NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 10-6250

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 19, 2012
LEONARD GREEN, Clerk

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	ON APPEAL FROM THE
	)	UNITED STATES DISTRICT
v.	)	COURT FOR THE WESTERN
	)	DISTRICT OF TENNESSEE
CARLOS DOTSON,	)	
	)	
Defendant-Appellant.	)	
	)	

ORDER

BEFORE: MERRITT and COLE, Circuit Judges; and VARLAN, District Judge.*

Carlos Dotson appeals the district court's judgment of conviction and sentence. Dotson pleaded guilty to obstructing commerce by robbery, in violation of 18 U.S.C. § 1951, and using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1). The original presentence report (PSR) calculated Dotson's base offense level for the robbery count as twenty and subtracted three levels for acceptance of responsibility, yielding a total offense level of seventeen and a guideline range of twenty-seven to thirty-three months of imprisonment. After Dotson failed to appear at sentencing, the PSR was amended to withhold the acceptance of responsibility reduction and add a two-level enhancement for obstruction of justice, raising Dotson's total offense level for the robbery count to twenty-two and his guideline range to forty-six to fifty-

*The Honorable Thomas A. Varlan, United States District Judge for the Eastern District of Tennessee, sitting by designation.

seven months of imprisonment. The guideline sentence for Dotson's firearm offense was set at seven years, the minimum sentence mandated by statute because the firearm was brandished during the robbery, to be served consecutively. *See* USSG § 2K2.4(b); 18 U.S.C. § 924(c)(1)(A)(ii).

At sentencing, defense counsel objected to the application of the brandishing enhancement, which raised the mandatory minimum sentence for the firearm offense from five to seven years, arguing that brandishing should be treated as an element of the offense that must be charged in the indictment and proven beyond a reasonable doubt. Defense counsel acknowledged that this argument was foreclosed by *Harris v. United States*, 536 U.S. 545 (2002), but suggested that the continued vitality of that decision had been called into doubt by *United States v. O'Brien*, 130 S. Ct. 2169 (2010), and sought to preserve an objection to the brandishing enhancement "should there be a change in the law." The district court overruled the objection, adopted the PSR's calculation of the sentencing guidelines, and imposed a below-guideline sentence of thirty-six months on the robbery count and a consecutive sentence of eighty-four months on the firearm count, for a total of 120 months of imprisonment, to be followed by four years of supervised release.

On appeal, Dotson argues that the district court erred by applying the brandishing enhancement because it was not charged in the indictment or proven beyond a reasonable doubt, thus violating the Supreme Court's holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Dotson concedes that, under controlling Supreme Court precedent, brandishing is a sentencing factor that may be found by the district court by a preponderance of the evidence rather than an element of the offense that must be admitted to by the defendant or found by a jury beyond a reasonable doubt. *See Harris*, 536 U.S. at 568; *see also O'Brien*, 130 S. Ct. at 2180 (reaffirming that "the brandishing and discharge provisions codified in § 924[(c)(1)](A)(ii) and (iii) do state sentencing factors"). Dotson

argues, however, that *Harris* was wrongly decided and should be overruled. We decline this invitation, as we have no authority to overrule a decision of the Supreme Court. *See Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) ("Needless to say, only this Court may overrule one of its precedents."); *United States v. Thompson*, 515 F.3d 556, 564-65 (6th Cir. 2008) (recognizing *Harris* as binding law).

Accordingly, we affirm the district court's judgment.

ENTERED BY ORDER OF THE COURT

Clerk