UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

UNITED STATES OF AMERICA	)	
	)	
	)	Case No. 2:03CR10095
	)	
v.	)	**OPINION AND ORDER**
	)	
BRIAN ANTONIO BURRELL,	)	By: James P. Jones
	)	Chief United States District Judge
Defendant.	)	

R. Lucas Hobbs, Assistant United States Attorney, Abingdon, Virginia, for United States of America; Henry S. Keuling-Stout, Keuling-Stout, P.C., Big Stone Gap, Virginia, for Defendant.

In this opinion, I resolve certain sentencing objections by the defendant.

On April 5, 2004, the defendant, Brian Antonio Burrell, pleaded guilty to an information charging him with forcibly assaulting an employee of the United States Government while such employee was engaged in the performance of his official duties, which conduct included physical contact with the employee, in violation of 18 U.S.C.A. § 111(a)(1) (West Supp. 2004). Burrell was an inmate of the United States Penitentiary in Lee County, Virginia, located in this judicial district, and the employee assaulted was Hilmat Mansour, an employee of the Bureau of Prisons ("BOP"). Mansour, an inmate case manager, was assaulted while he and other BOP

employees were attempting to break up a fight between Burrell and another inmate on September 8, 2003.

A presentence investigation report ("PSR") has been prepared by a probation officer of this court and the defendant has filed objections to the report. Evidence and argument was heard on these objections on June 21, 2004, and those objections are now ripe for decision.

Burrell objects to the description of the offense conduct in the PSR. (Objection No. 3.) Burrell denies that he grabbed Mansour's testicles and spit in his face, as recited in paragraphs 6 and 7 of the PSR. The defendant bares the burden of showing that the facts set forth in the PSR are incorrect. *See United States v. Terry*, 916 F.2d 157, 162 (4th Cir. 1990). After having heard the testimony of Burrell and Mansour, I find that the defendant has not met his burden of proof as to these objections. I credit the testimony of Mansour that while struggling with Burrell in an effort to restrain him, Mansour felt Burrell attempting to grab him by the testicles. Later, as Burrell was being led away, he deliberately spat in Mansour's face, spraying Mansour with blood from Burrell's mouth.

Burrell also denies that he attempted to bite another staff member during the incident, as recited in paragraph 7 of the PSR. (Objection No. 4.) The government offered no evidence as to any such attempt, although Mansour testified that he

"believe[d]" that Burrell had tried to bite him. Accordingly, I will sustain the objection as to the allegation that Burrell tried to bite a staff member other than Mansour on the date of the incident.[1]

Burrell next objects to his classification as a career offender, pursuant to the U.S. Sentencing Guidelines Manual ("U.S.S.G.") § 4B1.1 (2003). That provision provides for an enhanced sentence if

> (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.1. A "crime of violence" is defined by the Sentencing Guidelines as

> any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that--
>
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

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[1] Objections Nos. 3 and 4 do not affect the calculation of the guideline range in this case, but because they may be relied upon by the Bureau of Prisons in its classification of the defendant, it is still proper that they be determined.

Id. § 4B1.2(a). The commentary enumerates certain offenses that are crimes of violence and explains that

> [o]ther offenses are included as "crimes of violence" if (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted . . . , by its nature, presented a serious potential risk of physical injury to another.

Id. § 4B1.2, cmt. n.1.

The question presented by these objections is whether the instant conviction and certain of the prior predicate convictions constitute crimes of violence within the meaning of the Sentencing Guidelines. To resolve these issues, I am required to "determine as a matter of law whether the elements of the prior offense . . . involved conduct that presented a serious risk of physical injury to another." *United States v. Kirksey*, 138 F.3d 120, 124 (4th Cir. 1998).[2] Under this categorical approach, where the definition of the crime is ambiguous, I may look further only to the charging documents in the case in order to determine the nature of the offense. *See United States v. Pierce*, 278 F.3d 282, 286 (4th Cir. 2002).

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[2] Because this determination is a matter of law and not of fact, my decision does not implicate the principles of *Blakely v. Washington*, No. 02-1632, 2004 WL 1402697 (U.S. June 24, 2004). Moreover, the fact of prior conviction is not the type of fact requiring jury determination. *See Apprendi v. New Jersey*, 530 U.S. 466, 488 (2000).

Burrell argues that the instant offense is not a crime of violence. In determining career offender status, I must follow the categorical approach as to the instant offense as well as prior predicate convictions. *See United States v. Martin*, 215 F.3d 470, 472 (4th Cir. 2000) (applying categorical approach as to instant conviction of bank larceny). In other words, resolution of the factual dispute between Burrell and his victim as to Burrell's conduct during the incident is irrelevant to the determination of whether Burrell's instant offense is a crime of violence.

The statute under which Burrell was convicted, 18 U.S.C.A § 111(a)(1), provides in pertinent part that

> Whoever . . . forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person . . . while engaged in or on account of the performance of official duties . . . shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year, or both, and in all other cases, be fined under this title or imprisoned not more than 8 years, or both.

18 U.S.C.A. § 111(a)(1). The information in this case follows the initial wording of the statute and in addition, expressly charges that there was physical contact with the victim. While simple assault under the statute might encompass conduct that did not present a serious risk of physical harm to another, *see United States v. Campbell*, 259 F.3d 293, 296 (4th Cir. 2001) (holding that simple assault under § 111(a)(1) does not include an assault involving physical contact), the additional charged element of

physical contact does make it a crime of violence. *See United States v. Diaz*, No. 93-50299, 1993 WL 526229, at *2 (9th Cir. Dec. 20, 1993) (unpublished) (holding that violation of § 111 constituted crime of violence under the career offender guideline, where indictment charged that defendant forcibly assaulted government employee).

For these reasons, I hold that the instant offense is a qualifying crime of violence under U.S.S.G. § 4B1.1.

Burrell was previously convicted of attempted murder in state court in Alabama and he concedes that this is a crime of violence that can serve as one of the predicate offenses for the career offender guideline. He attacks two other possible predicate convictions, however.

As set forth in paragraph 45 of the PSR, Burrell was convicted in 1996 in state court in Alabama of burglary in the third degree. A person is guilty of burglary in the third degree under Alabama law if "he knowingly enters or remains in a building with intent to commit a crime therein." Ala. Code § 13A-7-7 (1975). Pursuant to the Sentencing Guidelines, burglary of a dwelling is a crime of violence, but not burglary of a commercial building. *United States v. Harrison*, 58 F.3d 115, 119 (4th Cir. 1995). The record does not contain the charging documents in this case and although the probation officer has reviewed a police report that states that Burrell actually burglarized a dwelling, I am not permitted to consider facts outside of the charging

documents in determining this question. Accordingly, I will sustain Burrell's objection to the use of the 1996 Alabama conviction.

Finally, Burrell attacks his federal conviction in 2000 (described in paragraph 53 of the PSR) for possession of an unregistered firearm in violation of 26 U.S.C.A. § 5861(d) (West 2002). He argues that the charging documents for this conviction do not show the type of unregistered firearm and thus it is not legally possible to consider that he was convicted of a crime of violence, even though the presentence report in that case shows that the firearm was a sawed-off shotgun and Fourth Circuit authority establishes that illegal possession of a sawed-off shotgun is a predicate crime of violence under the guidelines. *See United States v. Johnson*, 246 F.3d 330, 335 (4th Cir. 2001). I find the defendant's argument to be without merit.

The definition of a "firearm" as applied to 26 U.S.C.A. § 5861(d) means a sawed-off rifle, a machine gun, or a silencer, as well as a sawed-off shotgun. *See* 26 U.S.C.A. § 5845 (a), (e) (West 2002). All of these weapons share the characteristics that persuaded the Fourth Circuit to hold that possession of a sawed-off shotgun is a crime of violence because such weapons are "inherently dangerous and lack usefulness except for violent and criminal purposes." *Johnson*, 246 F.3d at 334 (quoting *United States v. Allegree*, 175 F.3d 648, 651 (8th Cir. 1999)). Accordingly,

I find that Burrell's conviction constitutes a crime of violence, even though the exact nature of the firearm is not mentioned in the charging documents.

Because the instant offense and at least two of Burrell's prior convictions are crimes of violence, it is proper to classify him as a career offender and his objections in this regard (Objections Nos. 5, 14, 19, and 22) are denied.

Burrell objects to the assignment of criminal history points for his prior conviction for possession of forged checks, described in paragraph 44 of the PSR. (Objection No. 7.) That conviction occurred in 1995 when Burrell was seventeen years old and he received a sentence of one year and one day, although he later served additional jail time for failure to pay a fee imposed under the Alabama Victim's Compensation Act. I agree with Burrell that his sentence does not qualify for criminal history points because it was for an offense committed prior to the age eighteen and he was not sentenced to imprisonment exceeding one year and one month. *See* U.S.S.G. § 4A1.2(d). I will thus sustain his objection and find that no points should be attributed to this sentence. However, the absence of criminal history points for this sentence does not affect his criminal history category, since while it reduces his total criminal history points to sixteen, instead of nineteen, his criminal history category is still VI.

Finally, Burrell objects to the imposition of restitution for Mansour, his victim. (Objection No. 20.) When Mansour and the other BOP employees attempted to restrain Burrell, Mansour fell to the floor and injured his knee. This knee injury resulted in considerable medical expense, which has been paid on Mansour's behalf by the United States Department of Labor's Office of Workers' Compensation.

In his plea agreement, Burrell agreed to pay restitution for "all matters included as relevant conduct." (Plea Agreement ¶ 7.) Relevant conduct includes "all acts . . . committed . . . by the defendant . . . that occurred during the commission of the offense of conviction [or] in preparation for that offense . . . [and] all harm that resulted from the acts." U.S.S.G. § 1B1.3 (a). Moreover, pursuant to the Mandatory Victims Restitution Act of 1996 ("MVRA"), 18 U.S.C.A. § 3663A (West 2000), in the case of an offense resulting in bodily injury to a victim, the defendant must pay "an amount equal to the cost of necessary medical and related professional services," as well as "necessary physical and occupational therapy and rehabilitation." 18 U.S.C.A. § 3663A(b)(2).

Burrell argues that the MVRA does not apply because his instant offense is not a "crime of violence." A "crime of violence" under the MVRA includes an "offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the

offense." 18 U.S.C.A. 16(b) (West 2000). It is necessary to apply a categorical approach to this definition. *See United States v. Bonetti*, 277 F.3d 441, 452 (4th Cir. 2002). For the reasons previously stated in connection with Burrell's career offender status, I find that his instant offense is a crime of violence within the meaning of the MVRA.

Alternatively, Burrell argues that he should not pay restitution for Burrell's injury because he did not intend to cause it. Mansour testified that his injury occurred as follows:

> A. As we, when you're responding to an emergency you evaluate the situation. Upon arrival I observed two inmates on separate sides, one officer has already restrained the inmate on the right. And I observed another officer struggling with Mr. Burrell, asking him to turn around and cuff up is the term we use for submit to restraint. I approached that situation, Mr. Burrell was fighting the officer and refused to cuff up.
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> Q What did you do when you approached Mr. Burrell?
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> A At that time we ordered him to cuff up and at that time he was resisting the verbal orders, and of course from there we just went where we, I believe we turned him around and there was three of us, and we went down on the floor, and that's where I sustained my injury to my knee.

While Burrell may not have expressly intended to injure Mansour in the way that he did, it is clear that Mansour's harm occurred "directly and proximately" from

Burrell's assaultive conduct. *See* 18 U.S.C.A. § 3663A(a)(2) ("the term 'victim' means a person directly and proximately harmed as the result of the commission of an offense for which restitution may be ordered"). Moreover, it was clearly foreseeable to Burrell that his conduct might cause such an injury.

Although Mansour's medical expenses have been paid, the MVRA mandates restitution to the workers compensation payer of these expenses. *See United States v. Cliatt*, 338 F.3d 1089, 1091 (9th Cir. 2003) (holding that MVRA requires restitution to a party that pays a victim's necessary medical expenses in the first instance).

For these reasons, I will deny Burrell's objection to restitution.[3]

Except as noted herein, all of the defendant's objections are denied for the reasons stated or for the reasons stated by the probation officer in his responses to the objections. It is so **ORDERED**.

ENTER: July 6, 2004

/s/ JAMES P. JONES
Chief United States District Judge

[3] Restitution is not a criminal penalty and therefore no jury determination of the facts is required within the meaning of *Blakely v. Washington*. *See United States v. Croxford*, No. 2:02-CR-00302PGC, 2004 WL 1462111, at *14-15 (D. Utah June 29, 2004).