

NONPRECEDENTIAL DISPOSITION

To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Argued January 30, 2026

Decided March 23, 2026

Before

MICHAEL B. BRENNAN, *Chief Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

No. 25-1302

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

TOMMIE L. HANEY,
Defendant-Appellant.

Appeal from the United States District
Court for the Western District of
Wisconsin.

No. 3:23-cr-00123-wmc-1

William M. Conley,
Judge.

ORDER

Tommie L. Haney pleaded guilty to conspiring to distribute and possessing with intent to distribute methamphetamine and cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 846. In calculating Haney's total adjusted offense level at sentencing, the district court applied a 2-level enhancement under U.S.S.G. § 2D1.1(b)(1) for possessing a firearm in furtherance of the drug conspiracy. Because the district court did not clearly err in applying that enhancement, we affirm.

I.

Haney and a co-defendant, Quo Vadis Lewis, led a drug conspiracy involving several co-conspirators and spanning from August 2021 to June 2023. The two coordinated shipments of narcotics, traveled together to pick up drugs, and frequently discussed their drug business over the phone. Law enforcement officers observed Haney at Lewis's residence. In March 2022, Haney attempted to pick up a large quantity of methamphetamine from Lewis's residence. In March 2023, Haney was seen at that residence following a controlled sale of methamphetamine, and in May 2023, Haney was seen after he completed a cocaine deal there. As part of the conspiracy, Haney also completed several other controlled sales of methamphetamine and cocaine.

In April 2023, Haney's cocaine supplier was arrested and three guns were found in the supplier's residence. Haney spoke with his co-conspirators about this arrest. In May 2023, co-conspirator Samuel Teague was arrested. A search of his house yielded cocaine, cash, and a firearm. Haney told a family member, "[M]y homeboy just got caught with 9 and half ounces ... half pound of weed and a pistol ... that's where all my muckin [sic] money went."

Throughout the conspiracy, Haney spoke with Lewis and other individuals about firearms. In June 2023, Haney messaged a customer, "I just got a few hand joints ... 2 40s and a 9." He said one of the guns was a "sig/9" they had previously discussed, and the other a "Taurus g2." In May 2023, Haney asked Lewis about guns, learning that Lewis possessed a Taurus G2C and a "rusty Smith & Wesson .40." Based on this information, Haney then offered to sell these guns. He told another associate about a "9 Sig," who agreed to buy it. He also told an unknown customer, "[M]y people got poles for sale ... he got a few 9 sigs right now."

Later in June 2023, officers arrested Haney in a motel room in Wausau, Wisconsin where they found cocaine and cash. After executing a search warrant at Lewis's residence (also in Wausau), officers found quantities of cocaine and marijuana, a digital scale, a money counter, and cash. In addition, the search at Lewis's home yielded 9mm ammunition and a Taurus 9mm handgun. Officers further found two .40 caliber handguns—a Glock 23 and a Llama—along with .40 caliber ammunition. Lewis's DNA was detected on all three firearms. Haney's DNA was later detected on the Taurus 9mm handgun that became the subject of the 2-level enhancement for Haney.

II.

Haney was indicted for, among other things, conspiring to distribute or possess with intent to distribute controlled substances in violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 846. Because the controlled substances included 500 grams or more of mixtures or substances containing detectable amounts of methamphetamine and cocaine, the minimum imprisonment term was 10 years with 5 years of supervised release, and the maximum term was life imprisonment, among other penalties. 21 U.S.C. § 841(b)(1)(A); 21 U.S.C. § 841(b)(1)(B)(ii).

With the assistance of counsel, Haney pleaded guilty. A Presentence Report (PSR) was prepared in which, based on the quantity of drugs involved, Haney's base offense level was 38 for the drug conspiracy. U.S.S.G. § 2D1.1(a)(5) (referencing Drug Quantity Table in (c)), (c)(1) ("90,000 KG or more of Converted Drug Weight"). Relevant here, the PSR included a 2-level enhancement for possessing a firearm. U.S.S.G. § 2D1.1(b)(1). Combined with other enhancements, Haney's total adjusted offense level was 43, and his criminal history category was VI. The advisory Guidelines recommended life imprisonment. Haney filed written objections to portions of the PSR, including the 2-level U.S.S.G. § 2D1.1(b)(1) enhancement:

Guideline Calculation: The defendant objects to the application of §2D1.1(b)(1) because the defendant's firearms sales were not connected to his drug trafficking. The defendant admits that his DNA was found on a firearm in Quo Vadis Lewis's residence. In addition, there is no evidence suggesting the defendant carried a firearm during drug transactions or kept one within reach during drug-related activities.

Dkt. 321, at 2–3.

At Haney's sentencing hearing, the district court reviewed these written objections and overruled his objection to the 2-level enhancement. The court explained it was "more likely than not that the defendant possessed firearms for sales to others." To support its conclusion, the district court considered (1) communications which indicated Haney trafficked in the sale of firearms, (2) a firearm referenced during intercepted communications pertaining to drug sales contained Haney's DNA, and (3) the firearm was found in "close proximity" to multiple controlled substances and other items used in drug trafficking at co-defendant Quo Vadis Lewis's apartment.

After overruling Haney's other objections, the district court adopted the PSR's guidelines determination. The government sought a 180-month sentence. Haney

requested between 120 and 150 months in prison. After considering 18 U.S.C. § 3553(a)'s sentencing factors and the parties' arguments, the court imposed a sentence of 168 months in prison, with 5 years of supervised release. Haney timely appeals.

III.

We review the district court's application of the Sentencing Guidelines de novo. *United States v. Taylor*, 160 F.4th 874, 880 (7th Cir. 2025). Challenges to the underlying factual determinations are reviewed for clear error. *Id.* The clear-error standard is deferential. We do not disturb the district court's findings unless, after examining the evidence and the reasonable inferences, "we are left with the definite and firm conviction that a mistake has been made." *Id.* (quotation omitted).

Under U.S.S.G. § 2D1.1(b)(1), a two-level enhancement applies "[i]f a dangerous weapon (including a firearm) was possessed." Application Note 11 of § 2D1.1(b)(1) explains that the enhancement "reflects the increased danger of violence when drug traffickers possess weapons." That note also states, "[t]he enhancement should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." U.S.S.G. § 2D1.1(b)(1) (Application Note 11).

This imposes a "twofold burden." *United States v. Sanchez*, 989 F.3d 523, 544 (7th Cir. 2021). First, the government must prove by a preponderance of the evidence that the defendant possessed a weapon either actually or constructively, meaning he had the power and intention to control the weapon. *Id.* And a firearm is presumed to have been used in furtherance of the conspiracy when it is found in "close proximity" to the illegal drugs. See *United States v. Zamudio*, 18 F.4th 557, 561–62 (7th Cir. 2021) (quotations omitted). Second, if the government satisfies this burden, the defendant must show a clear improbability that he possessed the weapon in connection with the offense. *Sanchez*, 989 F.3d at 544.

A.

The government presented evidence to show that Haney possessed a firearm in furtherance of the drug conspiracy. This included intercepted communications in which Haney and his co-conspirators discussed firearms they possessed. One of the messages specifically referred to his possession of a Taurus handgun for sale. A Taurus 9mm handgun was later found at Lewis's house in close proximity to drugs. Tests revealed Haney's DNA on that handgun. Based on the government's evidence, the district court

found that Haney possessed a firearm in furtherance of the drug conspiracy. We must decide whether that finding was clear error.

Haney challenges the district court's finding by advancing a "middleman" theory and a "secondary transfer" theory.

1.

Arguing he acted only as a middleman, Haney contends he communicated about firearms others possessed—he did not claim to possess a Taurus himself. He could later acquire those firearms for sale to an interested buyer. Per Haney, the potential to possess at some future point is not possession for purposes of the enhancement.

It is true that in some of these intercepted communications, Haney is heard discussing firearms others possessed. "[M]y people got poles for sale ... he got a few 9 sigs right now." But Haney's argument overlooks other intercepted communications showing he personally possessed various firearms, including a Taurus. "I just got a few hand joints ... 2 40s and a 9," one being a "sig/9" and another a "Taurus g2." Based on these communications, Haney's middleman theory falls short of clear error.

2.

Haney next submits that his DNA was found on the gun, not because he touched it, but because Lewis transferred Haney's DNA onto the firearm. The two men frequently touched the same cash and drugs in furtherance of the conspiracy. So, in his view, it is possible that Lewis transferred Haney's DNA from these shared items onto the Taurus 9 mm handgun.

Before addressing this contention, we consider whether, as the government says, Haney waived this argument by failing to raise it in his objections to the PSR or at sentencing. Indeed, in his objection to the enhancement, Haney "admit[ted] that his DNA was found on a firearm in Lewis's residence." He only contested that the firearm had a nexus to the drug transactions or related activity. To support its waiver argument, the government cites *United States v. Jackson*, 103 F.4th 483, 488 (7th Cir. 2024) ("The argument was not raised below and is thus waived.") (citing *United States v. Payne*, 102 F.3d 289, 293 (7th Cir. 1996) ("We have repeatedly held that a party that fails to press an argument before the district court waives the right to present that argument on appeal.") (citation omitted)).

Haney counters that under *Yee v. City of Escondido*, “[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.” 503 U.S. 519, 534–35 (1992). There, although the Court deemed a newly asserted due process claim waived on appeal, it found a new theory of the plaintiffs’ Fifth Amendment taking claim preserved. *Id.* The plaintiffs, the Court explained, “unquestionably raised a taking claim in the state courts,” so the Court could consider both the physical and regulatory taking theory on appeal. *Id.*

Haney also relies on our court’s cases applying *Yee*. In *Bew v. City of Chicago*, probationary police officers alleged that a certification exam they failed, which resulted in their discharge, violated Title VII as administered. 252 F.3d 891, 892, 896 (7th Cir. 2001). Plaintiffs challenged the exam’s “cut-off score” requirement in the district court. *Id.* at 895. On appeal, this court, citing *Yee*, allowed them to bring a new challenge to the “three strikes rule,” which limited the number of attempts to pass the exam, because it supported their Title VII claim. *Id.* at 895–96. Haney also cites to *United States v. Billups* and *United States v. Otradovec*, in which this court allowed the parties to fill out their interpretation of a statute with new textual arguments on appeal. *United States v. Billups*, 536 F.3d 574, 578 (7th Cir. 2008); *United States v. Otradovec*, 72 F.4th 794, 796 (7th Cir. 2023).

But *Yee*, *Bew*, *Billups*, and *Otradovec* are distinguishable. In objecting to the PSR’s application of the two-level enhancement, Haney did not contest his possession of the firearm. He challenged only its connection to the conspiracy. Under the burden-shifting framework in our caselaw, *Sanchez*, 989 F.3d at 544, Haney effectively conceded the government met its burden to prove possession. His objection went solely to his burden to show a “clear improbability” that the gun possession was in furtherance of his underlying offense.

Yet Haney’s secondary transfer argument, which he raises for the first time on appeal, challenges possession *qua* possession. It is not merely an alternative legal argument, like those preserved in *Yee* and *Bew*. Rather, it attempts to undo a factual concession within a legal burden-shifting framework. And unlike the defendants in *Billups* and *Otradovec*, Haney does not simply buttress his interpretation of a statute. He asks us as an appellate court to resolve a fact question—whether, by a preponderance of the evidence, his DNA was transferred onto the firearm by Lewis—and to do so in the first instance. That is like the argument waived in *Jackson*, in which we declined to decide in the first instance whether unburnt marijuana smelled enough like legal hemp

to reverse a finding of probable cause. 103 F.4th at 488. We thus conclude that Haney's secondary transfer argument has been waived.

3.

Even if not waived, this argument fails on its merits. The district court made reasonable inferences that Haney possessed the firearm. Secondary transfer supposes that Haney's DNA was easily transferrable from shared items to non-shared items. If so, this explains how Haney's DNA was transferred to the Taurus firearm. But it fails to explain why his DNA was not transferred to the other two guns found at Lewis's residence, on which only Lewis's DNA was found.

Now, other inferences could be drawn in Haney's favor. Perhaps the two guns that contained only Lewis's DNA were recently cleaned. Or perhaps they were recently purchased and only handled with clean hands, or only after touching bills or drugs not containing Haney's DNA. And it is conceivable that the Taurus 9 mm handgun is not the same firearm mentioned in the communications that show Haney possessed a Taurus at some point.

Even if inferences on both sides are in equipoise, the tiebreaker goes to the district court's decision. That court's factual finding that Haney possessed the firearm is reviewed for clear error, *Taylor*, 160 F.4th 874 at 880, and the arguments under Haney's theory of secondary transfer do not leave us with a definite and firm conviction that a mistake has been made. *Id.*

B.

The burden then shifts to Haney to show it was clearly improbable that he possessed the firearm in furtherance of the conspiracy. *Sanchez*, 989 F.3d 523, 544. To do so, he must rebut the presumption that, because the firearm was found in "close proximity" to drugs, it was used in furtherance of the drug trafficking conspiracy. *Zamudio*, 18 F.4th at 561–62.

Haney contends the PSR applied § 2D1.1(b)(1)'s two-level enhancement because he was "engaged in selling firearms." But these "firearms sales," he says, "were not connected to his drug trafficking." Similarly, he points out that no evidence shows he carried a firearm during the drug transactions, or that he had one within reach during drug-related activity.

Haney's arguments do not engage with his burden. In applying the enhancement, the district court did not rely solely on the fact that Haney sold firearms. Instead, the court emphasized that a firearm with his DNA on it, referenced in intercepted communications, was found in "close proximity" to drugs in his co-conspirator's house during the conspiracy. The burden does not rest on the government to prove that Haney possessed a gun during a specific transaction or drug-related activity. The burden to rebut the established presumption rests on Haney, which he has failed to carry.

Haney next posits there is no evidence showing that he sold the firearm in question to Lewis. There are many Taurus 9mm handguns in circulation. So, to him, it is more likely that Lewis acquired that gun from someone other than Haney. But this too misses the mark. The government carries no burden to prove that Haney sold this firearm to Lewis. The Taurus 9 mm handgun had Haney's DNA on it, no matter where it came from. And it was found in close proximity to drugs in Lewis's house, where Haney had visited. All this gives rise to a presumption that Haney possessed it in furtherance of the drug conspiracy. Because Haney's arguments fail to rebut that presumption, the district court did not err by applying the 2-level § 2D1.1(b)(1) enhancement.

C.

Failing to show clear error, Haney argues the PSR and district court misstated the legal standard for the § 2D1.1(b)(1) enhancement. The PSR focused on the fact that Haney was "selling firearms." The district court said the firearm's "relationship to the drug offense ... has no bearing on the guideline calculation." As Haney points out, § 2D1.1(b)(1) focuses on possessing, not selling firearms, and caselaw requires some connection to the underlying offense. Though the district court misspoke and said "no bearing," it properly connected possession of the firearm to the underlying offense when it explained that Haney's DNA was found on a firearm "referenced during intercepted communications pertaining to drug sales, and the firearm was found in close proximity to multiple controlled substances and other items used in drug trafficking at co-defendant Quo Vadis Lewis's apartment." Viewed in context, the district court applied the correct legal standard for the § 2D1.1(b)(1) enhancement and gave accurate reasoning for its conclusion and sentencing decisions.

* * *

For these reasons, the district court did not err in imposing a 2-level enhancement under § 2D1.1(b)(1).

AFFIRMED.