not of substance occurs when the defendant is not misled in any sense, is not subjected to any added burden and is not otherwise prejudiced." *United States v. Kegler*, 724 F.2d 190, 194 (D.C. Cir. 1984); *see also United States v. Bush*, 659 F.2d 163, 167 (D.C. Cir. 1981) (amendment may permissibly "correct a clerical error plainly insignificant in nature" if the defendant was not "misled by the miscue"). Indeed, upon finding an absence of prejudice to a defendant, we have previously countenanced the judicial amendment of an indictment to correct the typographical omission of the *mens rea* of an offense. *United States v. Sobamowo*, 892 F.2d 90, 97 (D.C. Cir. 1989). Bell neither contended below that he was prejudiced by this obvious typographical error**, J.A. 309,** nor makes any claim of prejudice now. We therefore affirm the District Court's denial of Bell's motion to dismiss Count Thirty-Eight of the indictment and its grant of the government's motion to amend the indictment.

Second, Bell argues that the District Court erred in denying his motion to suppress evidence from the electronic surveillance of Wayne Holroyd's phone, which allowed the government to identify Bell as a person of interest. **Blue Br. 14-20.** Following Chief Judge Beryl A. Howell's signing and issuance of an order authorizing the continuation of the wiretap, **J.A. 123-33,** the Clerk's Office informed the government that it did not have signed versions of the affidavit and application in support thereof – rather, it had unsigned versions, together with the signed order. **J.A. 134-35.** In denying Bell's motion to suppress, the District Court found that the at-issue wiretap order had been properly supported by an affidavit and application sworn to and signed before Chief Judge Howell. **J.A. 253-58.** Bell hypothesizes that "there were no signed copies" of the affidavit and application, Appellant's Opening Br. 19, and contends that the wiretap order was therefore facially insufficient under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.* "In assessing a district court's denial of a wiretap suppression motion, the court reviews the district court's legal conclusions *de novo* and its factual findings for clear error." *United States v. Williams*, 827 F.3d 1134, 1147 (D.C. Cir. 2016).

Title III – which "allows judges to issue wiretap orders authorizing the interception of communications to help prevent, detect, or prosecute serious federal crimes," *Dahda v. United States*, 138 S. Ct. 1491, 1494 (2018) – requires each application for such an order to, *inter alia*, "be made in writing upon oath or affirmation to a judge of competent jurisdiction," 18 U.S.C. § 2518(1). Title III authorizes the suppression of evidence gleaned from a wiretap upon a showing that "the order of authorization or approval under which it was intercepted is insufficient on its face." *Id.* § 2518(10)(a)(ii). In assessing an order for facial insufficiency, "a reviewing court must examine the four corners of the order and establish whether, on its face, it contains all that Title III requires it to contain." *United States v. Scurry*, 821 F.3d 1, 8 (D.C. Cir. 2016). But Bell points to no deficiency within the order's four corners, *see id.*, nor does he establish that the District Court's finding that the order was properly supported by an affidavit and application sworn to and signed before Chief Judge Howell was clearly erroneous. Therefore, we affirm the District Court's denial of Bell's motion to suppress evidence from the wiretap of Holroyd's phone.

Third, Bell asserts that the District Court erred in applying a two-level sentencing enhancement for obstruction of justice. **Blue Br. 20-24.** Relying primarily on the testimony of a cooperating witness that Bell "told" him to "get rid of [the witness's] phone," J.A. 406, the District Court found by a preponderance of the evidence that Bell "did attempt to impede the government's investigation" and applied the two-level sentencing enhancement under Section 3C1.1 of the U.S. Sentencing Guidelines. J.A. 495; *see id.* 495-97. Bell contends that the cooperating witness was not credible, **Blue Br. 23-24,** and also that his testimony, even if believed, establishes only that Bell "suggested" the witness dispose of the phone, which Bell argues "is not sufficient to establish obstruction of justice." Appellant's Opening Br. 22. On appeal of sentencing enhancements, "purely legal questions are reviewed *de novo*; factual findings are to be affirmed unless clearly erroneous; and we are to give due deference to the district court's application of the sentencing guidelines to facts." *United States v. Vega*, 826 F.3d 514, 538 (D.C. Cir. 2016) (per curiam) (brackets and citation omitted). We give "the greatest deference" to "the district court's credibility determinations." *United States v. Hart*, 324 F.3d 740, 747 (D.C. Cir. 2003) (brackets and citation omitted). Where a litigant fails to preserve his claim of error by raising an objection below, our review is only for plain error. *Puckett v. United States*, 556 U.S. 129, 134-35 (2009); FED. R. CRIM. P. 52(b).

The Sentencing Guidelines provide for a two-level sentencing increase for a defendant who has "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation . . . of the instant offense of conviction[.]" U.S.S.G. § 3C1.1; *see also id.* cmt. 4(D) (listing, under "Examples of Covered Conduct," "destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation . . . or attempting to do so"). Attacking the witness's credibility, Bell points to the witness's failure to mention Bell's name earlier in the investigation and to inconsistencies in the witness's testimony as to the number of their interactions, **Blue Br. 22-24,** but Bell fails to clear the high bar of establishing that the District Court's credibility-driven factual finding was clearly erroneous. Nor do we find clear error in the District Court's application of the sentencing enhancement to behavior that Bell, for the first time on appeal, attempts to cast as a mere "suggestion"; given the witness's testimony that Bell "told" him to dispose of the phone, and given too that the Guidelines sanction the application of the enhancement for "attempt," we cannot find that the District Court committed a "clear or obvious" error in applying the enhancement. *Puckett*, 556 U.S. at 135.

Finally, Bell argues that the District Court abused its discretion by sentencing him based on acquitted conduct. Although Bell was acquitted of the conspiracy charge, the District Court found by a preponderance of the evidence that "Bell was accountable for at least 35 grams of crack cocaine," J.A. 491 – i.e., for an amount that included the cocaine involved in the charged conspiracy. ***See* J.A. 530.** As Bell himself acknowledges, however, "the state of the law permits sentencing based on acquitted conduct." Appellant's Opening Br. 25; *see United States v. Watts*, 519 U.S. 148, 157 (1997) (per curiam) ("[T]he sentencing court [may] consider[] conduct underlying [an] acquitted charge, so long as the conduct has been proved by a preponderance of the evidence."); *see also United States v. Settles*, 530 F.3d 920, 924 (D.C. Cir. 2008) ("[U]nder binding precedent, the Constitution does not prohibit a sentencing court from relying on acquitted conduct."). Bell forwards this claim of error "in order to preserve this issue for when that law is changed." Appellant's Opening Br. 25. Because the District Court did not abuse its discretion by applying settled and binding precedent to the facts before it (the only way in which Bell asserts the District Court erred here), we affirm.

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 petition for rehearing *en banc*. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk