

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :
 :
 v. : CRIMINAL NO. 98-178
 :
 ROBERT EARL MARTIN :

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

May 7, 2001

Defendant Robert Earl Martin ("Martin") was charged with armed bank robbery in violation of 18 U.S.C. § 2113(d) (Count I), and using and carrying a firearm (a sawed-off, double-barreled shotgun) during and in relation to a crime of violence (the bank robbery charged in Count I) in violation of 18 U.S.C. § 924(c)(1) (Count II). He was convicted on both counts. The government is seeking life imprisonment under 18 U.S.C. §3559(c), the "three strikes statute," based on two prior convictions.

Martin filed a motion, relying on Apprendi v. New Jersey, 120 S. Ct. 2348 (2000), contesting the applicability of §3559(c) because the prior convictions were not charged in the indictment nor found by the jury in this action. He argues that his statutory maximum is 25 years on Count I, plus a statutory minimum of 10 years consecutive on Count II, but he should be sentenced according to the Sentencing Guidelines at the offense level 22, criminal history III (51-63 months, plus 120 consecutive months).

BACKGROUND

Prior to trial, on May 28, 1998, the government filed an Information charging prior offenses for consideration at sentencing. The Information claimed Martin had previously been convicted of: (1) second-degree murder, in violation of 18 Pa. C.S.A. §2505(b), to which he plead guilty on February 14, 1974;¹ and (2) armed bank robbery and carrying a firearm in relation to that bank robbery, in violation of 18 U.S.C. §§2113(d) and 924(c), to which he plead guilty on October 24, 1988.

Martin was convicted on the two counts charged in the Indictment on July 1, 1998; the two prior convictions were not submitted to the jury. Martin's post-trial motions for judgment of acquittal were denied on February 25, 2000 and May 1, 2001. Martin has now moved to dismiss the Indictment, or in the alternative, preclude the use of his prior convictions as a basis to increase his sentence beyond the statutory maximum, based on Apprendi v. New Jersey, 120 S. Ct. 2348 (2000)(state hate crime law providing for a sentence enhancement upon finding of intent by a trial judge instead of jury violates the Due Process Clause of the Fourteenth Amendment). For the reasons stated herein, the motion will be denied.

¹The Information also included Martin's February 17, 1978 withdrawal of his guilty plea and entry of a second guilty plea on the same charge; he was resentenced on the second plea.

DISCUSSION

Under 18 U.S.C. §2113(d) (Count I), the maximum sentence for armed bank robbery is twenty-five years and under 18 U.S.C. §924(c)(1) (Count II), a consecutive minimum sentence of ten years is mandated for the firearm violation.

The government seeks to have Martin sentenced to life imprisonment under Section 3559(c), requiring imposition of a life sentence "[n]otwithstanding any other provision of law," for a person convicted of a "serious violent felony" if that person has been convicted on separate prior occasions of two or more "serious violent felonies." 18 U.S.C.A. §3559(c)(1)(A). The government contends the two prior offenses charged in the May 28, 1998 Information constitute the necessary predicate "serious violent felonies." Martin argues that the two prior convictions were not alleged in the Indictment and he has not admitted to them by a plea of guilty in this action, so the alleged prior convictions cannot be used to enhance his sentence.

In Apprendi v. New Jersey, 120 S. Ct. 2348 (2000), the Court considered a New Jersey hate crime statute providing for longer imprisonment "if the trial judge finds, by a preponderance of the evidence, that '[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.'" Id. at 2351 (quoting N.J.

Stat. Ann. §2C:44-3(e) (West Supp. 2000)). At issue was whether the statute was constitutional if the sentencing enhancement element was decided by a judge by a preponderance of the evidence rather than found by a jury beyond a reasonable doubt. The Court held that, "**[o]ther than the fact of a prior conviction**, any fact that increases the penalty for a crime beyond the prescribed statutory maximum, must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 2363-63(emphasis added).

Martin argues the phrase "other than the fact of a prior conviction," refers to the specific facts of Almendarez-Torres v. United States, 523 U.S. 224 (1998). In Almendarez-Torres, the petitioner entered a plea of guilty to a grand jury indictment charging him with being in the United States without the permission of the Attorney General, after having been deported, in violation of 8 U.S.C. §1326. He later admitted he had been deported because of three earlier convictions for aggravated felonies. His sentence was enhanced under Section 1326(b)(2), providing for a maximum 20 year enhancement if the previous deportation was because of an aggravated felony; he was sentenced to 85 months, 61 months beyond the 24 month statutory maximum under §1326(a). The Court rejected petitioner's argument that the indictment had to charge the prior offenses for him to be sentenced under Section 1326(b)(2).

Martin asks this court to find Apprendi excluded only prior

convictions admitted to by defendant. He argues that, unlike the petitioner in Almendarez-Torres, he has not admitted the facts of his prior convictions (or that they constitute "serious violent felonies"); accordingly, the prior convictions had to be proved to a jury beyond a reasonable doubt for him to be sentenced under the "three strikes" statute. The Apprendi Court discussed Almendarez-Torres at length and noted that it was "an exceptional departure," and arguably "wrongly decided." Apprendi, 120 S. Ct. at 2361, 2362. The Apprendi Court recognized that petitioner in Almendarez-Torres had admitted the three prior convictions, but did not hold: "[o]ther than the fact of an **admitted** prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum, must be submitted to a jury, and proved beyond a reasonable doubt." Martin's reading of Apprendi is too narrow.² Even if Almendarez-Torres was "incorrectly decided" and may be overturned, the Apprendi court did not overturn it; it is still precedent binding on this court.

In United States v. Mack, 229 F.3d 226 (3d Cir. 2000), the court affirmed the sentence of a defendant convicted under the "felon-in-possession" statute, 18 U.S.C. §922(g), and sentenced

²If prior convictions cannot enhance a sentence unless found by a jury beyond a reasonable doubt, every trial where the government seeks a sentencing enhancement based on recidivism would require a two-phase trial to prevent the prejudicial evidence of prior convictions improperly influencing the jury determining guilt or innocence of defendant on the trial charges.

under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. §924(e)(1).³ Although the Apprendi issue was not raised, Chief Judge Becker, agreeing with the panel, wrote a concurring opinion discussing how Apprendi might have affected the outcome in Mack. Id. at 236-244. Noting that the "Apprendi majority went out of its way to cast the future viability of Almendarez-Torres into question," he conceded it was still good law. Id. at 239 n.5. Neither the concurring opinion nor the opinion for the court suggests it is constitutionally impermissible for a judge to increase a sentence based upon his or her finding of "facts of prior convictions." Id. at 239 n.5, 235 n.12.

A life sentence is beyond the statutory maximum for Martin's convictions under this Indictment. However, the sentence enhancement is based solely on two prior convictions;⁴ it is constitutional under Apprendi. See also U.S. v. Latorre-Benavides, 241 F.3d 262, 264 (2d Cir. 2001)(rejecting defendant's appeal of sentence under §1326(b) on the ground that "the Apprendi requirement is applicable to facts '[o]ther than facts of a prior conviction.'"); U.S. v. Pacheco-Zepeda, 234 F.3d 411,414 (9th Cir. 2001)(rejecting defendant's Apprendi-based

³The ACCA mandates a fifteen-year minimum sentence and authorizes a life sentence for persons with three prior convictions for violations of the "felon-in-possession" statute.

⁴Section 3559(c)(2)(f) defines "serious violent felonies" to include second-degree murder and robbery (under 18 U.S.C. §2113). There is no question that the prior felonies charged by the government are "serious violent felonies."

appeal of his enhanced sentence under §1326(b); Almendarez-Torres is dispositive even though defendant did not admit to the prior conviction); U.S. v. Martinez-Villalva, 232 F.3d 1329, 1332 (10th Cir. 2000)(rejecting defendant's appeal of his enhanced sentence under §1326(b); under Almendarez-Torres, the fact of his prior felony conviction is not an element that needs to be charged in the indictment); U.S. v. Powell, 109 F. Supp.2d 381, 384 (E.D. Pa. 2000)(Robreno, J.)(overruling criminal defendant's objection to the PSI on the ground that the prior listed convictions were not charged in the indictment).

CONCLUSION

Martin's motion to dismiss the indictment, or in the alternative, to preclude the use of his prior convictions to increase his sentence beyond the statutory maximum will be denied. The court will determine whether the prior convictions charged by the government were actually convictions of defendant Martin at the continued sentencing hearing.

An appropriate Order follows.

