

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12-4035

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

LAMONT CLINTON KING,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Greenville. David A. Faber, Senior District Judge. (4:05-cr-00109-FA-1; 4:06-cr-00032-FA-1; 5:07-cr-00009-FA-1)

Submitted: August 13, 2012

Decided: August 23, 2012

Before MOTZ, AGEE, and WYNN, Circuit Judges.

Affirmed in part, vacated in part, and remanded by unpublished per curiam opinion.

Sue Genrich Berry, BOWEN AND BERRY, PLLC, Wilmington, North Carolina, for Appellant. Thomas G. Walker, United States Attorney, Jennifer P. May-Parker, Kristine L. Fritz, Assistant United States Attorneys, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Lamont Clinton King appeals the conviction and sentence imposed after remand. After a trial, King was convicted of one count of possession with intent to distribute a quantity of cocaine, a quantity of heroin, and a quantity of marijuana, in violation of 21 U.S.C. § 841(a)(1) (Count One), two counts of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1), 924 (Counts Two and Five), and one count of using and carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A)(i) (Count Three). We vacated the conviction and sentence for Count Five and remanded with instructions that the district court review the grand jury testimony of Shatiek Bilal to determine whether the testimony was material and favorable to King and to take any remedial or other action as required by its determination. United States v. King, 628 F.3d 693, 704 (4th Cir. 2011).

On remand, the district court, having reviewed the grand jury testimony, found nothing that was material and favorable to King. After reinstating the conviction for Count Five, the court moved to resentencing. King, offering new evidence, argued that one of the predicate convictions supporting the Sentencing Guidelines career offender designation should not have counted because he had been adjudicated a

juvenile offender at the time. King also argued that the predicate felony conviction supporting both Counts Two and Five could no longer be considered a felony under United States v. Simmons, 649 F.3d 237 (4th Cir. 2011) (en banc).^{*} Based on evidence submitted by King, the court found that he was not a career offender, adjusted his criminal history category accordingly, and resentenced him to a sentence that was shorter than the original sentence.

Having reviewed the relevant grand jury testimony, we conclude that the district court did not err in finding it contained nothing material and favorable for King. Accordingly, the court properly reinstated the conviction for Count Five.

We further conclude that under Simmons, the predicate conviction offered in support of Counts Two and Five is not a felony. We vacate the convictions and sentences for Counts Two and Five and remand for resentencing on Counts One and Three.

Because we are remanding for resentencing, we need not decide whether the district court exceeded the scope of the mandate by considering a sentencing issue that had been raised during the initial sentencing, but abandoned on appeal. We note that resentencing in this case will be de novo and the court, in its discretion, may consider sentencing issues that were

^{*} Simmons was decided after the initial appeal.

previously waived or abandoned. See Pepper v. United States, 131 S. Ct. 1229, 1251 (2011); United States v. Susi, 674 F.3d 278, 284-85 (4th Cir. 2012).

Accordingly, we vacate the convictions and sentences for Counts Two and Five and remand for resentencing on Counts One and Three. We affirm the sixty month sentences entered for the convictions under Case Nos. 4:06-cr-00032-FA-1 and 5:07-cr-00009-FA-1. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED IN PART,
VACATED IN PART,
AND REMANDED