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Declined to Follow by U.S. v. Black, 6th Cir.(Mich.), January 15, 2014

4 Fed.Appx. 324

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Ninth Circuit Rule 36-3. (Find CTA9 Rule 36-3)

United States Court of Appeals,  
Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Ted Parker FIX, Defendant-Appellant.

No. 99-30235.

|

D.C. No. CR-98-05260-JET.

|

Argued and Submitted May 4, 2000.

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Decided Feb. 2, 2001.

Synopsis

Defendant was convicted in the United States District Court for the Western District of Washington, Jack E. Tanner, Senior J., of possessing a semiautomatic weapon and possessing an unregistered firearm. Defendant appealed. The Court of Appeals held that: (1) Norinco SKS weapons did not fall under grandfather clause which exempted from the Violent Crime Control and Law Enforcement Act semiautomatic assault weapons lawfully possessed on date of enactment, and (2) Calico Liberty III weapon did not fall under catchall "any other weapon" provision of statute making it an offense to possess an unregistered firearm.

Affirmed in part; reversed and remanded in part.

West Headnotes (6)

[1]

Weapons

ImageRetroactive operation

Norinco SKS weapons did not fall under grandfather clause which exempted from the Violent Crime Control and Law Enforcement Act semiautomatic assault weapons lawfully

possessed on date of enactment; because the weapons were modified by defendant or one of his employees after the effective date of the statute prohibiting such weapons, the weapons could not be deemed pre-ban weapons. 18 U.S.C.A. § 922(v).

1 Cases that cite this headnote

[2]

Internal Revenue

ImageFirearms and destructive devices

Calico Liberty III weapon did not fall under catchall “any other weapon” provision of statute making it an offense to possess an unregistered firearm; weapon did not fit definition required by statute as it was capable of being held with one hand at time it was originally designed and made, and it had a rifled bore. 26 U.S.C.A. §§ 5845(a, e), 5861(d); 27 C.F.R. § 179.11.

1 Cases that cite this headnote

[3]

Internal Revenue

ImageFirearms and destructive devices

Weapons

ImagePossession or carrying without a license

Mens rea requirement was proven for conviction for manufacturing, transferring, or possessing a semiautomatic assault weapon and possessing an unregistered firearm by showing that defendant was aware of features of weapon which brought it within scope of the statutes. 18 U.S.C.A. § 922; 26 U.S.C.A. § 5861.

Cases that cite this headnote

[]

Criminal Law

ImageNecessity of requests

Because failure to instruct regarding definition of rifle was not so clear that district judge should have given an instruction on its own, defendant’s request for relief on that claim had to be denied in prosecution for weapons offenses.

Cases that cite this headnote

[5]

Criminal Law

ImageSentencing proceedings in general

Failure to object to findings in presentence report constituted waiver of that challenge on appeal.

Cases that cite this headnote

[6]

Weapons

ImageRetroactive operation

Statute making it an offense to manufacture, transfer, or possess a semiautomatic assault weapon except if there is possession or transfer of any semiautomatic assault weapon otherwise lawfully possessed under federal law on date of enactment of statutory subsection did not require a defendant to have personally possessed weapon on enactment date. 18 U.S.C.A. § 922(v)(1, 2).

Cases that cite this headnote

\*325 Appeal from the United States District Court for the Western District of Washington Jack E. Tanner, Senior District Judge, Presiding.  
Before RYMER, T.G. NELSON, Circuit Judges, and BROWNING, District Judge.\*

MEMORANDUM\*\*

\*\*1 Appellant Ted Parker Fix (“Fix”) appeals his convictions on three counts under 18 U.S.C. § 922(v) and one count under 26 U.S.C. § 5861. On appeal, Fix raises seven issues: (1) whether the government proved that the Norinco weapons which were the bases of the convictions in Counts I, III, and IV were prohibited weapons; (2) whether the government proved that the weapon described as a Calico Liberty III in Count V was a firearm rather than a pistol; (3) whether the government proved the required mens rea for a conviction on all counts; (4) whether the performance of Fix’s trial counsel amounted to ineffective assistance of counsel; (5) whether the district court erred in not instructing the jury as to the grandfather clause, the definition of “rifle,” and the definition of “any other weapon”; (6) whether the sentencing court erred in increasing Fix’s offense level by applying U.S.S.G. §§ 2K2.1(b)(1)(C), 3B1.1, and

3B1.3; and (7) whether the district court erred in denying Fix's motion to dismiss on the ground that 18 U.S.C. § 922(v)(1) is unconstitutionally vague. We affirm the convictions on Counts I, III, and IV, deny relief as to issues 3 through 7, but reverse as to Count V.

#### I. Whether the Government Proved that the Norinco SKS Weapons Are Prohibited

[1] Fix argues that the government failed to prove that the grandfather clause does not apply to the Norinco SKS weapons involved in Counts I, III, and IV. This argument must fail because, contrary to Fix's contention, the Norinco weapons in question are not the type described by 18 U.S.C. § 921(a)(30)(A). Section 921(a)(30)(A) applies only to AK type Norinco weapons, which the Norincos involved in Counts I, III, and IV were not. The Norincos do, however, fall under § 921(a)(30)(B), by virtue of their features. Because the weapons were modified by Fix or one of his employees after the effective date of the statute prohibiting such weapons, the weapons cannot be deemed pre-ban weapons. Accordingly, the grandfather provision does not apply to the Norinco weapons involved in Counts I, III, and IV.

Fix argues that even if the Court finds the grandfather clause in § 922(v) does not \*326 apply to the Norincos, the government did not prove essential elements of the offense beyond a reasonable doubt, because it did not demonstrate that the Norinco weapons were rifles within the definition of § 921. This argument fails as well, because there was no dispute at trial as to whether the weapons met the definition, several witnesses testified that they were rifles, and even defense counsel referred to them as rifles.

#### II. Whether the Calico Liberty III Required Registration

[2] Fix argues that the government did not prove the Calico Liberty III, found during a search of his home and business, was a weapon that required registration. Fix was convicted under 26 U.S.C. § 5861(d) of possession of an unregistered firearm. In a related provision, "firearm" is defined by a list of eight weapons and a catchall provision of "any other weapon." See 26 U.S.C. § 5845(a). "Any other weapon" includes "any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive," but not "a pistol ... having a rifled bore ..." See 26 U.S.C. § 5845(e). Weapons not included in the definition of firearm in § 5845 need not be registered under § 5861(d). Fix argues that his Calico was a pistol, met the exception in § 5845(e), and did not need to be registered under § 5861.

\*\*2 We agree that the Government failed to prove a violation of § 5861(d) for two reasons.

First, the weapon does not fit the definition required by the statute. The provision defining "pistol" for the purposes of the statute is 27 C.F.R. § 179.11, which defines a pistol as "a weapon originally designed, made, and intended to fire a projectile (bullet) from one or more barrels when held in one hand ...." The government argues that because the Calico was

modified to be fired with two hands, it “falls out” of the definition of pistol and falls back into the definition of “any other weapon” in § 5845. This argument ignores the definition’s requirement that the weapon be capable of being held with one hand at the time it was originally designed and made. As written, this definition does not consider modifications of the weapon by the owner. The Calico was originally designed and made to be fired with one hand, and still could be, despite the addition of a foregrip.

Second, the definition of “any other weapon” in §§ 5845(a) and (e) expressly excludes weapons with a rifled bore. We assume that the “any other weapon” provision was intended as a catch-all category in which to gather sawed-off shotguns and other hybrid weapons. A sawed off shotgun may be concealed like a pistol, but would have the smooth bore of a shotgun. The Government’s witness stated that the Calico Liberty III had a rifled bore, and thus, cannot be considered “any other weapon.”

Accordingly, the conviction on Count V must be reversed for insufficiency of the evidence.<sup>1</sup>

### III. Mens Rea

[3] Fix argues that the government did not prove the required mens rea for convictions \*327 under 18 U.S.C. § 922 and 26 U.S.C. § 5861. In reaching this conclusion, Fix relies on *Staples v. United States*, 511 U.S. 600, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994), for the proposition that the government must prove that he had knowledge that the particular weapons in his possession and/or sold by him were prohibited by statute. However, this is a misreading of *Staples*. *Staples* only requires that a defendant be aware of the features of the weapon which bring it within the scope of the statute. See *id.* at 619. Because Fix was aware of the features of the Norinco weapons that brought them within the statutes in question, the mens rea requirements were met.

### IV. Ineffective Assistance of Counsel

Fix argues that the performance of his trial counsel amounts to a violation of his Sixth Amendment right to effective counsel. The government correctly argues that this claim should not be addressed at this time. While the Court is permitted to hear an ineffective assistance claim on direct appeal where the record is sufficiently developed to permit determination of the issue, see *United States v. Davis*, 36 F.3d 1424, 1433 (9th Cir.1994), an ineffective assistance claim in this case would be more properly raised in a motion for collateral relief under 28 U.S.C. § 2255, at which time the District Court could develop a record regarding Fix’s representation at the guilt phase of his trial.

## V. Jury Instructions

\*\*3 [4] Fix argues the district court erred in failing to instruct the jury regarding the definition of “rifle.” Fix did not request this instruction at trial or object to its omission, and thus this Court reviews only for plain error. See *United States v. Barajas-Montiel*, 185 F.3d 947, 953 (9th Cir.1999). At trial, Fix did not argue that the weapon did not fall under the statute as a rifle, and several witnesses testified that the Norinco weapons were rifles. Because the failure to instruct on this issue was not so clear that the judge should have given an instruction on its own, Fix’s request for relief on this claim must be denied.

Fix also argues the district court should have instructed the jury about the grandfather provision in 18 U.S.C. § 922(v)(2). However, because the rifles were not modified until after the statutory cut-off date, they do not qualify under the grandfather provision. Thus, the instruction would not have been proper.

## VI. Sentencing Guidelines

[5] Fix contends the district court erred in its application of the United States Sentencing Guidelines. The district court increased Fix’s offense level by three points under U.S.S.G. § 2K2.1(b)(1)(C) for an offense involving between eight and twelve firearms, by two points under § 3B1.1(c) for being a leader in the criminal act, and by two points under § 3B1.3 for using a special skill. Fix failed to file a timely objection to the presentence report and declined to object to factual findings in the presentence report at the sentencing hearing. Rule 32(b)(6)(D) of the Federal Rules of Criminal Procedure requires the parties to provide the probation department with any objections to the report within 14 days after receipt of the report. These objections, along with the report, are then submitted to the court by the probation department. Under Rule 32(b)(6)(D), the sentencing court may accept the presentence report as its findings of fact, unless there is some unresolved objection. Fix filed a very untimely sentencing memorandum, and at sentencing Fix failed to comment on or object to the sentencing report, despite being given an opportunity to do so. In the Ninth Circuit, \*328 failure to object to findings in a presentence report constitutes waiver of that challenge on appeal. See *United States v. Visman*, 919 F.2d 1390, 1394 (9th Cir.1990). Accordingly, Fix’s arguments regarding the sentencing guidelines must fail.

## VII. Vagueness of 18 U.S.C. § 922(v)

[6] Finally, Fix argues that § 922(v) is unconstitutionally vague and thus that his convictions on Counts I, III, and IV should be overturned. There is no merit to this claim. Fix seriously misconstrues both the government’s argument and the apparent basis for the result in the district court. The government did not argue that Fix himself had to possess the weapon prior to enactment of the statute, but only that someone must have lawfully possessed it. In fact, § 922 is not at all amenable to Fix’s “personally possessed” interpretation. Sections 922(v)(1) and

922(v)(2), read together, require that the statute mean that the weapon was possessed by someone at the time of enactment, since § 922(v)(2) makes future possession or transfer of the weapon lawful where the weapon was lawfully possessed prior to enactment of the statute. The § 922(v)(2) exception would make no sense if the weapon had to be possessed by the defendant at the time of enactment, because it would render the transfer provision essentially ineffective.

\*\*4 AFFIRMED as to Counts I, III, and IV; REVERSED as to Count V; and REMANDED for resentencing.

All Citations

4 Fed.Appx. 324, 2001 WL 180820

Footnotes

\*

The Honorable William D. Browning, Senior United States District Judge for the District of Arizona, sitting by designation.

\*\*

This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

1

Were the Court not to reverse Count V on insufficiency of the evidence, reversal would still be required because the jury was improperly instructed. The trial court's Instruction No. 12 modified the requested instruction to say that Fix was charged with possessing a "semi-automatic assault rifle." Additionally, an incomplete definition of "firearm" was given to the jury. Accordingly, the jury could not fully and accurately determine whether the appellant had committed the charged offense.

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### Filings (3)

Title	PDF	Court	Date	Type
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1. Appellant's Brief

UNITED STATES OF AMERICA, Appellee, v. Ted Parker FIX, Appellant.

1999 WL 33622014 Image C.A.9 1999 Brief

2. Brief for the United States

UNITED STATES OF AMERICA, Appellee, v. Ted Parker FIX, Appellant.

1999 WL 33622015 Image C.A.9 1999 Brief

3. Docket 99-30235

USA v. FIX — C.A.9 July 30, 1999 Docket

### Negative Treatment

#### Negative Citing References (1)

The KeyCited document has been negatively referenced by the following events or decisions in other litigation or proceedings:

Treatment	Title	Date	Type	Depth	Headnote(s)
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Declined to Follow by Image 1. U.S. v. Black Image

739 F.3d 931 , 6th Cir.(Mich.)

CRIMINAL JUSTICE - Weapons. Weapon that defendant was convicted of possessing was not a "pistol," and thus qualified for sentencing enhancement under National Firearms Act. Jan.

15, 2014 Case Image 2

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### History (2)

#### Direct History (2)

Image 1. U.S. v. Fix Image

4 Fed.Appx. 324 , 9th Cir.(Wash.) , Feb. 02, 2001



Certiorari Denied by

2. Fix v. U.S.

533 U.S. 924 , U.S. , June 18, 2001

#### Citing References (14)

Treatment Title Date Type Depth Headnote(s)

Discussed by 1. Corrected Reply Brief for the Appellant

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. Rossahn BLACK, Defendant-Appellant.

2013 WL 6138367, \*1+ , 6th Cir. (Appellate Brief)

Nov. 18, 2013 Brief Image 2

Fed.Appx.

Discussed by 2. Brief for the United States

UNITED STATES OF AMERICA, Appellee, v. Thomas LAFLEUR, Appellant.

2017 WL 3887933, \*1+ , 11th Cir. (Appellate Brief)

Sep. 01, 2017 Brief Image 2

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Discussed by 3. Brief for the United States Image

UNITED STATES OF AMERICA, Appellee, v. Joseph VAIL, Appellant.

2003 WL 23734252, \*23734252+ , 11th Cir. (Appellate Brief)

Nov. 17, 2003 Brief Image 2

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Declined to Follow by

Image Image 4. U.S. v. Black

739 F.3d 931, 935+ , 6th Cir.(Mich.)

CRIMINAL JUSTICE - Weapons. Weapon that defendant was convicted of possessing was not a "pistol," and thus qualified for sentencing enhancement under National Firearms Act.

Jan. 15, 2014 Case Image 2

Fed.Appx.

Cited by 5. Thompson v. U.S. Image

2005 WL 2095698, \*2 , E.D.Ark.

On February 18, 2004, in the United States District Court for the Eastern District of Arkansas, the movant, Keith Thompson, was found guilty of felon in possession of a firearm in...

Aug. 30, 2005 Case Image 1

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Cited by 6. Initial Brief of Appellant Image  
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. Tony Eugene DAVIS,  
Defendant-Appellant.

2009 WL 6599870, \*6599870+ , 5th Cir. (Appellate Brief)

Oct. 21, 2009 Brief Image 2

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Cited by 7. Reply Brief for the Appellant  
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. Rossahn BLACK, Defendant-Appellant.  
2013 WL 4648058, \*1+ , 6th Cir. (Appellate Brief)

Aug. 21, 2013 Brief Image 2

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Cited by 8. Appellant's Brief  
UNITED STATES OF AMERICA, Appellee, v. Ted Parker FIX, Appellant.  
1999 WL 33622014, \*33622014 , 9th Cir. (Appellate Brief)

1999 Brief Image —

Cited by 9. Brief for the United States  
UNITED STATES OF AMERICA, Appellee, v. Ted Parker FIX, Appellant.  
1999 WL 33622015, \*33622015 , 9th Cir. (Appellate Brief)

1999 Brief Image —

Cited by 10. Reply Brief of the Appellant Thomas LaFleur Image  
UNITED STATES OF AMERICA, Appellee, v. Thomas LAFLEUR, Appellant.  
2017 WL 4712314, \*1+ , 11th Cir. (Appellate Brief)

Oct. 13, 2017 Brief Image 2

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Cited by 11. Corrected Brief of the Appellant Thomas LaFleur Image  
UNITED STATES OF AMERICA, Appellee, v. Thomas LAFLEUR, Appellant.  
2017 WL 2982445, \*1+ , 11th Cir. (Appellate Brief)

July 07, 2017 Brief Image 2

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— 12. Firearms Law Deskbook s 10:6, § 10:6. "Assault weapon" as defined by  
manufacturer and model

Section 921(a)(30)(A) defines “semiautomatic assault weapon” in part as “any of the firearms, or copies or duplicates of the firearms in any caliber, known as ...” after which...

2018 Other Secondary Source —

1

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— 13. Firearms Law Deskbook s 6:15, § 6:15. “Any other weapon”  
Section 5845(a)(5) defines a firearm to include “any other weapon,” a technical term defined in  
Section 5845(e) as follows: The term “any other weapon” means any weapon or...

2018 Other Secondary Source —

2

Fed.Appx.

— 14. HALF-COCKED: THE REGULATORY FRAMEWORK OF SHORT-BARREL  
FIREARMS

40 Harv. J.L. & Pub. Pol’y 493 , 495+

Introduction. 493 I. History of the National Firearms Act of 1934. 496 II. Constitutional  
Challenges to the NFA. 501 A. The First Prong of the Ninth Circuit’s Second Amendment...

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#### Table of Authorities (4)

Treatment	Referenced Title	Type	Depth	Quoted	Page Number
Cited	Image 1. Staples v. U.S.				
	114 S.Ct. 1793, U.S.Okla., 1994				
	Firearms. To obtain conviction for possession of unregistered machine gun, government must show that defendant knew his rifle had relevant characteristics.				
	Case Image		327+		
Cited	Image 2. U.S. v. Barajas-Montiel				
	185 F.3d 947, 9th Cir.(Cal.), 1999				
	Defendant was convicted of alien smuggling and document possession offenses, following jury trial in the United States District Court for the Southern District of California,...				
	Case Image		327		
Cited	Image 3. U.S. v. Davis				
	36 F.3d 1424, 9th Cir.(Nev.), 1994				

Defendants were convicted in United States District Court for the District of Nevada, Philip M. Pro, J., for distributing and conspiring to distribute one-half pound of cocaine...

Case Image 327

Cited Image 4. U.S. v. Visman  
919 F.2d 1390, 9th Cir.(Cal.), 1990

Defendant was convicted in the United States District Court for the Eastern District of California, Edward J. Garcia, J., of various narcotics offenses, and he appealed. The...

Case Image 328