

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

AUSTIN DRAKE DAY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

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for the Northern District of Texas, entered May 17, 2023.
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APPENDIX A

United States Court of Appeals for the Fifth Circuit

No. 23-10539
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

February 23, 2024

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

AUSTIN DRAKE DAY,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 2:22-CR-125-1

Before BARKSDALE, GRAVES, and OLDHAM, *Circuit Judges.*

PER CURIAM:*

Austin Drake Day challenges his guilty-plea conviction, pursuant to a written plea agreement, for possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) (prohibiting felon in possession of firearm), 924(a)(8) (outlining maximum penalty). He contends for the first time on appeal that: the court misconstrued § 922(g)(1); the provision

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

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violates the Second Amendment; and, as a result, the court plainly erred in accepting his plea.

Day (as he also concedes) did not raise these issues in district court. The failure to preserve a claim in district court results in review's being only for plain error. *E.g.*, *United States v. Broussard*, 669 F.3d 537, 546 (5th Cir. 2012). Under that standard, Day must show a forfeited plain error (clear-or-obvious error, rather than one subject to reasonable dispute) that affected his substantial rights. *Puckett v. United States*, 556 U.S. 129, 135 (2009). If he makes that showing, we have the discretion to correct the reversible plain error, but generally should do so only if it “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings”. *Id.* (citation omitted).

Day first asserts: § 922(g)(1) requires more than a showing that the firearm he possessed traveled in interstate commerce; in the alternative, § 922(g)(1) is unconstitutional because it exceeds Congress' power to regulate interstate commerce. Day acknowledges our precedent forecloses his assertions. *E.g.*, *United States v. Rawls*, 85 F.3d 240, 242–43 (5th Cir. 1996) (“The ‘in or affecting commerce’ element can be satisfied if the firearm possessed by a convicted felon had previously traveled in interstate commerce.”); *United States v. Alcantar*, 733 F.3d 143, 145–46 (5th Cir. 2013) (maintaining “§ 922(g)(1) is a valid exercise of Congress’s authority under the Commerce Clause”). As a result, he raises the issues to preserve them for possible further review.

Second, Day contends § 922(g)(1) infringes the Second Amendment under *New York State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 17 (2022) (outlining test for assessing whether statute infringes Second Amendment). Our court has rejected the same contention under plain-error review. *E.g.*, *United States v. Jones*, 88 F.4th 571, 574 (5th Cir. 2023).

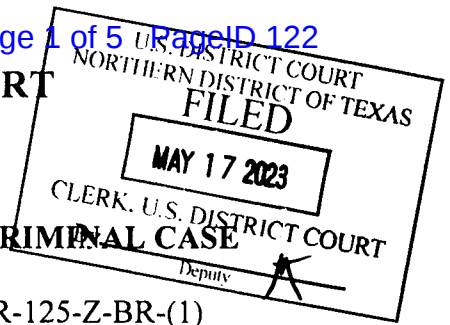
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Last, Day maintains, in the light of his challenges (the claimed errors) *supra*, the district court misadvised him of the nature of his offense and erroneously accepted the factual basis for his guilty plea; in violation of Federal Rule of Criminal Procedure 11(b)(1)(G), (b)(3), respectively. Because our court rejects Day's underlying challenges, he does not show the requisite clear-or-obvious error.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
Amarillo Division



UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

Case Number: 2:22-CR-125-Z-BR-(1)

AUSTIN DRAKE DAY

U.S. Marshal's No.: 28410-510

Meredith Elizabeth Pinkham, Assistant U.S. Attorney

Eric Coats, Attorney for the Defendant

On January 11, 2023 the defendant, AUSTIN DRAKE DAY, entered a plea of guilty as to Count One of the Indictment filed on November 17, 2022. Accordingly, the defendant is adjudged guilty of such Count, which involves the following offense:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. §§ 922(g)(1) and 924(a)(8)	CONVICTED FELON IN POSSESSION OF A FIREARM	10/24/2022	One

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to Title 18, United States Code § 3553(a), taking the guidelines issued by the United States Sentencing Commission pursuant to Title 28, United States Code § 994(a)(1), as advisory only.

The defendant shall pay immediately a special assessment of \$100.00 as to Count One of the Indictment filed on November 17, 2022.

The defendant shall notify the United States Attorney for this district within thirty days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Sentence imposed May 16, 2023.

MATTHEW J. KACSMARYK
UNITED STATES DISTRICT JUDGE

Signed May 17, 2023.

Judgment in a Criminal Case
Defendant: AUSTIN DRAKE DAY
Case Number: 2:22-CR-00125-Z-BR(1)

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IMPRISONMENT

The defendant, AUSTIN DRAKE DAY, is hereby committed to the custody of the Federal Bureau of Prisons (BOP) to be imprisoned for a term of **Thirty Seven (37) months as to Count One** of the Indictment filed on November 17, 2022.

The Court makes the following recommendations to the Bureau of Prisons:

1. that the Defendant be allowed to participate a full medical evaluation to identify any lingering health issues; participate in a mental health evaluation to address the significant trauma reflected in the PSR; and be allowed to participate in any and all substance abuse treatment and rehabilitation programs, including the Residential Drug Abuse Program, while in the custody of the Federal Bureau of Prisons, if eligible, if consistent with security classification;
2. that the Defendant be allowed to participate in any and all educational and vocational training, if possible, HVAC, CDL, welding and solar energy, if eligible, if consistent with security classification; and
3. that the Defendant be allowed to serve his term of incarceration at FCI El Reno or FCI Big Spring, if possible, if eligible, if consistent with security classification.

The Defendant is remanded to the custody of the United States Marshal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **Three (3) years** as to Count One of the Indictment filed on November 17, 2022.

While on supervised release, in compliance with the Standard Conditions of supervision adopted by the United States Sentencing Commission at Section 5D1.3(c), the defendant shall:

1. The defendant shall report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed.
3. The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer.
4. The defendant shall answer truthfully the questions asked by the probation officer.

Judgment in a Criminal Case

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Defendant: AUSTIN DRAKE DAY

Case Number: 2:22-CR-00125-Z-BR(1)

5. The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. The defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that he or she observes in plain view.
7. The defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment he or she shall try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or the job responsibilities), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within 72 hours.
10. The defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers).
11. The defendant shall not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk.
13. The defendant shall follow the instructions of the probation officer related to the conditions of supervision.

Also, as set forth in the Notice of Intent to Impose Conditions of Supervised Release signed and dated May 16, 2023, the Defendant shall comply with the below-listed other conditions of supervised release, which are derived from Sections 5D1.3(a), (b), (d), and (e), in relevant part:

1. The defendant shall not commit another federal, state or local offense (*see* 18 U.S.C. § 3583(d)).
2. The defendant shall not unlawfully possess a controlled substance (*see* 18 U.S.C. § 3583(d)).

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Defendant: AUSTIN DRAKE DAY
Case Number: 2:22-CR-00125-Z-BR(1)

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3. The defendant who is convicted for a domestic violence crime as defined in 18 U.S.C. § 3561(b) for the first time shall attend a public, private, or private non-profit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is available within a 50-mile radius of the legal residence of the defendant (*see* 18 U.S.C. § 3583(d)).
4. The defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on supervised release and at least two periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any individual defendant if the defendant's presentence report or other reliable information indicates a low risk of future substance abuse by the defendant (*see* 18 U.S.C. § 3583(d)).
5. If a fine is imposed and has not been paid upon release to supervised release, the defendant shall adhere to an installment schedule to pay that fine (*see* 18 U.S.C. § 3624(e)).
6. The defendant shall (A) make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A, or any other statute authorizing a sentence of restitution; and (B) pay the assessment imposed in accordance with 18 U.S.C. § 3013. If there is a court-established payment schedule for making restitution or paying the assessment (*see* 18 U.S.C. § 3572(d)), the defendant shall adhere to the schedule.
7. If the defendant is required to register under the Sex Offender Registration and Notification Act, the defendant shall comply with the requirements of that Act (*see* 18 U.S.C. § 3583(d)).
8. The defendant shall submit to the collection of a DNA sample from the defendant at the direction of the United States Probation Office if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (34 U.S.C. § 40702).
9. The defendant shall participate in an outpatient program approved by the probation officer for treatment of narcotic, drug, or alcohol dependency that will include testing for the detection of substance use, abstaining from the use of alcohol and all other intoxicants during and after completion of treatment, and contributing to the costs of services rendered (copayment) at the rate of at least \$10 per month.

FINE/RESTITUTION

The Court does not order a fine or costs of incarceration because the defendant does not have the financial resources or future earning capacity to pay a fine or costs of incarceration.

Restitution is not ordered because there is no victim other than society at large.

FORFEITURE

Pursuant to 18 U.S.C. § 924(d) and 28 U.S.C. § 2461(c), and subject to the provisions of 21 U.S.C. § 853(n), it is hereby ordered that Defendant's interest in the following property is **condemned** and **forfeited** to the United States: **A Smith & Wesson, Model Victory, .38 caliber revolver, bearing serial number V175754, along with any ammunition recovered with the firearm.**

Judgment in a Criminal Case
Defendant: AUSTIN DRAKE DAY
Case Number: 2:22-CR-00125-Z-BR(1)

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RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

United States Marshal

BY _____
Deputy Marshal

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

UNITED STATES OF AMERICA

v.

NO. 2:22-CR-125-Z

AUSTIN DRAKE DAY

FACTUAL RESUME

In support of Austin Drake Day's plea of guilty to the offense in Count One of the indictment, Day, the defendant, Eric Coats, the defendant's attorney, and the United States of America (the government) stipulate and agree to the following:

ELEMENTS OF THE OFFENSE

To prove the offense alleged in Count One of the indictment, charging a violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(8), that is, Convicted Felon in Possession of a Firearm, the government must prove each of the following elements beyond a reasonable doubt:¹

- First.* That the defendant knowingly possessed a firearm as charged in the indictment;
- Second.* That before the defendant possessed the firearm, the defendant had been convicted in a court of a crime punishable by imprisonment for a term in excess of one year;
- Third.* That when he possessed the firearm, the defendant knew he had been convicted of such a crime; and

¹ Fifth Circuit Pattern Jury Instruction 2.43D (5th Cir. 2019 ed.).

Fourth. That the firearm possessed traveled in interstate or foreign commerce; that is, before the defendant possessed the firearm, it had traveled at some time from one state to another or between any part of the United States and any other country.

STIPULATED FACTS

1. Austin Drake Day admits and agrees that on or about October 24, 2022, in the Amarillo Division of the Northern District of Texas, and elsewhere, knowing he was a person who had previously been convicted of a crime punishable by a term of imprisonment exceeding one year, he did knowingly possess in or affecting interstate or foreign commerce, a firearm, that is, a Smith & Wesson, Model Victory, .38 caliber revolver, bearing serial number V175754, in violation of Title 18, United States Code Sections 922(g)(1) and 924(a)(8).

2. On October 24, 2022, Amarillo Police Department (APD) officers encountered Day while they were performing surveillance near the 100 block of North Forest Avenue in Amarillo, Texas. Because it was raining, the officers and Day agreed to move to a covered area to speak. Day told the officers he had an outstanding arrest warrant. The officers noticed that Day was acting nervous and kept touching the right side of the jacket he was wearing. As one officer attempted to handcuff Day while the other officers investigated the warrant, the officer noticed the butt of a firearm protruding from Day's jacket pocket.

3. An officer read Day his *Miranda* warnings and he agreed to be interviewed. Day admitted to possessing the firearm located in the jacket he was wearing. Day also admitted that he had previously been convicted of a felony.

4. Court records confirmed that before October 24, 2022, Day had been convicted of a crime punishable by imprisonment for a term in excess of one year, that is, a felony offense. Further, before Day possessed the firearm, he knew he had been convicted of a crime punishable by imprisonment for a term in excess of one year, that is, a felony offense.

5. An officer was able to determine that the firearm described above was manufactured outside of the state of Texas. Accordingly, the firearm affected interstate or foreign commerce because the firearm must have traveled at some time from one state to another or between any part of the United States and any other country.

6. The defendant agrees that the defendant committed all the essential elements of the offense. Specifically, the defendant agrees that he possessed the firearm while being a person having been previously convicted in a court of a crime punishable by imprisonment for a term in excess of one year, that the defendant knew he had been previously convicted of a crime punishable by a term of imprisonment exceeding one year, and that the said firearm traveled in interstate or foreign commerce. This factual resume is not intended to be a complete accounting of all the facts and events related to the offense charged in this case. The limited purpose of this statement of facts is to demonstrate that a factual basis exists to support the defendant's guilty plea to Count One of the indictment.

AGREED TO AND STIPULATED on this 20 day of Dec., 2022.

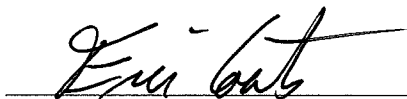
LEIGHA SIMONTON
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AUSTIN DRAKE DAY
Defendant



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