UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Appeal No. 02-1190

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JERRY L. PEETE,

Defendant-Appellant,

Appeal From the Final Judgment of Conviction
Entered In The United States District Court
For The Eastern District of Wisconsin,
Honorable Rudolph T. Randa, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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SUPPLEMENTAL JURISDICTIONAL STATEMENT

The government is correct that this Court has jurisdiction over this appeal under 18 U.S.C. §3742(a) as well as under 28 U.S.C. §1291.

The government is wrong, however, in stating that the judgment of conviction was entered on June 15, 2000. Gov't Brief at 1. While the judgment was marked "Filed" on June 15, 2000 (R23:1; App. 1), it was entered on the docket on June 19, 2000 (*See* Docket Entry 23).

SUPPLEMENTAL STATEMENT OF THE CASE

Although having no direct effect on the resolution of this matter, the

government misstates the length of the sentence imposed in this case throughout its brief. *E.g.*, Gov't Brief at 3. The District Court imposed concurrent sentences of 188 months on each count (*i.e.*, 15 years, 8 months) (R23:2; R37:20; App. 2, 12), not 15 years.

ARGUMENT

I.

PEETE'S CONVICTION FOR FELON IN POSSESSION OF A FIREARM VIOLATES THE COMMERCE CLAUSE

The government's brief merely states the obvious, that most courts, including this one, have failed to recognize that federal criminal jurisdiction cannot legitimately be based on so minimal a thread as the fact that a firearm crossed state lines at some point prior to the defendant's possession of it. While acknowledging that this Court's current case law is against him, Mr. Peete's opening brief at 10-16 explained why those decisions are wrong under controlling Supreme Court precedent. Nothing in the government's string-citations to contrary decisions suggests otherwise. It is the quality of legal analysis, rather than the quantity of opposing cases, which must control. *E.g.*, *Sun Cal, Inc., v. United States*, 25 Cl.Ct. 426, 433-34 (1992). As explained in Peete's Brief at 15, the supposed "jurisdictional element" in 18 U.S.C. §922(g)(1), as applied in a case such as this, does not mandate proof of a substantial affect on commerce, and thus does not satisfy Commerce Clause requirements.

II.

THE MAXIMUM PERMISSIBLE SENTENCE UNDER COUNT FOUR IS TEN YEARS IMPRISONMENT AND THREE YEARS SUPERVISED RELEASE

Mr. Peete did not waive his challenge to the excessive sentence under Count Four. *See* Gov't Brief at 17-18. As this Court explained in *United States v. Staples*, 202 F.3d 992, 995 (7th Cir. 2000), a defendant's actions constitute a "waiver" barring appellate review *only* when he "intentionally relinquishes a known right." (Citations omitted). When the defendant's failure to preserve an issue arises from ignorance or neglect, it is not a "waiver," but a "forfeiture" allowing for plain error review on appeal. *Id.*; *see United States v. Sumner*, 265 F.3d 532, 537 (7th Cir. 2001). Waiver principles are to be construed liberally in favor of the defendant. *Id.* at 538, citing *United States v. Perry*, 223 F.3d 431, 433 (7th Cir. 2000).

There was no "intentional relinquishment" of Mr. Peete's *Apprendi* claim here. There is nothing in this record to suggest that Mr. Peete or his trial counsel knew of the *Apprendi* challenge to application of 18 U.S.C. §924(e)(1) and intentionally chose not to raise it. *Compare Staples*, 202 F.3d at 995 (waiver where defendant "knew he had a right to object to the calculation of his criminal history, knew the contents of the report and affirmatively decided not to object. This decision shows intent to waive the right, not ignorance or neglect of the right"). Indeed, at the time of sentencing, as it technically remains now, the issue was controlled by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). Only in *Apprendi v. New Jersey*, 530

U.S. 466 (2000), decided 11 days *after* Peete's sentencing, did the Supreme Court acknowledge the likely invalidity of *Almendarez-Torres*. *See* 530 U.S. at 489.

Mr. Peete's claim accordingly is subject to plain error review. *E.g.*, *Perry*, 223 F.3d at 433 (plain error review required in absence of evidence defendant knew of legal basis for objection at sentencing and intentionally relinquished right to raise it).

CONCLUSION

For these reasons, as well as for those in his opening brief, Mr. Peete respectfully asks that the Court reverse his judgment of conviction and sentence, vacate the conviction under Count Four, and remand for resentencing on the remaining counts.

Dated at Milwaukee, Wisconsin, April 10, 2002.

Respectfully submitted,

JERRY L. PEETE, Defendant-Appellant

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RULE 32(a)(7) CERTIFICATION

I hereby certify that this brief complies with the type volume limitations contained in Fed. R. App. P. 32(a)(7) for a reply brief produced with a proportionally-spaced font. The length of the includable portions of this brief, *see* Fed. R. App. P. 32(a)(7)(B)(iii), is 687 words as determined using the word count of the WordPerfect word-processing program used to prepare the brief.

_____

Robert R. Henak

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of April, 2002, I caused 15 hard copies of the Reply Brief of Defendant-Appellant Jerry L. Peete, to be mailed, properly addressed and postage prepaid, to the United States Court of Appeals for the Seventh Circuit, 219 South Dearborn Street, Chicago, Illinois 60604. I further certify that on the same date, I caused two hard copies of that document and one copy of the Brief on digital media to be mailed, properly addressed and postage prepaid, to counsel for the Government, Paul L. Kanter, Office of the United States Attorney, 517 E. Wisconsin Ave., Rm. 530, Milwaukee, WI 53202.

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