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Recent Developments: Bailey v. United States: A Drug Trafficker Must "Actively Employ" a Firearm in Order to Sustain a Conviction under the "Use" Provision of 18 U.S.C.A. Section 924(c)(1)(1984)

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*Bailey v.
United States:*

**A DRUG
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924(c)(1)(1984).**

In a unanimous decision, the Supreme Court of the United States, in *Bailey v. United States*, 116 S. Ct. 501 (1995), held that in order to sustain a conviction, under 18 U.S.C.A. section 924(c)(1)(1984), for "use" of a firearm while committing a drug related offense, the prosecution must demonstrate that the defendant "actively employed" the firearm during the offense. The Court's interpretation of the term "use" in the context of section 924(c)(1) makes numerous courts' previously articulated standards for "use" in obtaining a conviction obsolete. Furthermore, the Court's ruling, while affecting the interpretation of "use" under section 924(c)(1), leaves the companion "carry" provision open for future interpretation.

In May 1989, Roland Bailey ("Bailey") was stopped for a traffic violation and was ordered from his vehicle when he failed to produce a driver's license. As he stepped out of the vehicle, the police officer saw Bailey put something between the seat and the console. A subsequent search of the vehicle revealed a single bullet and thirty grams of cocaine in the driver's compartment as well as a large amount of cash and a loaded nine millimeter handgun in the trunk. Bailey was charged with several counts, including "using or carrying" a firearm in violation of section 924(c)(1), which provides in relevant part, that anyone convicted of "using or

carrying" a firearm during the commission of any drug trafficking or other violent crime shall be committed to prison for not less than five years.

Bailey was convicted by a jury on all counts and was given a prison sentence which included a consecutive five year term for the section 924(c)(1) conviction. Bailey appealed, claiming that there was insufficient evidence to support a conviction under section 924(c)(1). The Court of Appeals for the District of Columbia, however, rejected Bailey's argument and held that the jury could reasonably infer that the gun had been used by Bailey to protect his drugs and drug money as well as to facilitate narcotic sales.

In the second of the two consolidated cases, Candisha Robinson ("Robinson") was arrested and charged with several counts, including a violation of section 924(c)(1), after the police executed a search warrant on her apartment following a drug related investigation. The search resulted in the discovery of an unloaded, holstered twenty-two caliber Derringer handgun along with almost eleven grams of crack cocaine which were found inside a locked trunk in a bedroom closet. Robinson was convicted on all counts and given a prison sentence which, similar to Bailey's, included a five year term for the section 924(c)(1) violation. The district court denied Robinson's motion for judgment of acquittal and Robinson appealed to

the Court of Appeals for the District of Columbia which reversed the conviction, holding that under the wording of the statute a person cannot be convicted for violating section 924(c)(1) unless he or she actually uses the firearm in connection with a drug offense, even if he or she had intended to use it but did not.

In order to resolve the inconsistencies in the application of section 924(c)(1), the court of appeals consolidated the two cases and agreed to rehear them en banc. In a divided opinion, the court rejected the previously used multi-factor standard and replaced it with an accessibility and proximity test. Thus, the court paid little attention to the use of a firearm and instead concerned itself only with its accessibility. The court found, in both cases, that the firearm was readily accessible and close enough in proximity to the drug related crime to sustain a section 924(c)(1) conviction. Because of the conflict among circuit courts' application of section 924(c)(1), the Supreme Court of the United States granted certiorari in order to clarify the meaning of the term "use" under the statute.

According to the Court, the court of appeals erred in applying an accessibility and proximity standard; it did agree, however, that "use" meant more than mere possession. *Bailey*, 116 S. Ct. at 506. The error in the accessibility standard, the Court pointed out, was that un-

der that standard every *possession* of a firearm would potentially trigger section 924(c)(1) and this was not how the Court interpreted Congress' intention. *Id.* If Congress had intended a violation of section 924(c)(1) for possession of a firearm in connection with a drug offense, it would have provided for this in the statute, as it did in sections 922(g), 922(j), 922(k) and other gun-crime statutes. *Id.* The issue for the Court, therefore, was to determine what evidence must be presented in order to trigger the "use" provision of section 924(c)(1). *Id.*

The Court began its analysis with the language of section 924(c)(1), noting that judges should pay close attention to the wording of a statute, especially when it describes the elements of a crime. *Id.* at 506-07. The language of section 924(c)(1) criminalizes "using" or "carrying" a firearm in connection with a drug offense. 18 U.S.C.A. § 924(c)(1)(1984). The Court explained that if the term "use" was meant to be read broadly, as the court of appeals had done, there would be no room left for the "carry" provision to have any separate and distinct implication. *Id.* at 507. The Government, however, argued that Congress' intention was to combine the "use" and "carry" prongs of the statute, making its broad reading of "use" appropriate. *Id.* at 508. The Government supported its argument by pointing out that the original statute, written in 1968, provided for two sepa-

rate sections, one for the "use" prong and one for the "carry" prong. *Id.* at 507. Congress then, in 1984, combined the two sections into one. *Id.* The Court, however, disagreed that Congress' intention in combining the two sections was to strip "use" and "carry" of their independent and distinct meanings. *Id.* at 508. The Court opined that "[i]f Congress had intended to deprive 'use' of its active connotations, it could have simply substituted a more appropriate term "possession" to cover the conduct it wished to reach." *Id.*

To clarify the meaning of "use" under section 924(c)(1), the Court provided a few examples of what constitutes "using" or "actively employing" a firearm. Brandishing, displaying, bartering with, striking with, and obviously firing or attempting to fire a firearm were examples which the Court found violative of the "use" prong of section 924(c)(1). *Id.* The Court went on to say that even the mention of a firearm, intended to bring about a change in circumstance, or the silent presence of a gun could constitute a "use" under the statute. *Id.*

Storing a gun near drugs or drug proceeds, however, would not be considered a "use" without the requisite active employment. *Id.* Without active employment, the storage is no more than mere possession which the Court had already determined does not satisfy the statute. *Id.* To resolve the ques-

tion of what to do with an offender who keeps a gun close by, to grab if necessary, the Court pointed out that the Government has other means available to reach such a situation. *Id.* at 509. One example is the “carry” prong of section 924(c)(1). *Id.*

As a result of the Court’s interpretation, it was compelled to rule that in neither of the cases at bar was the gun actively employed, not while in the trunk of the car and not while in a holster in a locked trunk on the floor of a closet. *Id.* The Court, thus, reversed the convictions under the “use” prong of section 924(c)(1) and remanded the cases back to the district court to determine whether the “carry” prong could sustain the convictions.

In reversing the convictions in *Bailey*, the Supreme Court of the United States established a more discernible standard for courts to use in determining whether a drug trafficker has “used” a firearm under section 924(c)(1). The firearm must have played an active

role in the crime in order to constitute a violation of the “use” prong of section 924(c)(1), whether it was actually fired by the defendant or merely mentioned in order to intimidate another party. Conversely, if the firearm was present unbeknownst to any party present at the crime other than the defendant, it appears that the Court would not consider the firearm “used” in the crime. The decision which the Supreme Court of the United States reached in *Bailey* offers little in the form of precedent available on appeal to those individuals who have been convicted under similar circumstances for a section 924(c)(1) violation. The Court made no mention of making the decision retroactive. *Bailey* does, however, serve to change the standard by which courts will analyze the “use” provision of the statute. This change could conceivably have a detrimental effect on society. In the future, drug dealers will not fear the ramifications of *possessing* a firearm while engaged in their

illicit acts, specifically the extra five year sentence associated with them if they are caught. Thus, a gun will continue to be a common tool of the trade for drug dealers. This, of course, assumes that those engaged in the drug trade were ever concerned with the regulation to begin with.

- Kevin Barner