UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

UNITED STATES of America, Plaintiff-Appellee, v. Parker SHOWALTER, Defendant-Appellant.	ALB-25-01

Before LYNCH, DERN, MACLACHLAN, Circuit Judges.

OPINION

LYNCH, Circuit Judge.

Appellant Parker Showalter was convicted in the United States District Court for the District of Albers under 18 U.S.C. § 1112 for involuntary manslaughter and 18 U.S.C. § 922(g)(1) for unlawful possession of a firearm. He timely appealed his conviction under § 1112 and his sentence for his § 922(g)(1) conviction. Two issues are before this Court. First, Showalter contends that the district court erred in denying his motion to suppress a single nucleotide polymorphism DNA profile used by law enforcement during their investigation, as well as evidence obtained as a result of that use. Second, Showalter contends that the district court erred in finding that Showalter was eligible for the Armed Career Criminal Act's fifteen-year mandatory minimum sentence. See 18 U.S.C. § 924(e). For the reasons discussed below, this Court holds (1) that the district court properly denied Showalter's motion to suppress and (2) that the district court did not err by sentencing Showalter under the Armed Career Criminal Act. Therefore, we AFFIRM the district court's decisions below.

Facts

The district court made the following factual findings, which the parties do not dispute. On the morning of April 8, 1990, the body of Benjamin Horne, U.S. Representative for the Albers 1st congressional district, was found deceased by cleaning staff in a room at the Black Lodge Motel in Albers City. The room showed clear signs of a physical altercation, with objects broken and strewn about the room, but none of Horne's belongings were missing. The medical examiner later classified the death as a homicide and determined the cause of death to be strangulation. Horne also exhibited contusions on his face and body, indicative of a fight. The FBI was called in, as the suspected homicide involved a federal elected official.

The crime scene revealed few leads. There were no witnesses or surveillance video, and no fingerprints were left at the scene. The night auditor at the Black Lodge Motel recalled Horne checking in around 9:00 PM on April 7, 1990, but had no memory of seeing anyone else with him, and did not recall anyone else checking in around the same time or later that night. The night auditor also had no memory of any disturbances, loud noises, or anything else out of the ordinary. The only evidence recovered at the scene was three strands of blonde hair, found on the victim's body (notably, Horne had short, curly, dark brown hair). DNA analysis of the hair at the time produced no leads, but FBI agents retained it as evidence.

Despite the victim's high-profile political status, the FBI's investigation went cold. Finally, in 2020, agents within the FBI's cold case unit learned of Joseph James DeAngelo's arrest. DeAngelo was arrested after an emerging law enforcement technique called Forensic Genetic Genealogy ("FGG")[1] identified him as the infamous "Golden State Killer." Believing

[1] The United States Department of Justice ("DOJ") defines FGG as "the forensic genetic genealogical DNA analysis of a forensic or reference sample of biological material by a vendor laboratory to develop an FGG profile and the subsequent search of that profile in a publicly-available open-data personal genomics database or a direct-to-consumer genetic genealogy

that FGG could finally help solve the murder of Benjamin Horne, FBI agents sent a strand of the blonde hair recovered at the crime scene to Martell Labs, which generated a single nucleotide polymorphism ("SNP") profile from the DNA. Martell Labs uploaded the profile to DNAMatch, a database that allows anyone to upload their DNA profile to find genetic familial matches from across the world. Martell Labs then prepared a report about the SNP profile, including information about the suspect's physical traits (including skin, eye, and hair color) and ethnic and racial background. The report also identified a cousin of the suspect, who was identified through uploading the profile to DNAMatch. At no point during this process did law enforcement obtain a warrant.

Using this information, FBI agents constructed a family tree from the DNAMatch profile and began to narrow their search. Ultimately, they landed on Parker Showalter, a fifty-six-year-old Albers resident.[2] Records confirmed that Showalter had lived in Albers City at the time of the murder, and a booking photo[3] of him taken in 1991 showed hair the same length and color as that found in the motel room. To confirm their suspicions, FBI agents began surveilling Showalter and collected a cigarette butt that Showalter dropped in an alleyway. Agents generated a Short Tandem Repeat ("STR") profile from the DNA on the cigarette butt. The STR profile was a match to the DNA in the strands of hair found at the Black Lodge Motel crime scene. Based on this information, FBI agents obtained a warrant for Showalter's arrest, which was executed on February 25, 2021. While executing a search incident to the arrest, agents discovered a loaded firearm in Showalter's waistband.

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service." United States Department of Justice, Interim Policy Forensic Genetic Genealogical DNA Analysis and Searching, 1 n.2 (Nov. 2019) [hereinafter DOJ Interim Policy].

[2] Showalter was born on August 20, 1967.

[3] As discussed infra, Showalter was arrested and pled guilty in 1991 to distribution of a Class B controlled substance, possession with intent to distribute a Class B controlled substance, and resisting arrest.

Proceedings Below and Additional District Court Findings

On March 3, 2021, a federal grand jury indicted Showalter for the murder of Benjamin Horne under 18 U.S.C. § 1111 and, because of his prior felony convictions, unlawful possession of a firearm under 18 U.S.C. § 922(g).

On April 5, 2021, Showalter timely moved to suppress (1) the SNP profile created from the DNA left at the crime scene, (2) the information gained from uploading the SNP profile to DNAMatch, and (3) the STR profile created from the cigarette butt.[4] In all instances Showalter argued that these pieces of evidence should be suppressed because each was the result of an unreasonable, warrantless search in violation of the Fourth Amendment. At the suppression hearing, the Government argued that Showalter had no reasonable expectation of privacy in DNA left at a crime scene, voluntarily shared by third parties on DNAMatch, or left on a discarded cigarette, and therefore no Fourth Amendment searches occurred.

On April 26, 2021, Judge Clinton Sternwood of the United States District Court for the District of Albers denied Showalter's motion to suppress in its entirety. Judge Sternwood found that Showalter "had no reasonable expectation of privacy in the physical evidence he abandoned at the Black Lodge Motel and in the alleyway" and that "this Court does not recognize a reasonable expectation of privacy in the information that can be drawn from DNA evidence using standard forensic procedures." Because Judge Sternwood held that none of law

[4] Although neither law enforcement's collection of abandoned trash in a public space nor creation of an STR profile would violate the Fourth Amendment, Showalter contends that here, the cigarette butt and the creation of the STR profile from the DNA on it are fruit of the poisonous tree because law enforcement would not have seized the cigarette butt absent the creation of the SNP profile and the information gained from uploading it to DNAMatch. The Government concedes that if creation of the SNP profile and law enforcement's use of FGG were an unreasonable warrantless search in violation of the Fourth Amendment, that the STR profile would be fruit of the poisonous tree and the exclusionary rule would apply to it as well. Neither party raises any arguments about the STR profile separately, however.

enforcement's actions constituted a search under the Fourth Amendment, he did not address whether the alleged warrantless searches would be considered reasonable.

Showalter elected to proceed with a bench trial. On November 15, 2021, he was convicted in the district court for involuntary manslaughter[5] under 18 U.S.C. § 1112 and for being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1). Showalter timely filed his notice of appeal on November 26, 2021, appealing his manslaughter conviction on the grounds that his motion to suppress was improperly denied.

At Showalter's December 13, 2021, sentencing hearing, the Government asked Judge Sternwood to sentence Showalter under the Armed Career Criminal Act ("ACCA"), which imposes a mandatory fifteen-year minimum sentence for anyone who violates 922(g) and "has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. § 924(e)(1). Such prior convictions are also referred to as "ACCA predicates" when they support sentencing an offender under the ACCA's fifteen-year minimum sentence. Absent application of the ACCA, a conviction under 18 U.S.C. § 922(g)(1) typically carries a maximum sentence of ten years.

In 1991, Showalter was arrested and charged under Albers state law with one count of distribution of a Class B controlled substance, one count of possession with intent to distribute a Class B controlled substance, one count of resisting arrest "by flight," and one count of resisting arrest "by use or threat of violent force." On November 21, 1991, Showalter pleaded guilty to all charges except the charge of resisting arrest by flight, which was dropped in Showalter's written plea agreement. Showalter admitted to the following facts in his written plea agreement:

[5] Showalter made a successful imperfect self-defense claim at trial, and his charge was reduced accordingly from murder (under 18 U.S.C. § 1111) to involuntary manslaughter (under 18 U.S.C. § 1112).

(1) On August 27, 1991, police conducted a controlled buy between Showalter and a confidential informant at Showalter's Albers City home at 9:20 PM.

(2) Police obtained a warrant to arrest Showalter, and arrived at his home the following morning at 8:05 AM. After arriving at the door to Showalter's home, police heard a door slam.

(3) Police entered the home and found 800 grams of cocaine on Showalter's kitchen counter.

(4) Police conducted a search of the neighborhood, and found Showalter hiding in a shed at 9:10 AM approximately a quarter-mile away from Showalter's home.

(5) Showalter attempted to flee out of a window and kicked an officer in the face, resulting in injuries to the officer.

Showalter received three eighteen-month sentences for each offense, to be served consecutively. Showalter has not been convicted for any other offenses between his release in 1996 and the present case.

Based on the undisputed facts recounted above, Judge Sternwood found that Showalter's convictions arose from separate occasions, noting that Showalter "had ample opportunity to cease his illegal conduct" in between each of his three offenses.

Judge Sternwood further found that Showalter's convictions for distribution of cocaine and possession with intent to sell cocaine both met the definition of a "serious drug offense" the ACCA defines as "[an] offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . . for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(ii). Showalter does not dispute that § 924(e)(2)(A)(ii) applies to his two drug offenses.

Finally, Judge Sternwood found that because Albers allows offenders (like Showalter) to be charged twice for the same course of conduct for resisting arrest "by using or threatening the

use of violence or physical force" and for resisting arrest "by fleeing," and because other plea deals have made this distinction, Albers treats its resisting arrest statute as describing two separate offenses. See Alb. Rev. Stat. ch. 216, § 112.[6] Based on Showalter's written plea agreement, Sternwood found that Showalter had been convicted of the former offense, resisting arrest by using or threatening the use of violence or physical force. Judge Sternwood found that because Showalter was convicted for an offense that "ha[d] as an element the use, attempted use, or threatened use of physical force against the person of another," Showalter's resisting arrest conviction met the definition of a "violent felony" under the ACCA. See 18 U.S.C. § 924(e)(2)(B)(i). Accordingly, Judge Sternwood found that Showalter had committed three ACCA predicate offenses.[7]

On February 5, 2022, Judge Sternwood sentenced Showalter to seventy-two months in prison for involuntary manslaughter, and, based on the ACCA enhancement, to 180 months in prison for his unlawful possession of a firearm charge. Showalter timely filed a notice of appeal on February 17, 2022. On appeal, Showalter argues (1) that his prior convictions for distribution of a controlled substance, possession with intent to distribute, and resisting arrest arose from the same occasion, and (2) his resisting arrest conviction under Alb. Rev. Stat. ch. 216, § 112 was not a violent felony because it does not "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another." See 18 U.S.C. § 924(e)(2)(B)(i).

This Court joined Showalter's two appeals and heard oral argument on March 20, 2023.

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[6] See infra Appendix A.

[7] The Government conceded that Showalter's conviction for involuntary manslaughter in violation of 18 U.S.C. § 1112 is not a crime of violence. United States v. Benally, 843 F.3d 350, 353 (9th Cir. 2016) (holding involuntary manslaughter under 18 U.S.C. § 1112 to not be a "crime of violence" where involuntary manslaughter only requires a mens rea of gross negligence). See also Borden v. United States, 593 U.S. 420, 445 (2021) ("Offenses with a mens rea of recklessness do not qualify as violent felonies under ACCA.").

Discussion

1. Appellant Showalter's Motion to Dismiss

This Court reviews a district court's denial of a motion to suppress and its legal conclusions de novo. United States v. Smith, 967 F.3d 198, 204 (2d Cir. 2020).

The Fourth Amendment guarantees people the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. A Fourth Amendment search does not occur unless an individual has a subjective expectation of privacy in the object searched and society recognizes that expectation as objectively reasonable. Kyllo v. United States, 533 U.S. 27, 33 (2001) (citing Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

Fourth Amendment searches are presumptively unreasonable without a warrant supported by probable cause, but this warrant requirement may be overcome if the government can show that the search was reasonable. Kentucky v. King, 563 U.S. 452, 459 (2011). Reasonableness is determined by examining the totality of the circumstances, including the degree to which the search intrudes upon an individual's privacy with the degree to which the search is needed for the promotion of legitimate governmental interests. United States v. Knights, 534 U.S. 112, 118–19 (2001). Warrantless searches are typically unreasonable where "a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing" rather than for a separate, non-law enforcement purpose. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652–53 (1995).

The Government concedes that Showalter manifested a subjective expectation of privacy in his DNA and the Single Nucleotide Polymorphism ("SNP") profile created from it. The Government contends, however, and the district court agreed that the creation and use of the SNP profile was not search in violation of the Fourth Amendment. Showalter contends that it

was, arguing that the creation and use of the SNP profile intruded upon an expectation of privacy that society is prepared to recognize as reasonable, making it a search, and that this search was not subject to any reasonableness exceptions to the warrant requirement. See Katz, 389 U.S. at 361 (Harlan, J., concurring); Kentucky v. King, 563 U.S. at 459.

A. Modern Law Enforcement Use of DNA Profiles and Forensic Genetic Genealogy

Forensic DNA typing has historically been used to compare 13-20 Short Tandem Repeat ("STR") DNA markers between a forensic sample recovered from a crime scene and one or more reference samples from a known source. DOJ Interim Policy at 2. STR profiles contain exclusively "junk-DNA," or noncoding segments of DNA that do not yield information about the source but can be used to easily distinguish individuals from each other. Erin Murphy, Law and Policy Oversight of Familial Searches in Recreational Genealogy Databases, 292 Forensic Sci. Int'l. e5, e5–e6 (2018), available at https://www.sciencedirect.com/science/article/pii/S0379073818305280. In Maryland v. King, this Court held that the creation of an STR profile from an arrestee's cheek swab was a search under the Fourth Amendment, but it was reasonable—therefore subject to a warrant exception—because: (1) the level of intrusion was "negligible;" (2) the arrestee in custody had a diminished expectation of privacy; and (3) the government had interests in identification, safety, and freeing those wrongfully convicted. 569 U.S. 435-36, 465-66 (2013). However, the Court also observed that the although the STR profile did not "reveal the genetic traits of the arrestee . . . science can always progress further, and those progressions may have Fourth Amendment consequences . . . ." Id. at 465 (internal quotation omitted).

More recently, advances in DNA technology have allowed for the creation of SNP profiles. See Murphy, supra, e5–e6. These profiles are highly detailed and contain information

about the source that includes their physical characteristics, ethnicity, predisposition to disease and mental illness, familial relationships, and more. Id.

When law enforcement creates an SNP profile, they no longer need a reference sample from a known suspect or DNA database, such as CODIS, to compare the profile to. Rather, law enforcement can turn to forensic genetic genealogy ("FGG"). The United States Department of Justice ("DOJ") defines FGG as "the forensic genetic genealogical DNA analysis of a forensic or reference sample of biological material by a vendor laboratory to develop an FGG profile and the subsequent search of that profile in a publicly-available open-data personal genomics database or a direct-to-consumer genetic genealogy service." DOJ Interim Policy at 1 n.2. Essentially, the FGG profile, which is an SNP-based genetic profile created by a vendor laboratory, is compared by the vendor laboratory to all the genetic profiles that users have voluntarily submitted to one or more publicly-available DNA databases (such as GEDMatch) or direct-to-consumer genetic genealogy services (such as 23andMe). Id. at 3. The goal is that the comparison of the FGG profile with the other genetic profiles will result in one or more potential matches, indicating a genetic familial relationship. Id. This information is used by investigators to aid in their search for the source of the original forensic sample, usually in relation to solving a cold case. Id. at 4.

Use of FGG dramatically increases law enforcement's investigative capabilities, "effectively expand[ing] a DNA search from the approximately 16 million individuals in official databases to potentially the entire population of the United States." Bicka Barlow & Kristen McCowan, Genetic Genealogy in the Legal System, 97 Wis. Law. 14, 15 (January 2024). As of 2018, "[commercial] DNA testing ha[s] become so widespread that around 60 percent of Americans of Northern European descent [can] be identified through commercial genealogical databases, whether or not they had participated directly in DNA testing." Yaniv Erlich et al.,

Identity Inference of Genomic Data Using Long-Range Familial Searches, 362 Science 690, 690 (2018). FGG was most famously used in 2018 to identify Joseph James DeAngelo as the Golden State Killer, who committed at least fifty rapes and thirteen murders in California from 1974 to 1986, by linking him to a distant cousin via a public genealogy database. Robert I. Field et al., Am I My Cousin's Keeper? A Proposal to Protect Relatives of Genetic Database Subjects, 18 Ind. Health L. Rev. 1, 9 (2021).

B. Privacy Under the Fourth Amendment

The Supreme Court has not yet addressed the use of SNP profiles or FGG by law enforcement, other than the mention in Maryland v. King of "progressions [in science that] may have Fourth Amendment consequences." 569 U.S. at 465. However, the Court has recently extended additional privacy protections in the wake of other technological advancements used by law enforcement.

In Carpenter v. United States, the Court recognized that individuals have a reasonable expectation of privacy in the record of their physical movements as captured through Cell-Site Location Information ("CSLI"). 585 U.S. 296, 311 (2018). The Court found that, although the CSLI was voluntarily shared with a third party (wireless carriers), that diminished privacy expectation was overcome by "the unique nature of cell phone location records" as "a detailed and comprehensive record of the person's movements." Id. at 309. The Court narrowly constrained its holding in Carpenter to recognizing an expectation of privacy in historical CSLI only, and most lower courts have declined to extend the Carpenter analysis to cases that do not involve surveillance or the creation of a "comprehensive record of the person's movements." See, e.g., United States v. Hay, 95 F.4th 1304, 1316–17 (10th Cir. 2024), cert. denied, No. 24-72,

2024 WL 4874676 (U.S. Nov. 25, 2024). Some courts, however, have extended Carpenter's protections. See, e.g., United States v. Medina, 712 F. Supp. 3d 226, 245 (D.R.I. 2024).

Showalter contends that his subjective expectation of privacy in his DNA and any profiles made from it is objectively reasonable. Showalter contends that Carpenter's reasoning should extend to law enforcement's use of FGG where the SNP profile reveals much more intimate information than the STR profile the Supreme Court analyzed in Maryland v. King and where law enforcement does not already have any individualized suspicion as to the source of the DNA. He argues that like the historical CSLI data in Carpenter, the Fourth Amendment should apply to an SNP profile because it also "provides an intimate window into a person's life." 585 U.S. at 311.

Showalter concedes, as he must, that he is not arguing that his privacy interests were implicated when the hair follicles were seized from the crime scene by law enforcement, as that is routine evidence collection. Rather, he asserts that his privacy interests were implicated when law enforcement "searched" the hair follicles to create the SNP profile, then uploaded the profile to a genetic genealogy database. See State v. Westrom, 6 N.W.3d 145, 153 (Minn. 2024), cert. denied, No. 24-271, 2024 WL 4529836 (U.S. Oct. 21, 2024). He points to various state laws regulating the use of FGG, as well as surveys of public opinion, to argue that society is indeed prepared to accept this privacy interest as objectively reasonable. See, e.g., Utah Code Ann. § 53-10-403.7. The Government, however, points to surveys showing just the opposite. Moreover, there was simply no intrusion here of the type present in cases where the Supreme Court has recognized an objectively reasonable expectation of privacy. See, e.g., Maryland v. King, 569 U.S. at 447. Thus, creation of the SNP profile here and its use in FGG was not a search.

Furthermore, even if Showalter's expectation of privacy was objectively reasonable here, he abandoned his hair follicles, and thus, his DNA, at the crime scene. See State v. Hartman, 534 P.3d 423, 435 (Wash. App. Div. 2 2023), review denied, 540 P.3d 778 (Wash. 2024). Showalter asserts that he did not abandon his DNA when he shed hair follicles in the motel room, as "[a] person does not surrender all Fourth Amendment protection by venturing into the public sphere." Carpenter, 585 U.S. at 310; see also State v. Burns, 988 N.W.2d 352, 394 (Iowa 2023) (Oxley, J., dissenting), cert. denied, 144 S. Ct. 288 (2023). We disagree. Involuntarily leaving hair behind is no different than involuntary leaving a fingerprint behind. See Burns, 988 N.W.2d at 362.

Finally, we find that even if the creation of the SNP profile and the use of FGG here was a warrantless Fourth Amendment search, any such search would be reasonable. We agree with Showalter that no existing exception to the warrant requirement likely applies here. See Katz, 389 U.S. at 357; Kentucky v. King, 563 U.S. at 459–60. The Government contends, however, and we agree, that even if a search occurred here, it was reasonable. Law enforcement has strong interests in solving unsolved major violent crimes, identifying unidentified victims, and exonerating wrongfully convicted individuals. As in Maryland v. King, DNA and FGG has "unmatched potential . . . to serve that interest," and, in many cases, is the only way for law enforcement to do so. 569 U.S. at 461. Thus, even if the creation of the SNP profile and its subsequent use amounted to a warrantless Fourth Amendment search, that search was reasonable. Because we agree with the district court that law enforcement's actions did not violate the Fourth Amendment, we AFFIRM the district court's order denying Showalter's motion to suppress.

2. Appellant Showalter's Sentence

This Court reviews de novo "[w]hether a prior conviction qualifies as an [Armed Career Criminal Act] predicate." United States v. Whindleton, 797 F.3d 105, 108 (1st Cir. 2015). "Questions of statutory interpretation are questions of law and are reviewed de novo." Hernandez-Miranda v. Empresas Diaz Masso, Inc., 651 F.3d 167, 170 (1st Cir. 2011)

As discussed above, after electing for a bench trial on both charges he faced,[8] Showalter was convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), and sentenced pursuant to the Armed Career Criminal Act ("ACCA"), which imposes a mandatory fifteen-year minimum sentence for anyone who violates 18 U.S.C. § 922(g) and who "has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. § 924(e). Showalter challenges that sentence, arguing (1) that his prior convictions for distribution of a controlled substance, possession with intent to distribute, and resisting arrest arose from a single criminal episode, and (2) that his resisting arrest conviction under Alb. Rev. Stat. ch. 216, § 112 was not a violent felony. We will consider these arguments in turn.

[8] This Court recognized in Erlinger v. United States that the ACCA's occasions clause is an element that needs to be found beyond a reasonable doubt by a unanimous jury. 602 U.S. 821, 835 (2024). Because Showalter opted for a bench trial, he waived that right, and Erlinger is mostly irrelevant to this case. However, Erlinger provides important context for understanding ACCA occasions clause cases decided in 2024. Several cases after Erlinger have tackled how to address people convicted under the ACCA separate occasion clause without a jury determination under harmless error review. See, e.g., United States v. Johnson, 114 F.4th 913, 917 (7th Cir. 2024) (finding district court determination that robberies occurring approximately five minutes apart with intervening 0.6 mile car ride were separate occasions was not harmless error); United States v. Campbell, 122 F.4th 624, 631 (6th Cir. 2024) (finding harmless error where judge–instead of jury–found robbery and trafficking convictions arising from conduct months apart occurred on separate occasions).

A. The ACCA Occasions Clause

The Supreme Court recently addressed the "occasions different from one another" language, also known as the "occasions clause," in United States v. Wooden, ruling that Wooden's ten convictions for burglarizing ten storage units in succession during a single night were not committed on "occasions different from one another." 595 U.S. 360, 376 (2022). First, this Court found that counting successive, continuous crimes as a single "occasion" better matched the common use of the word "occasion." Id. at 367. Applying this definition of occasion, the Wooden Court observed that "a range of circumstances may be relevant to identifying episodes of criminal activity," including timing, location, and the character and relationship of the offenses. Id. at 369. The Court further stated that "[i]n many cases, a single factor—especially of time or place —can decisively differentiate occasions," but instructed courts to look at the ACCA's history and purpose in more difficult cases. Id. at 369-70.

As to timing specifically, Wooden explicitly states that courts "have nearly always treated offenses as occurring on separate occasions if a person committed them a day or more apart." Id. (citing United States v. Rideout, 3 F.3d 32, 34 (2d Cir. 1993)). In fact, prior to Wooden, several courts had found that crimes occurring only hours apart could constitute separate occasions. See, e.g., United States v. Washington, 898 F.2d 439, 442 (5th Cir. 1990); United States v. Callahan, 179 F. App'x 200, 202 (4th Cir. 2006). Although Wooden post-dates these cases, it does not overrule them.

Second, the Wooden Court recognized that Congress added the occasions clause to the ACCA in a 1988 amendment following the Supreme Court's remand in United States v. Petty after the Solicitor General admitted in the government's brief "that ACCA should not be construed 'to reach multiple felony convictions arising out of a single criminal episode.'"

Wooden, 595 U.S. at 371-73 (internal citation omitted). In Senator Byrd's analysis of the 1988 amendment, he noted that "[t]he proposed amendment . . . would clarify the armed career criminal statute to reflect the Solicitor General's construction [in Petty]." Id. at 373 (quoting 134 Cong. Rec. 13783 (1988)).

In the Sixth Circuit decision that Wooden overturned, the court had applied a three-part test to find Wooden had committed his burglaries on separate occasions. United States v. Wooden, 945 F.3d 498, 504 (6th Cir. 2019), rev'd, 595 U.S. 360 (2022). This test asked: "Is it possible to discern the point at which the first offense is completed and the subsequent point at which the second offense begins?; Would it have been possible for the offender to cease his criminal conduct after the first offense and withdraw without committing the second offense?;" and "Were the offenses committed in different residences or business locations?" Id. The Sixth Circuit reasoned that the first factor was fulfilled because "Wooden could not be in two (let alone ten) of [the storage units] at once." Id. at 505. The Supreme Court rejected the Sixth Circuit's application of its test. Wooden, 595 U.S. at 365. In adopting a more "holistic" approach to the occasions clause and rejecting the Sixth Circuit's approach that "deem[s] the clause satisfied whenever crimes take place at different moments in time—that is, sequentially rather than simultaneously," Wooden rejected a strictly sequential approach to the occasions clause. Id. at 365, 367-71.

It is unclear, however, how much further Wooden extends to overrule other prior decisions on the occasions clause, which is especially relevant as other circuits employ multi-factor approaches similar to that used by the Sixth Circuit. The Fourth Circuit, for example, uses a five-factor test which includes "whether 'the defendant had the opportunity, after committing the first-in-time offense, to make a conscious and knowing decision to engage in the next-in-time

offense'" as its sole timing element. United States v. Curtis, No. 18-4907, 2024 WL 1281335, at *4 (4th Cir. Mar. 26, 2024). The Fourth Circuit held that Wooden did not alter its five-factor approach to the occasions clause. Id. at *6. See also, e.g., United States v. Gallimore, 71 F.4th 1265, 1268 n.1 (10th Cir. 2023). Some courts and judges, however, have acknowledged that Wooden does require some new approach to the occasions clause. See, e.g., United States v. Enoch, No. 17-2089, 2023 WL 5745372, at *3 (3d Cir. Sept. 6, 2023); United States v. Stowell, 82 F.4th 607, 611 (8th Cir. 2023) (Erickson, J., dissenting), cert. denied, 144 S. Ct. 2717 (2024).

Showalter contends that the Wooden factors (time, place, and nature of the crime) show that at least two of his convictions were for crimes that occurred on a single occasion. His conduct, however, occurred over a roughly twelve-hour period, longer than the conduct described in Wooden. See 595 U.S. at 363. Although Showalter points to at least one case in which a court found that it was not clear beyond a reasonable doubt that two robberies occurring five minutes and 0.6 miles apart were separate occasions, see United States v. Johnson, 114 F.4th 913, 917 (7th Cir. 2024), the Government points to many more that found separate occasions even between drug offenses with extremely short time gaps. See, e.g., Curtis, 2024 WL 1281335 at *6; United States v. Letterlough, 63 F.3d 332, 337 (4th Cir. 1995).Showalter further contends that he necessarily had to possess cocaine in order to distribute it, arguing that his possession was functionally concurrent with the distribution and the two convictions arose from a single course of conduct and suggesting that the relationship between a distribution offense and a possession offense makes for an uncomfortable fit with the "stop and reconsider" test courts apply to the occasions clause. See, e.g., Letterlough, 63 F.3d at 337. Again, we disagree. Distribution and possession with intent convictions can count as separate occasions. See, e.g., United States v. Sims, 683 F.3d 815, 817 (7th Cir. 2012).

Finally, he argues that resisting arrest necessarily is part of the same occasion when, as here, a defendant is arrested while committing an offense. United States v. Mann, 552 F. App'x 464, 470 (6th Cir. 2014). Here, however, Showalter was charged separately for his flight and his violent resistance, and his conviction for violent resistance is the potential predicate conviction here. That criminal act occurred after law enforcement tracked Showalter to a shed, a quarter-mile away and more than an hour after the cocaine was discovered in his home. The distance between where a person commits their original offense and where they resist arrest as particularly relevant, because it provides "an opportunity to cease . . . criminal activity." Levering v. United States, 890 F.3d 738, 741-42. Thus, we agree with the Government and the district court that Showalter's resisting arrest was also a separate occasion from his possession of cocaine and his intent to distribute it, which also occurred on separate occasions.

B. Violent Felony and the Albers Resisting Arrest Statute

In addition to the occasions clause, another important source of ambiguity under the ACCA is which offenses count as ACCA predicates. The Supreme Court adopted the "categorical approach" to decide whether a conviction is an ACCA predicate. United States v. Taylor, 495 U.S. 575, 602 (1990). The Court's adoption of the categorical approach rests on three grounds. Id. at 600-01. First, that Congress intended for sentencing courts applying the ACCA to look at convictions rather than underlying conduct. Id. at 600. Second, that the ACCA's legislative history shows that Congress treated ACCA predicates categorically (rather than allowing for the possibility that a conviction under a particular statute might sometimes be a predicate and sometimes not be one). Id. at 601. Third, that a "factual approach" would lead to difficult evidentiary questions as sentencing courts dealt with years-old convictions. Id.

Under the categorical approach, courts look at the statute under which the defendant was charged rather than the defendant's actual conduct. Id. at 602. An offense is an ACCA predicate "if, but only if, its elements are the same as, or narrower than, those of the generic offense." Mathis v. United States, 579 U.S. 500, 503 (2016). This means a statute is not a "violent felony" under the ACCA if it criminalizes some conduct that does not have violent force as an element. Borden v. United States, 593 U.S. 420, 424 (2021).

A single statute may describe two separate offenses: one that is an ACCA predicate, and one that is not. Descamps v. United States, 570 U.S. 254, 257 (2013). Courts may consult certain documents to determine whether a defendant was convicted of an ACCA predicate offense. Shepard v. United States, 544 U.S. 13, 26 (2005). These documents are "the statutory definition, charging document, written plea agreement, transcript of the plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." Id. at 16. A court will only conduct this analysis, however, if a statute is divisible. Mathis, 579 U.S. at 505. Statutes are not divisible when they merely list alternative means by which an element of an offense can be established, rather than presenting multiple distinct offenses. Id. at 519.

Showalter contends that the Albers resisting arrest statute under which he was convicted should not count as an ACCA predicate because it is not divisible. Rather, he argues, the statute describes two different means of conducting a single offense: "resisting arrest by use or threatened use of force or by fleeing from an officer," where "by use or threatened use of force" and "by fleeing from an officer" are two means by which a defendant could resist arrest. Alb. Rev. Stat. ch. 216, § 112. Read this way, he argues that a conviction under the statute cannot be an ACCA predicate because the statute encompasses some conduct that does not have violent force as an element.

Resisting arrest is a crime that depending on the state, statute, and circuit, has been found to either be categorically a violent felony, categorically not a violent felony, or divisible such that Shepard documents could be used to clarify whether the felony was violent or not. Albers has adopted a statute with language identical to the Missouri resisting arrest statute discussed in United States v. Brown, 73 F.4th 1011 (8th Cir. 2023). These statutes state:

> A person commits the offense of resisting or interfering with arrest, detention, or stop if he or she knows or reasonably should know that a law enforcement officer is making an arrest or attempting to lawfully detain or stop an individual or vehicle, and . . . he or she:
>
> (1) Resists the arrest, stop or detention of such person by using or threatening the use of violence or physical force or by fleeing from such officer[.]

Mo. Rev. Stat. § 575.150.1(1); Alb. Rev. Stat. ch. 216, § 112. Taken as a whole, this statutory language encompasses both some conduct that "has as an element the use, attempted use, or threatened use of physical force against the person of another" and some conduct that does not. See 18 U.S.C. § 924(e)(2)(B)(ii). Namely, resisting arrest "by using or threatening the use of violence or physical force" is violent, but resisting arrest "by fleeing" is not. See Alb. Rev. Stat. ch. 216, § 112. We agree with Showalter that because the Albers statute describes some conduct that would not be a violent felony, his resisting arrest conviction cannot be an ACCA predicate if the statute is read as indivisible.

Our agreement ends there, however. Like the district court judge here and the Eighth Circuit in Brown, we find that the statute is divisible into two offenses: "(1) resisting arrest by use or threatened use of force and (2) resisting arrest by fleeing from an officer." Brown, 73 F.4th at 1014. Because the statute is divisible, the district judge correctly considered Showalter's written plea agreement during sentencing. The written plea agreement clearly states that Showalter pleaded guilty to "resisting arrest by use or threatened use of force." Consequently,

the district judge correctly held that Showalter's resisting arrest conviction was a violent felony and therefore an ACCA predicate.

Showalter points out that the Eighth Circuit originally concluded that the Missouri resisting arrest statute was divisible in United States v. Shockley. 816 F.3d 1058, 1063 (8th Cir. 2016). He contends that Shockley's value as precedent is uncertain following Mathis's conclusion that a statute that merely lists the alternative means by which the offense can be committed is not divisible. See Brown, 73 F.4th at 1014. He attempts to distinguish Missouri's statute by pointing out that Missouri has approved two sets of jury instructions that list a different element for either means of resisting arrest, a factor the Brown court found significant. Id. at 1014-16. In contrast, Albers has not approved any jury instructions regarding resisting arrest. He also urges this Court to look at other resisting arrest statutes that courts have found indivisible. See, e.g., United States v. Jones, 914 F.3d 893, 900 (4th Cir. 2019).

We find these arguments unpersuasive. Although Brown is not binding on this Court, it is persuasive, and we adopt its reasoning here. We agree with the district court that Showalter's conviction for resisting arrest is a predicate offense under the ACCA.

C. Showalter's Drug Offenses as ACCA Predicates

The ACCA explicitly defines serious drug offenses to include "distributing or possessing with intent . . . or distribute," so Showalter's possession with intent and distribution convictions unambiguously count as serious drug offenses under the ACCA, a finding he does not dispute. 18 U.S.C. § 924(e)(2)(A)(ii).[9]

[9] Section 924(e)(2)(A)(ii) lists additional categories of "violent felonies" which are inapplicable here. The enumerated clause listing "burglary, arson, or extortion" and crimes that involve explosives is inapplicable here. The residual clause including crimes that "otherwise involve[] conduct that presents a serious potential risk of physical injury to another" was held unconstitutionally vague in Johnson v. United States. See generally 576 U.S. 591 (2015).

Because we agree with the district court that Showalter was convicted of three predicate offenses occurring on three separate occasions, we AFFIRM the district court's sentencing order.

Conclusion

For these reasons, this Court AFFIRMS Showalter's conviction and his sentence.

Dated: October 20, 2023

SUPREME COURT OF THE UNITED STATES

Parker SHOWALTER, Petitioner,	)	
v.	)	ALB-25-01
UNITED STATES of America, Respondent.	)	

OPINION

Petition for writ of certiorari to the United States Court of Appeals for the Fourteenth Circuit granted.

January 17, 2025[10]

[10] Competitors may not rely on any decisions issued or articles published subsequent to this date.

Appendix A

Albers Revised Statutes

CHAPTER 216

SECTION 112.

(1) A person commits the offense of resisting or interfering with arrest, detention, or stop if he or she knows or reasonably should know that a law enforcement officer is making an arrest or attempting to lawfully detain or stop an individual or vehicle, and for the purpose of preventing the officer from effecting the arrest, stop or detention, he or she:

(a) Resists the arrest, stop or detention of such person by using or threatening the use of violence or physical force or by fleeing from such officer; or

(b) Interferes with the arrest, stop or detention of another person by using or threatening the use of violence, physical force or physical interference.

(2) This section applies to:

(a) Arrests, stops, or detentions, with or without warrants;

(b) Arrests, stops, or detentions, for any offense, infraction, or ordinance violation; and

(c) Arrests for warrants issued by a court or a probation and parole officer.

(4) A person is presumed to be fleeing a vehicle stop if he or she continues to operate a motor vehicle after he or she has seen or should have seen clearly visible emergency lights or has heard or should have heard an audible signal emanating from the law enforcement vehicle pursuing him or her.

(5) It is no defense to a prosecution pursuant to subsection 1 of this section that the law enforcement officer was acting unlawfully in making the arrest. However, nothing in this section shall be construed to bar civil suits for unlawful arrest.

(6) The offense of resisting or interfering with an arrest is a class E felony for an arrest for a:

(a) Felony;

(b) Warrant issued for failure to appear on a felony case; or

(c) Warrant issued for a probation violation on a felony case.

The offense of resisting an arrest, detention or stop in violation of subdivision (1) or (2) of subsection 1 of this section is a class A misdemeanor, unless the person fleeing creates a substantial risk of serious physical injury or death to any person, in which case it is a class E felony.