Leave to filed GRANTED

Amy B. Jackson 5/20/22

Amy B. Jackson Date
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
v.	)	Case No. 21-cr-689-ABJ
THOMAS HAMNER,	)	
Defendant.	)	

DEFENDANT HAMNER'S RESPONSE TO THE GOVERNMENT'S NOTICE OF INFORMATION IN PREPARATION FOR MAY 17, 2022 PLEA HEARING

On May 16, the government submitted to chambers a "Projected Guidelines Calculation on Count Two" of the Indictment. That is the Count to which Hamner intends to plead guilty on May 17. The government's submission is mistaken.

Count Two charges an offense under 18 U.S.C. § 231(a)(3). ECF No. 6. The charged conduct in Count Two is the same as the conduct allegedly supporting Count One, charging an offense under 18 U.S.C. § 111(a)(1) and (b). *Id.* The government describes Hamner's conduct this way:

> At approximately 1:40 p.m., as officers continued to fend off repeated attempts by rioters to breach the police line and assault the officers, the rioters moved a large metal "TRUMP" billboard on wheels with a metal frame towards the barricade. As the billboard was moved closer to the police line, Hamner grabbed it and assisted in throwing the large billboard onto the defensive line of police officers, using the billboard as a battering ram against the police officers who were attempting to hold the line.

Gov't Notice, p. 7.

While parts of this description are factually accurate, the government's characterizations of Hamner's conduct are neither accurate nor appropriate. Counsel has reviewed the evidence on which Counts One and Two rest. It does not support the contentions that Hamner "threw" the

billboard onto police officers and that he used the sign as a "battering ram."

What the evidence shows instead is a sizeable group of protesters carrying the large billboard above their heads as though it were a person "crowd surfing" at a concert. The billboard moved toward the police line at a slow, lumbering pace that was visible to the officers for quite some time. The evidence shows that Hamner approached one corner of the billboard shortly before it crossed over onto the upraised hands of the officers on the other side of the police line. That is, Hamner was not a part of the group responsible for moving the billboard up to the point of the "defensive line." Hamner lifted up his hands and guided a corner of the billboard just as it crossed the line. At no point did Hamner "throw" the billboard or use it as a "battering ram." It was too large for any person to "throw." At no point did the billboard fall on the officers, who within a matter of seconds placed the object on the ground. The government has represented to Hamner's counsel that no officer was injured in this incident.

An accurate description of the evidence shows why the government's projected Guidelines calculation for Count Two is grossly off-base. As the government notes, the base offense level for a § 231(a)(3) offense is 10. U.S.S.G. §2A2.4(a) ("Obstructing or Impeding Officers"). However, it contends that the cross reference in §2A2.4(c) applies, as Hamner's conduct constituted "aggravated assault," the government asserts. Gov't Notice, p. 2. If so, the base offense level would be set by U.S.S.G. §2A2.2.

Hamner's guiding of the billboard at the last minute for a matter of seconds does not constitute "aggravated assault" for a number of reasons. First, Hamner did not commit a "felonious assault." U.S.S.G. §2A2.2, Application Note 1 ("Aggravated assault" definition). Second, he did not use a "dangerous weapon with intent to cause bodily injury (i.e., not merely to frighten) with that weapon." *Id.* That is because, with respect to Hamner, the sign was not a

"dangerous weapon," as he did not intend to use that object "not ordinarily used as a weapon . . . with the intent to commit bodily injury." U.S.S.G. §2A2.2, Application Note 1 ("Dangerous weapon" definition). Similarly, Hamner did not have that intent under the "Aggravated assault" definition. U.S.S.G. §2A2.2, Application Note 1 ("Aggravated assault" definition). Third, Hamner did not cause "serious bodily injury." *Id.* Fourth, Hamner did not "strangl[e], suffocate[e], or attempt[] to strange or suffocate." *Id.*

Finally, even if he committed the civil disorder offense Hamner did not intend "to commit another felony." U.S.S.G. §2A2.2, Application Note 1 ("Aggravated assault" definition). The government has explained that the "other felony" on which the government relies in this Application Note is the § 111(a)(1) and (b) offense in Count One. But that offense is not "another felony" under the Double Jeopardy Clause of the Fifth Amendment.

Under the "same elements" test enunciated by the Court in *Blockburger v. United States*, "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." 284 U.S. 299, 304 (1932). Counts One and Two both concern the same alleged act or transaction, i.e., Hamner lifting up his hands to help move the sign forward into the hands of police officers. Both Counts require the government to prove (a) "imped[ing]" or "interfer[ing]" (b) law enforcement officers (c) engaged in the performance of their official duties. Count Two, however, "requires proof of a fact which [Count One] does not." *Blockburger*, 284 U.S. at 304. Namely, the government must prove in Count Two "the commission of a civil disorder which in any way and degree obstructed, delayed, and adversely affected commerce . . ." ECF No. 6 (quoting § 231). Thus,

although Count Two contains an element lacking in Count One, the opposite is not true.[1]

The government disagrees, pointing to sentencing enhancement provisions in § 111(a) and (b). In order for any penalty on Hamner to exceed one year of incarceration, the government must prove in Count One that his "acts involve[d] physical contact with the victim of that assault or the intent to commit another felony. . ." § 111(a). The government also points to the "enhanced penalty" provision in § 111(b) under which the statutory maximum sentence may be raised to 20 years if Hamner used a deadly or dangerous weapon or inflicted bodily injury.

The government confuses penalty "elements" in the Sixth Amendment context and elements of the offense for purposes of the Double Jeopardy Clause. *E.g.*, *Smith v. Hedgpeth*, 706 F.3d 1099 (9th Cir. 2013). It is true that under *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and its progeny, the government is required to prove penalty "elements" beyond a reasonable doubt to the petit jury. *Hedgpeth*, 706 F.3d at 1103. But the Supreme Court has never extended that understanding of a penalty "element" to the Double Jeopardy context. *Id.* And, indeed, in *Apprendi* the Court "seem[ed] to suggest the opposite." *Id.* In fact, because Congress enacted both §§ 111 and 231 well before *Apprendi*, it would be chronologically confused to construe congressional intent in a way that would incorporate that later-filed-decision's Sixth Amendment understanding of a penalty "element" into the previously enacted criminal statutes for purposes of the Double Jeopardy Clause.

In sum, the "Aggravated assault" Guideline in U.S.S.G. §2A2.2 would not apply to

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[1] In the *Leffingwell* case, an Assistant U.S. Attorney advised the Court that there was no *Blockburger* issue between §§ 111 and 231 because *one* of the offenses "had a different element." But, as shown above, the "same elements" test asks whether *each* offense possesses an element that the other does not. Section 111 does not possess an offense element lacking in § 231(a)(3).

Hamner's conviction under Count Two. That also implies the government mistakenly adds 6 levels for an official victim under U.S.S.G. §3A1.2(b). For the Guideline in U.S.S.G. §2A2.4 concerns "obstructing or impeding officers" by default, which means the Court should not apply §3A1.2. U.S.S.G. §2A2.4, Application Note 2.

Dated: May 16, 2022

Respectfully submitted,

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