NONPRECEDENTIAL DISPOSITION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 December 14, 2022
Decided March 17, 2023

Before

DIANE S. SYKES, *Chief Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

JOHN Z. LEE, *Circuit Judge*

No. 22-2035

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BRYANT LOVE,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

No. 2:17-cr-00002

Philip P. Simon,
Judge.

O R D E R

Bryant Love pleaded guilty to possession and distribution of cocaine and unlawful possession of a firearm as a felon. At the sentencing hearing, the government argued that the district court should apply the 15-year mandatory minimum custodial sentence under the Armed Career Criminal Act ("ACCA"), because Love had committed three prior "violent felony" offenses. 18 U.S.C. § 924(e). The district court disagreed, finding that Love had committed only two such offenses, and imposed a custodial sentence of 96 months.

On appeal, we agreed with the government and ordered the district judge to resentence Love accordingly. *United States v. Love*, 7 F.4th 674 (7th Cir. 2021), *cert. denied*, 143 S. Ct. 159 (2022) ("*Love I*"). On remand, the district court applied ACCA and resentenced Love to 15 years in prison, precipitating this appeal by Love.

Love now argues that one of his predicate offenses, a 1994 Illinois conviction for armed robbery, does not qualify as a "violent felony" under ACCA after *Borden v. United States*, 141 S. Ct. 1817 (2021). But because Love did not raise this argument in either the district court or his first appeal (until his petition for rehearing *en banc*), the argument is forfeited. And, applying plain-error review, we conclude the district court did not commit an obvious error by treating Love's 1994 Illinois offense as an ACCA predicate offense. We therefore affirm.

I.

In 2019, Love pleaded guilty to three counts of possession and distribution of cocaine, 21 U.S.C. § 841(a)(1), and one count of unlawful possession of a firearm while a felon, 18 U.S.C. § 922(g)(1). At Love's first sentencing hearing, the government argued that the district court should apply ACCA's 15-year mandatory minimum sentence, *see id.* § 924(e), because Love had three prior convictions for a "violent felony." They were: (1) a 1994 Illinois conviction for armed robbery; (2) a 2009 federal conviction for distribution of crack cocaine; and (3) a 2015 Indiana conviction for battery of a law enforcement officer resulting in bodily injury.

For his part, Love argued that his 1994 Illinois conviction did not qualify under ACCA because Illinois had sent him a restoration of rights letter, leading him to believe that the conviction had no legal effect. He also argued that his 2015 Indiana conviction was not a "violent felony" for various reasons. The district court rejected Love's first argument but agreed with the latter. Accordingly, it concluded that ACCA's 15-year mandatory minimum did not apply and imposed a custodial sentence of 96 months.

Both Love and the government appealed. The government reiterated that Love qualified as a career offender under ACCA. Love repeated the arguments he had made to the district court. We agreed with the government, concluding that each of Love's three prior offenses qualified as an ACCA "violent felony" offense. *United States v. Love*, 7 F.4th 674 (7th Cir. 2021), *cert. denied*, 143 S. Ct. 159 (2022) ("*Love I*"). We therefore remanded the case for resentencing under ACCA. *Id.*

Love then petitioned this court for rehearing *en banc*, arguing, for the first time, that his 1994 Illinois armed robbery conviction did not qualify as a "violent felony" under *Borden*, 141 S. Ct. 1817. In *Borden*, which was issued after oral arguments in *Love I* but before the appeal was decided, the Supreme Court held that, to be a "violent felony" under ACCA, the use of physical force against the person of another requires "purposeful or knowing conduct." 141 S. Ct. at 1828. Love contended that his 1994 Illinois armed robbery conviction did not meet this definition because the Illinois statute prohibited both the intentional *and reckless* use of force. We denied the rehearing petition. *See Love I*, 7 F.4th 674, *reh'g en banc denied*, Oct. 4, 2021.

On remand, Love presented this new argument to the district court, but the court ruled that it was bound to apply ACCA's 15-year mandatory minimum due to the constraints of the remand. The district court also concluded that, in any event, Love's 1994 Illinois armed robbery conviction was a "violent felony" under circuit law. Therefore, the district court imposed a custodial sentence of 15 years, and Love filed the instant appeal.

II.

This court ordinarily reviews a district court's application of ACCA *de novo*, except when the purported error involves a factual finding, which we review for clear error. *United States v. Robinson*, 29 F.4th 370, 374 (7th Cir. 2022). Here, however, we must consider a threshold question: whether Love waived or forfeited his new argument about his 1994 Illinois conviction by failing to raise in a timely manner. *See United States v. Nebinger*, 987 F.3d 734, 742 (7th Cir. 2021).

Waiver requires an intent to abandon an argument, and it precludes appellate review of the issue waived. By contrast, forfeiture occurs when a party inadvertently omits an available argument, and we review the merits of the forfeited argument for plain error. *Robinson,* 29 F.4th at 377. An error is plain when it is obvious and affects the forfeiting party's substantial rights, as well as the fairness and integrity of the judicial proceedings. *Nebinger*, 987 F.3d at 738. As in *Robinson*, we find forfeiture to better suit Love's case. 29 F.4th at 377. The problem Love faces is not that he intentionally abandoned the argument, but that he did not raise it until his petition for rehearing in *Love I*.

Love argues that *Borden* is an intervening change in the law, compelling us to change our precedent. We disagree. First, prior to the instant appeal, we have had no occasion to address whether the *mens rea* of recklessness is sufficient to sustain a

conviction under the Illinois armed robbery statute and, if so, whether this is sufficient to render such a conviction a "violent felony" under ACCA. In this regard, Love notes that we have ruled that the offense of armed robbery in Illinois requires enough force to qualify as a "violent felony" under ACCA. *See Klikno v. United States*, 928 F.3d 539, 545 (7th Cir. 2019). This may be true, but *Klikno* was not a *mens rea* case; it remains undisturbed by *Borden*.

Second, *Borden* did not make available to Love any new argument that he could not have raised during his initial sentencing hearing or in his first appeal. The arguments advanced in *Borden* had already been raised in at least one other circuit court prior to his sentencing, *see United States v. Borden*, 769 F. App'x 266 (6th Cir. 2019), and nothing in Supreme Court or Seventh Circuit precedent foreclosed Love from doing the same. *Nebinger*, 987 F.3d at 742. In any event, *Borden* involved a straightforward application of the "by-now-familiar method" of the categorical approach. 141 S. Ct. at 1822. Indeed, *Borden* acknowledged that, at least since 2013, it has been recognized that "[a]n offense does not qualify as a 'violent felony' unless the *least* serious conduct it covers falls within the elements of the clause." *See id.* at 1832 (citing *Moncrieffe v. Holder*, 569 U.S. 184, 190–91 (2013)). Thus, even without the benefit of *Borden*, Love could have made this argument to the district court or even to this court on his first appeal.

What is more, Love had the benefit of *Borden* before the panel's decision in *Love I*, but neglected to raise the matter until after the decision was issued. By waiting, Love forfeited the argument.

Having forfeited his argument that his 1994 Illinois conviction was not a predicate offense under ACCA because it criminalizes the reckless use of force, Love must show that the district court committed plain error during his sentencing to prevail. We conclude that Love cannot make this showing.

III.

Under ACCA, an offense is a "violent felony" if it "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). At the time of Love's Illinois conviction in 1994, the armed robbery statute criminalized a person who "takes property … from the person or presence of another by the use of force or by threatening the imminent use of force," 720 ILCS 5/18-1 (1994), while armed with a dangerous weapon, *id.* 5/18-2. To decide whether the Illinois offense satisfies ACCA's elements clause, we use the familiar categorical approach and ask whether the crime necessarily involved the defendant's

purposeful or knowing use, attempted use, or threatened use of physical force against the person of another. *See Borden*, 141 S.Ct. at 1822. If the Illinois armed robbery statute permitted a defendant to be convicted for recklessly using force against another in the act of taking property from that person, it would not categorically match ACCA's elements clause and could not serve as an ACCA predicate offense.

It is not obvious that, in 1994, the crime of armed robbery in Illinois encompassed the reckless use of force. On the one hand, when Love was convicted of this crime, the Illinois statute was silent as to the state of mind needed to convict a person of using force to commit an armed robbery. In the face of statutory silence, the default rule in Illinois was that the crime can be completed with purpose, knowledge, or recklessness. *See* 720 ILCS 5/4-3 (1993); *see also People v. Jones*, 595 N.E.2d 1071, 1075 (Ill. 1992) ("[E]ither intent, knowledge or recklessness is an element of robbery even though the statutory definition of robbery does not expressly set forth a mental state."). It seems arguable, then, that a defendant could have violated the statute by recklessly using force to complete an armed robbery in Illinois in 1994. If so, the crime would be too broad to qualify as a "violent felony" under ACCA. *See Borden*, 141 S. Ct. at 1822.

On the other hand, the Illinois pattern jury instructions at the time of Love's conviction suggest that the default rule may have applied only to the "taking" element of the statute (requiring that a person "takes property") and not to the "force" element ("by the use of force or by threatening the imminent use of force"). The instructions state that the prosecution must prove, first, that the defendant "intentionally, knowingly, or recklessly" took the property from another, and second, that the defendant took property "by the use of force or by threatening the imminent use of force." Illinois Pattern Jury Instructions—Criminal § 14.02. According to the government, the inclusion of recklessness in the taking element—but *not* the force element—shows that the use of force must be intentional or knowing.

In light of these two competing views, it is not obvious that the crime of armed robbery in Illinois back in 1994 encompassed the reckless use of force. Therefore, Love cannot establish that the district court plainly erred in treating Love's conviction as a "violent felony" under ACCA even under the test espoused in *Borden*.

AFFIRMED