UNITED STATES v. ABRAMSKI
United States Court of Appeals
Fourth Circuit
706 F.3d 307
January 23, 2013

OPINION: KING... On November 17, 2009, in purchasing a Glock 19 handgun for his uncle in Pennsylvania, Bruce James Abramski, Jr., assured the firearms dealer in Virginia that he was the "actual buyer" of the handgun. Abramski was thereafter charged with being an illegal "straw purchaser" of the firearm. Pursuant to conditional pleas of guilty, Abramski was convicted in the Western District of Virginia on June 29, 2011, for two firearm offenses: (1) making a false statement that was material to the lawfulness of a firearm sale in violation of 18 U.S.C. §922(a)(6) and (2) making a false statement with respect to information required to be kept in the records of a licensed firearms dealer—that is, that he was the actual buyer of the firearm, when in fact he was buying it for someone else—in contravention of 18 U.S.C. §924(a)(1)(A).

Prior to his guilty pleas, the district court denied Abramski's motions to dismiss the charges and suppress evidence. Abramski appeals from the criminal judgment, maintaining that the court erred in two respects. First, he argues that the court erred in denying his motion to dismiss the indictment because his conduct was beyond the purview of §§922(a)(6) and 924(a)(1)(A), in that both he and his uncle were legally entitled to purchase and own the Glock 19 handgun. Second, he contends that the court erred in denying his motion to suppress on the ground that inculpatory evidence had been unconstitutionally seized from his residence. As explained below, we reject Abramski's contentions of error and affirm.

Because it appears Abramski waived his challenge to the search warrants on appeal to the Supreme Court, those facts and that discussion is omitted.

I.

The facts underlying Abramski's convictions are undisputed. Prior to November 2009, Abramski, who lived in Franklin County, Virginia, and his uncle, Angel Alvarez, who resided in Pennsylvania, had several conversations concerning Alvarez's desire to obtain a Glock 19 handgun. Abramski offered to purchase a Glock 19 for Alvarez because, as a former Virginia police officer, Abramski could obtain a favorable price from a firearms dealer that catered to police officers in Collinsville, Virginia. Before purchasing the handgun, Abramski spoke with three licensed federal firearms dealers and discussed how to legally conduct such an acquisition. The dealers apparently advised Abramski, in essence, that a licensed dealer in Pennsylvania could complete the transfer to his uncle after the handgun had been purchased by Abramski in Virginia. In order to implement the transaction, Alvarez sent Abramski a check for $400 on November 15, 2009. The term "Glock 19 handgun" was written in the memo line of the check.

On November 17, 2009, Abramski went to the firearms dealer in Collinsville and purchased a Glock 19 handgun, among other items, paying for them with more than $2,000 in cash. In conducting the transaction, Abramski completed Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") Form 4473, which contained several questions about the purchase of

firearms, to be answered by checking boxes marked "Yes" or "No." Of importance here, question 11.a. on the ATF Form 4473 stated:

> " Are you the actual transferee/buyer of the firearm(s) listed on this form? *Warning: You are not the actual buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual buyer, the dealer cannot transfer the firearm(s) to you."*

Abramski checked the answer "Yes" to question 11.a. Three days later, on November 20, 2009, the $400 check from Alvarez was deposited in Abramski's bank account, and the next day Abramski transferred the Glock 19 handgun to Alvarez at a licensed federal firearms dealer in Easton, Pennsylvania. At that time, Alvarez gave Abramski a receipt confirming the transfer, reflecting that Alvarez had purchased the Glock 19 handgun for $400.

Meanwhile, on November 12, 2009, a bank robbery occurred at Franklin Community Bank in Rocky Mount, Virginia. An investigation of the robbery led the FBI to suspect Abramski. Abramski had been fired from the Roanoke police department in 2007, looked similar to the masked bank robber, and was down on his luck (Abramski and his wife had recently separated and their home was in foreclosure).

Abramski was arrested in early July 2010 on state law charges relating to the bank robbery. In connection therewith, two FBI agents investigating the robbery sought and secured search warrants relating to the investigation...

The federal authorities have never charged Abramski with bank robbery, and the state bank robbery charges against him were dismissed on October 15, 2010. On November 18, 2010, however, the federal grand jury indicted Abramski for the firearms offenses underlying this appeal...[The indictment] charged Abramski, in Count One, with making the false and fictitious statement on the ATF Form 4473 that he was the actual buyer of the Glock handgun. Count Two of the indictment charged Abramski with making a false statement with respect to information required to be kept in the records of a licensed firearms dealer. In both charges, the prosecution relied on the theory that Abramski was merely a "straw purchaser" of the firearm that was immediately transferred to Alvarez...

Abramski moved to dismiss both counts of the indictment...contending that, because the firearm was legally transferred to Alvarez and Abramski made no material misrepresentations to the Virginia firearms dealer, the firearms statutes were never intended to punish his conduct...The district court denied [the motion]. The court ruled...that 18 U.S.C. §§922(a)(6) and 924(a)(1)(A) were violated when a false or fictitious statement is made on an ATF Form 4473...

Pursuant to a plea agreement with the United States Attorney, Abramski entered conditional guilty pleas...to both charges in the indictment...The court sentenced Abramski to five years of probation on each offense, to run concurrently. Abramski thereafter filed a timely notice of appeal.

II.

...[Discussion irrelevant to our study omitted.]

III.

...[Discussion of jurisdiction omitted.]

A.1.

Abramski first contends that the district court erred in denying his motion to dismiss the charges in the indictment, and in ruling that Abramski's purchase of the Glock 19 handgun constituted a straw purchase that violated 18 U.S.C. §§922(a)(6) and 924(a)(1)(A). Abramski maintains that, because he and Alvarez were both legally entitled to purchase such a firearm, he was not a "straw purchaser" and his "Yes" answer on the ATF Form 4473—representing that he was the "actual buyer" thereof—was not material and was never intended to be punished by the Gun Control Act of 1968, or by §§922(a)(6) or 924(a)(1)(A). Indeed, Abramski asserts that Congress's intent in enacting those statutes was "to make it possible to keep firearms out of the hands of those not legally entitled to possess them." Under Abramski's theory, he could only be prosecuted for his Virginia acquisition of the Glock 19 handgun if Alvarez had been ineligible to possess a firearm, a convicted felon, thereby rendering the "actual buyer" question on the ATF Form 4473 "material to the lawfulness of the sale." On the legal proposition pursued by Abramski, there appears to be a split in the courts of appeals. At least three of our sister circuits have heretofore addressed the issue, and one of them seems to agree with Abramski.

In support of his position, Abramski relies on the Fifth Circuit's decision in *United States v. Polk* (5th Cir.1997). In that case, the court of appeals assessed whether § 922(a)(6) liability attached where "the true purchaser [here, Alvarez] can lawfully purchase a firearm directly." The Fifth Circuit determined that it did not, ruling that the plain language of the statute compels the conclusion...that § 922(a)(6) criminalizes false statements that are intended to deceive federal firearms dealers with respect to facts material to the "*lawfulness of the sale*" of firearms...Thus, if the true purchaser can lawfully purchase a firearm directly, §922(a)(6) liability (under a "straw purchase" theory) does not attach.

Put simply, we are unable to agree with *Polk.* It is clear to us that the prohibition against false and fictitious statements in §922(a)(6) is not limited to those persons who are prohibited from buying or possessing a firearm. To establish a violation of §922(a)(6), the prosecution is obligated to prove four elements: "(1) the defendant knowingly made (2) a false or fictitious oral or written statement that was (3) material to the lawfulness of the sale or disposition of a firearm, and was (4) intended to deceive or likely to deceive a firearms dealer." *United States v. Harvey* (6th Cir.2011). The straw purchaser issue goes directly to the third of these essential elements—materiality.

Abramski's contention that §922(a)(6) does not apply to a firearm transaction involving two eligible purchasers was recently rejected by the Sixth Circuit in *United States v. Morales* (6th Cir.2012). In that case, the court also took issue with the reasoning of *Polk* and agreed with the Eleventh Circuit's decision in *United States v. Frazier* (11th Cir.2010). In *Frazier,* the court of appeals had likewise rejected *Polk,* explaining its decision in language that we readily approve:

> "to say that the identity of the actual purchaser is material to the lawfulness of one sale but not to another, is counterintuitive. Although *Polk* focused on whether one's identity affected the lawfulness of a sale under §922(a)(6), we focus on whether one's identity is a fact that is

material to the lawfulness of a sale. *The identity of the purchaser is a constant that is always material to the lawfulness of the purchase of a firearm under § 922(a)(6).* Thus, it can be reasoned that although the lawfulness of a sale may change depending on the identity of the purchaser, the fact that the identity of the purchaser is material to the lawfulness of the sale does not."

In denying Abramski's first dismissal motion from the bench on March 14, 2011, the court relied on the *Frazier* case, expressing concern that Abramski's theory "creates an extra element in the prosecution of the offense" in that the government would have to "prove that the middleman, in this case [Abramski], knew that a subsequent purchaser was a prohibited person." The court rejected that theory, ruling that "both counts of the indictment are legally sound. It seems to me that, if the government is able to prove what the grand jury has alleged in the indictment, that the defendant would be in violation of these two statutes." In sum, we are satisfied that the Sixth and Eleventh Circuits, as well as the district court, correctly and properly ruled that the identity of the actual purchaser of a firearm is a constant that is always material to the lawfulness of a firearm acquisition under §922(a)(6).

The ATF Form 4473, as completed and signed by Abramski, warned him—in bold type—that he was not the actual buyer of the Glock 19 handgun if he was buying it for someone else. And the undisputed facts show that Abramski's transfer of the Glock 19 to Alvarez was not an afterthought. On this record, that transfer was a carefully calculated event—indeed, it was the sole reason for Abramski's purchase of the Glock 19 handgun. Because the identity of the actual purchaser of the handgun was material to the lawfulness of its acquisition by Abramski on November 17, 2009, he made a false and fictitious statement to the licensed dealer when he answered "Yes" to question 11.a. on the ATF Form 4473, assuring the dealer that he was the actual buyer.

2.

Turning to Count Two, §924(a)(1)(A) of Title 18 criminalizes "any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter." To establish a violation of §924(a)(1)(A), the government must prove that: (1) the dealer was a federally licensed firearms dealer at the time the offense occurred; (2) the defendant made a false statement or representation in a record that the licensed firearm dealer was required by federal law to maintain; and (3) the defendant made the false statement with knowledge of its falsity. This statutory provision does not require that the falsehood on the ATF Form 4473 relate to the lawfulness of the firearm acquisition itself. Although Abramski argues that his "Yes" answer to question 11.a. on the Form 4473 was not material to the recordkeeping requirements of §924(a)(1)(A), the plain statutory language is unambiguous, and it does not require a showing of materiality. *See United States v. Johnson* (9th Cir.2012) ("the text of § 924(a)(1)(A) unambiguously describes which false statements and representations it prohibits—simply those that are made with respect to information that is required to be kept by federally licensed firearms dealers"); *United States v. Sullivan* (8th Cir.1972) ("While a violation of 18 U.S.C.A. §922(a)(6) expressly requires a showing of materiality no such expression is found in § 924(a).").

3.

In sum, the assertion that Abramski was the actual buyer of the Glock 19 handgun was a false and fictitious answer to question 11.a. of the ATF Form 4473, and that false statement was material to the lawfulness of the Virginia sale of the handgun. Moreover, the identity of the actual purchaser of the Glock 19 handgun was a fact required to be maintained by the Virginia firearms dealer that sold the firearm. By virtue of the bold-print warning on question 11.a. of the ATF Form 4473, Abramski was on notice that he was not the actual buyer of the handgun if he was purchasing it for someone else. Accordingly, the district court properly denied Abramski's motion to dismiss both charges of the indictment.

B.

[Because it appears Abramski waived his challenges to the search warrants on appeal to the Supreme Court, this discussion is omitted.]

IV.

Pursuant to the foregoing, the judgment of the district court is affirmed.