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United States v. Gayle

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UNITED STATES V. GAYLE

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Under federal law, a defendant found illegally in possession of a firearm, who has a prior felony conviction "in any court", may be charged as a felon-in-possession in violation of 18 U.S.C. § 922(g)(1).[1] The purpose of this statute is to protect the public against gun possession by convicted felons. In *United States v. Gayle*,[2] the U.S. Court of Appeals for the Second Circuit held that the defendant's prior Canadian conviction did not constitute a predicate offense under the statute because the conviction did not occur in a United States court. The authorities are split when determining whether a prior foreign conviction can serve as a predicate offense under 18 U.S.C. § 922(g)(1). The third, fourth and sixth circuits have allowed convictions in *any* court to qualify as a predicate offense,[3] whereas, the second and tenth circuits have refused to adopt this broad reading of the statute.[4] In *United States v. Gayle*,[5] the court held that the plain text, statutory scheme, and leg-

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1. 18 U.S.C. § 922 (2003).

2. 342 F.3d 89 (2d Cir. 2003).

3. *See* United States v. Small, 333 F.3d 425 (3d Cir. 2003) (holding that a Japanese conviction could serve as a predicate offense under 18 U.S.C. § 922(g)(1)); United States v. Atkins, 872 F.2d 94 (4th Cir. 1989) (holding that the defendant's conviction in England could serve as a predicate offense because the term "any" was unambiguous and all-encompassing); United States v. Winson, 793 F.2d 754 (6th Cir. 1986) (holding that the defendant's Argentinean and Swiss convictions could serve as a predicate offense).

4. *See* United States v. Gayle, 342 F.3d 89 (2d Cir. 2003) (holding that the defendant's Canadian conviction could not serve as a predicate offense under 18 U.S.C. § 922(g)(1) because the Senate Report and the Conference Report show Congress's intent to exclude foreign convictions); United States v. Concha, 233 F.3d 1249 (10th Cir. 2000) (holding that the defendant's United Kingdom convictions could not serve as predicate offenses because the strong arguments for both allowing or not allowing a foreign conviction to serve as a predicate offense required the court to apply the rule of lenity. The rule of lenity states that when Congress's intent is unclear, a court may not interpret a federal criminal statute in a manner that would increase the penalty placed on the individual).

5. *Gayle*, 342 F.3d 89.

islative history of 18 U.S.C. § 922(g)(1) evidenced Congress's intent to exclude foreign convictions from this statute. However, the court made these conclusions based on a logically flawed analysis, which in turn led to an erroneous reversal. In order to apply the law more equitably, and to address the concerns raised by the various circuits, this comment proposes a two-prong test that would allow a fairer and more consistent result.

On February 16, 2001, authorities arrested Rohan Ingram in a New York hotel because they suspected he illegally entered the United States.[6] In his hotel room, the authorities found a large number of firearms.[7] Previously, Ingram had been convicted in a Canadian court for violating the Canadian Criminal Code by using a firearm during the commission of an indictable offense.[8] As a result of Ingram's previous conviction, he was presently arrested and charged with, *inter alia*,[9] being a felon-in-possession of a firearm in violation of 18 U.S.C. § 922(g)(1).

Under 18 U.S.C. § 922(g)(1), it is unlawful for any person, "who has been convicted *in any court*, of a crime punishable by imprisonment for a term exceeding one year; . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."[10] At the district court level, the defense moved to dismiss the felon-in-possession count, claiming Ingram's prior

6. *Gayle*, 342 F.3d at 90.

7. *Id.*

8. *Id.*; Canadian Criminal Code, R.S.C. ch. C-46, § 85 (1985) (Can.). The Canadian Criminal Code provides in relevant part that, "(1) Every person commits an offence who uses a firearm (a) while committing an indictable offence, other than an offence under section 220 (criminal negligence causing death), 236 (manslaughter), 239 (attempted murder), 244 (causing bodily harm with intent - firearm), 272 (sexual assault with a weapon) or 273 (aggravated sexual assault), subsection 279 (1) (kidnapping) or section 279.1 (hostage-taking), 344 (robbery) or 346 (extortion), (b) while attempting to commit an indictable offence, or (c) during flight after committing or attempting to commit an indictable offence, whether or not the person causes or means to cause bodily harm to any person as a result of using the firearm.

9. *Gayle*, 342 F.3d at 90. Ingram was also charged with conspiracy to export defense articles designated on the United States Munitions List in violation of 18 U.S.C. § 371, 22 U.S.C. § 2778 and conspiracy to travel with intent to engage in the illegal acquisition of firearms in violation of 18 U.S.C. § 922(a)(1)(A) and 18 U.S.C. § 924(n).

10. 18 U.S.C. § 922 (2003).

Canadian conviction did not fall within the definition of the statute.[11] After hearing arguments from both the defense and the government, the district court denied Ingram's motion.[12] The district court held that § 922(g)(1) includes foreign convictions and therefore, Ingram's conviction served as a suitable predicate offense.[13]

On October 5, 2001, Ingram was found guilty on all counts.[14] He made a motion to set aside the verdict, which was denied on February 5, 2002.[15] On January 30, 2002, the court sentenced Ingram to 78 months imprisonment followed by a three year term of supervised release, and a $300 fine.[16] Thereafter, Ingram appealed to the second circuit on the grounds that his foreign Canadian conviction should not constitute a predicate offense under 18 U.S.C. § 922(g)(1).[17]

On appeal, the second circuit addressed the only issue before the court, whether Ingram's conviction in a Canadian court satisfied the statutory element that requires a conviction "in any court."[18] The court held that Congress did not intend the statute to apply when the prior conviction occurred in a foreign court.[19] To reach this conclusion, the court analyzed the plain text of the statute, the statutory scheme, and its legislative history.

The court stated that "[s]tatutory construction begins with the plain text and, if that text is unambiguous" the court need not look any further to determine the statute's meaning.[20] The majority of courts, including the third, fourth and sixth circuits, have held that the term "in any court" is unambiguously broad and all encompassing.[21] However, the second circuit concluded that the ambiguity in the terms required a more-thorough examination,[22] because the

11. *Gayle*, 342 F.3d at 91.
12. *Id.*
13. *Id.* at 92. The district court concluded the language "in any court" was unambiguous.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 95.
20. *Id.* at 92 (citing to United States v. Velastegui, 199 F.3d 590, 594 (2d Cir. 1999)).
21. *Id.*
22. *Id.*

statutory language could not be construed as completely "unambiguous" on its face.[23]

The court addressed the plain text meaning by looking at the statutory scheme.[24] Under 18 U.S.C. § 921, Congress generally defines the types of crimes that can constitute a predicate offense for a § 922(g)(1) conviction.[25] The court reasoned that Congress did not intend to include foreign convictions because they purposely did not include foreign courts in the definition of a predicate offense under § 921.[26] The court relied on the Tenth Circuit's reasoning and acknowledged the tension between the application of the statute to foreign and domestic crimes.[27]

In order to resolve this tension, the court closely examined the statute's legislative history for clues into Congress's intent. The court began this analysis by looking at the Senate Judiciary Committee Report on the Gun Control Act as well as the Conference Report.[28]

According to the court, the Senate Judiciary Committee Report "strongly" suggested that Congress did not intend to include foreign convictions because when the Senate explained the meaning of the word "felony," it only included federal and state court convictions.[29] The court stated, "the Senate Report thus *unmistakably* contemplated felonies, for purposes of the Gun Control Act, to include only convictions in federal and state courts."[30] Additionally, the court analyzed the Conference Report.[31] The court stated

23. *Id.*

24. *Id.* at 93.

25. 18 U.S.C. § 921 (2003) (The term "crime punishable by imprisonment for a term exceeding one year" does not include: (A) any federal or state offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or (B) any state offense classified by the laws of the state as a misdemeanor and punishable by a term of imprisonment of two years or less).

26. *Gayle*, 342 F.3d at 93.

27. *Id.* "If 'in any court' were to include foreign courts, we would be left with the anomalous situation that fewer domestic crimes would be covered than would be foreign crimes." *See also* United States v. Concha, 233 F.3d 1249, 1254 (10th Cir. 2000).

28. *See Gayle*, 342 F.3d at 94; S. Rep. No. 90-1501 (1968); H.R. Conf. Rep. 90-1956, 1968 U.S.C.C.A.N. 4426 (1968).

29. *Id.*

30. *Id.* (emphasis added).

31. *Gayle*, 342 F.3d at 95.

that the Conference Report "voiced no disagreement"[32] with the Senate Report's analysis of the terms to be included in the statute. The court held that by choosing the phrase "a crime punishable by imprisonment for a term exceeding one year" instead of "felony," the Conference Report accepted the Senate Report's limitation of the statute to domestic convictions only. Therefore, Congress never intended to include foreign convictions within the meaning of the statute.[33]

Lastly, the court balanced the possibility that Congress may have intended to include foreign convictions in the definition of the statute with due process concerns.[34] The court noted that Congress probably meant to prohibit people previously convicted of committing violent crimes from possessing firearms, regardless of where that crime occurred.[35] On the other hand, the court recognized that Congress might be concerned about the inequitable application of the law between foreign and domestic courts and the need to protect a person's First Amendment rights because in other countries, the failure to follow a certain religion or to criticize the government may constitute felonies.[36] The court concluded that these concerns should be left for Congress to decide and refused to interpret the statute in a manner that appeared inconsistent with Congress's intent.[37]

Accordingly, the court reversed Ingram's conviction with regard to the felon-in-possession charge and remanded it for resentencing on the remaining counts.[38] Although the court thoroughly analyzed the statute's plain meaning, statutory scheme and legislative history, its analysis was inherently flawed and completely circumvents the purpose of the statute. If adopted, this analysis will lead to arbitrary results.

The Second Circuit's analysis was flawed for a number of reasons. First, the court cited to § 921, which is the Gun Control Act's

32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 96.
38. *Id.*

general definition section.[39] This section states, "the term 'a crime punishable by imprisonment for a term exceeding one year' *does not include* (A) any Federal or State offenses . . ."[40] The court then jumped to the conclusion that since Congress explicitly excluded certain types of federal and state offenses,[41] they did not mean to include foreign offenses. This conclusion does not logically follow from the court's reasoning. From this assertion, one could logically argue that since Congress explicitly excluded certain types of federal and state offenses, they necessarily meant to *include* foreign offenses. Had Congress wished to exclude foreign offenses, it could very well have had listed them in this section of excluded convictions.

Second, the court in *Gayle* incorrectly relied on the Tenth Circuit's decision in *United States v. Concha*.[42] The main issue to be resolved in *Concha* concerned the application of the sentence enhancement provision of the Armed Career Criminal Act ("ACCA") to foreign convictions.[43] Under the ACCA, a person in possession of a firearm who has three or more prior convictions for violent felonies or serious drug offenses must be imprisoned for at least fifteen years.[44] The ACCA refers specifically to § 922(g)(1),[45] therefore, whether foreign convictions are included under the ACCA still needed to be determined. In *Concha*, the court concluded that the statute was ambiguous and that there was a textual argument supporting both the inclusion and exclusion of foreign convictions.[46] As a result of this ambivalence, the court applied the rule of lenity, stating that "in such a situation, we are guided by the rule of lenity, that we 'will not interpret a federal criminal statute so

39. *Id.* at 93.

40. 18 U.S.C. § 921 (2003).

41. *Id.* The statute excludes, *inter alia*, antitrust violations, restraints of trade and other offenses relating to business practices.

42. 233 F.3d 1249 (10th Cir. 2000).

43. 18 U.S.C. § 924 (2003).

44. *Id.* The defendant in *Concha* had four prior felony convictions, three of which occurred in the United Kingdom.

45. 18 U.S.C. § 924 (e)(1) states that the enhancement applies to "three previous convictions by any court referred to in section 922(g)(1) of this title."

46. *Concha*, 233 F.3d at 1256.

as to increase the penalty that it places on an individual.'"[47] The *Gayle* court similarly concluded that the statute was ambiguous, and yet rather than apply the rule of lenity, sought to interpret Congress's intent by examining the legislative history. After assessing two portions of the legislative history, the *Gayle* court concluded "that Congress did not intend foreign convictions to serve as a predicate offense for § 922(g)(1)."[48]

Lastly, the Second Circuit analyzed the legislative history of the statute. The court relied on the Senate report's definition of the term felony.[49] However, the Second Circuit failed to recognize that when the statute was enacted, the House bill was passed in lieu of the Senate bill,[50] and Congress relied on the definition of felony set out in the House bill.[51] The court recognized that the Senate Report's definition of felony was limited to federal and state convictions, and concluded that since the House bill did not specifically denounce this limitation, Congress never meant to include foreign convictions.[52] However, the court admitted that Congress may have intended to incorporate "certain types" of foreign convictions because the legislation represents Congress's concern with firearm possession by convicted felons.[53] Congress intended to prevent exactly the type of situation that occurred in *Gayle* when they enacted § 922(g)(1).

The tension created between Congress's intent and the ambiguity in the statute has led to the current split of authority on this

47. *Concha*, 233 F.3d at 1256 (citing to United States v. Diaz, 989 F.2d 391, 393 (10th Cir. 1993)).

48. *Gayle*, 342 F.3d at 95. The court attributed its determination that Congress did not intend foreign convictions to constitute predicate offenses under the statute to certain "illuminating" House and Senate reports. *Id.* at 95 n.6.

49. *See Gayle*, 342 F.3d at 94; S. Rep. No. 90-1501, at 31 (1968) (a felony is a "federal crime punishable by a term of imprisonment exceeding one year and in the case of State law, an offense determined by the laws of the State to be a felony.").

50. Gun Control Act of 1968, Pub. L. No. 90-618, 1968 U.S.C.C.A.N. 4410 (1968).

51. H.R. Conf. Rep 90-1956, 1968 U.S.C.C.A.N. 4426, 4428 (1968) (stating:
> A difference between the House bill and the Senate amendment which recurs in the provisions described above is that the crime referred to in the House bill is one punishable by imprisonment for more than one year and the crime referred to in the Senate amendment is a crime of violence punishable as a felony . . . The conference substitute adopts the crime referred to in the House bill).

52. *Gayle*, 342 F.3d at 95.

53. *See Gayle*, 342 F.3d at 95; S. Rep. No. 90-1501, at 22 (1968).

issue. Presently, the majority of courts have held that the language in § 922(g)(1) is clearly unambiguous and therefore, encompasses all convictions in any court including foreign convictions.[54] However, the minority viewpoint can just as strongly argue that Congress never intended to include foreign convictions because of the obvious inconsistencies that arise when applying the statute to domestic or foreign convictions.[55] For these reasons, the court should adopt a new test when addressing whether a foreign conviction should be allowed to serve as a predicate offense under 18 U.S.C. § 922(g)(1).

Instead of focusing on the statutory language of § 922(g)(1), the courts should adopt a case-by-case analysis using a two-prong test. The first prong analyzes the nature of the offense: Would the offense be considered a felony under the laws of the United States? The second prong analyzes the justice system of the court of the previous conviction: Does this nation/country adhere to similar due process standards and requirements as the United States? By adopting this type of approach, the courts could uphold Congress's intent to prevent persons convicted of dangerous felonies from possessing firearms, as well as set a standard that would avoid the inequitable application of the law which occurs today.[56]

First, the courts should focus on the nature of the offense.[57] For example, if the previous crime committed constituted an aggravated assault under the United States criminal justice system, the court would assess whether that crime should fall within the statute. They should examine the type of crime, whether the defendant

54. *Gayle*, 342 F.3d at 92.

55. See generally Tracey A. Basler, Note, *Does "Any" Mean "All" or Does "Any" Mean "Some"? An Analysis of the "Any Court" Ambiguity of the Armed Career Criminal Act and Whether Foreign Convictions Count as Predicate Convictions*, 37 NEW ENG. L. REV. 147 (2002), for an in-depth analysis of the current split between the majority and minority viewpoints as well as the legal issues and policy concerns about inferring Congressional intent with regard to foreign convictions under the Armed Career Criminal Act and 18 U.S.C. § 922(g)(1).

56. *See generally* Joan E. Lisante, *Felon Gets Second Chance On Gun Sentence*, 2 No. 36 A.B.A. J. E-Report 3, 1 (2003) (recognizing the split of authority between the circuits; the 3rd, 4th, 6th and 7th circuits have allowed foreign convictions as a predicate offense under the felon-in-possession statute, whereas the 2nd and 10th have denied the use of foreign convictions).

57. *See generally Concha*, 233 F.3d at 1253-4 (explaining how certain foreign felonies should not constitute predicate offenses under § 922(g)(1) because they would have been excluded if the conviction had been obtained in a United States court).

used a firearm during the commission of the crime, and to what extent that crime would be punishable under the United States system. By looking at the nature of the offense, the courts would avoid including foreign convictions which otherwise would not fall within the statute.[58] If the court determined that this type of offense would be punishable as a felony under the United States criminal justice system, then it would move to the second prong of the test.

The second prong of the test would require the court to look into the basis of the previous conviction. To determine the validity of the conviction, the court should assess where the previous conviction occurred, the type of judicial system in use, and the stability and reliability of the conviction.

First, the court should assess where the previous conviction occurred and the type of judicial system utilized by that country. For example, if the conviction occurred in an English court, an American court would be more likely to hold that a foreign conviction qualifies as a predicate offense because the United States derived its judicial system from English law.[59] By allowing the court to assess the jurisdiction and type of judicial system where the previous conviction occurred, the due process concerns expressed in *Gayle*[60] would be immaterial because this would allow the court to determine whether the "procedures and methods" used by that system "conform to minimum standards of justice."[61]

The court should also assess the stability and reliability of the conviction. This aspect closely relates to assessing the judicial system where the previous conviction occurred. In *United States v. Small*,[62] the court adopted the approach of the Restatement (3d) of

58. *See Concha*, 233 F.3d at 1253.

59. *See* United States v. Atkins, 872 F.2d 94, 96 (4th Cir. 1989) (stating Atkins suffered the misfortune of violating foreign law in England, the country which provides the origin or antecedent of the jurisdictional system employed in the United States of America. We here deal with a system of common law and statutes refining it, which obtains in England and America alike. Accordingly, we find that Atkins' English conviction was a proper predicate for conviction under § 922)

60. *Gayle*, 342 F.3d at 95 (stating that "had Congress contemplated extending the prohibition to persons having foreign convictions, it would in all likelihood have been troubled by the question whether the prohibition should apply to those convictions by procedures and methods that did not conform to minimum standards of justice").

61. *Gayle*, 342 F.3d at 95.

62. 333 F.3d 425 (3d Cir. 2003).

Foreign Relations Law of the United States § 482(1), which provides in part that "a court *may not* recognize a judgment of a foreign state if (a) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law."[63] By adopting this approach, the court could accurately assess the due process concerns as well as make an educated decision as to whether the conviction should serve as a predicate offense under the statute. This would allow the court more discretion when analyzing whether the foreign conviction's tribunal comports with our notions of justice or to protect the convicted person's First Amendment rights.[64]

Furthermore, under this two-prong approach, a court could effectively determine whether a foreign conviction should serve as a predicate offense under § 922(g)(1), as well as hold true to Congress's purpose in enacting this statute—protecting citizens from the danger imposed by allowing convicted felons to possess firearms. For example, the Tenth Circuit recognized the impropriety

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63. *Small*, 333 F.3d at 428. Section 482 states:

(1) A court in the United States may not recognize a judgment of the court of a foreign state if:

(a) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law; or

(b) the court that rendered the judgment did not have jurisdiction over the defendant in accordance with the law of the rendering state and with the rules set for in § 421;

(2) A court in the United States need not recognize a judgment of the court of a foreign state if:

(a) the court that rendered the judgment did not have jurisdiction of the subject matter of the action;

(b) the defendant did not receive notice of the proceedings in sufficient time to enable him to defend;

(c) the judgment was obtained by fraud;

(d) the cause of action on which the judgment was based, or the judgment itself, is repugnant to the public policy of the United States or of the State where recognition is sought;

(e) the judgment conflicts with another final judgment that is entitled to recognition; or

(f) the proceeding in the foreign court was contrary to an agreement between the parties to submit the controversy on which the judgment is based to another forum.

Id. (citing Restatement (3d) of Foreign Relations Law of the United States § 482).

64. *Gayle*, 342 F.3d at 95.

of the application of § 922(g)(1) to foreign convictions in the area of antitrust or business practice.[65] The Tenth Circuit stated:

> If § 922(g)(1) were meant to cover foreign crimes, we would be left with the anomalous situation that fewer domestic crimes would be covered than would be foreign crimes. . . someone who had been convicted of a U.S. antitrust violation would be allowed to possess a firearm, while someone convicted of a British antitrust violation would not be allowed to possess a firearm.[66]

By applying this case to the two-prong test, the British antitrust violation would not constitute a predicate offense under § 922(g)(1). Although the British conviction meets the requirements of the second prong, it does not meet the requirements of the first prong since it would not be considered to fall within this statute had the defendant been convicted in the United States. Therefore, this test prevents the "anomalous" results feared in *Concha.*

In conclusion, if the court had applied this two-prong test, Ingram's conviction would have been upheld. The nature of the previous conviction would satisfy the first prong, and the Canadian court system would satisfy the second prong. Therefore, the court could have fairly concluded that Ingram's prior conviction constituted a predicate offense and upheld Congress's intent to protect our citizens from the "danger[s] posed by firearms in the hands of convicted felons," regardless of where that conviction occurred.[67]

65. *Concha*, 233 F.3d at 1254.

66. *Id.*

67. *Gayle*, 342 F.3d at 95 (citing to Barrett v. United States, 423 U.S. 212, 218 (1976), S. Rep. No. 90-1501, at 22 (1968), S. Rep. No. 90-1097, at 19 (1968)).