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Citation: **2005 U.S. App. LEXIS 1921**

*2005 U.S. App. LEXIS 1921, **

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. JACK SEIBERT, Defendant - Appellant.

No. 04-10171

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

2005 U.S. App. LEXIS 1921

December 8, 2004, Argued and Submitted, San Francisco, California
February 7, 2005, Filed

NOTICE: [*1] RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the United States District Court for the District of Nevada. D.C. No. CR-03-00358-RLH/RJJ. Roger L. Hunt, District Judge, Presiding.

DISPOSITION: AFFIRMED in part and REMANDED.

CASE SUMMARY


PROCEDURAL POSTURE: Defendant appealed from a judgment of the United States District Court for the District of Nevada convicting him of possessing a sawed-off shotgun, a violation of [26 U.S.C.S. § 5861\(d\)](#), and for being a felon in possession of a shotgun, a violation of [18 U.S.C.S. § 922\(g\)\(1\)](#), and sentencing him.


OVERVIEW: Because there were no objections to the prosecutor's questions or remarks during trial or at final argument, the court's review was for plain error, not mere error. The court found no plain error. It was hard to sort out whether the prosecutor was asking and talking about defendant's prior inconsistent statements or his silence, and the former would be permissible. Without objection, the trial judge could not know whether the defense attorney was purposely withholding objection to objectionable material in order to lead the prosecution into something that would open up useful evidence for the defense. There was also no prejudice from any error because the evidence of guilt was overwhelming. The district court also did not err by imposing separate sentences for the offenses. The two offenses did not merge because they were not the same thing. One applied to sawed-off shotguns, whether the person in possession was a felon or not, and the other applied to felons possessing shotguns, whether they were sawed-off or not. The court remanded so that the district judge could determine whether the change in the law by the Supreme Court would make a difference in the sentencing of the case.


OUTCOME: The court affirmed defendant's conviction but remanded for review of his sentence under recent Supreme Court precedent.

CORE TERMS: shotgun, sawed-off, sentence, felon, plain error, prosecutor, possessing, merge


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HN1  Where there were no objections to the prosecutor's questions or remarks during trial or at final argument, the court of appeals' review is for plain error, not mere error. [More Like This Headnote](#)


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HN2  The offenses of possessing a sawed-off shotgun and for being a felon in possession of a shotgun do not merge for sentencing purposes because they are not the same thing. One applies to sawed-off shotguns, whether the person in possession is a felon or not, and the other applies to felons possessing shotguns, whether they are sawed-off or not. [More Like This Headnote](#)

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HN3  Where each offense contains an element not contained in the other, they do not merge, and separate punishment does not amount to double jeopardy. [More Like This Headnote](#)

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For JACK SEIBERT, Defendant - Appellant: Jason F. Carr, Esq., FPDNV - FEDERAL PUBLIC DEFENDER'S OFFICE, Las Vegas, NV.


JUDGES: Before: D.W. NELSON, KLEINFELD, and GOULD, Circuit Judges.

OPINION: MEMORANDUM *

- - - - - Footnotes - - - - -

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by [Ninth Circuit Rule 36-3](#).

- - - - - End Footnotes - - - - -

HN1  Because there were no objections to the prosecutor's questions or remarks during trial or at final argument, our review is for plain error, not mere error. n1 There was no plain error. First, **[*2]** it was hard to sort out whether the prosecutor was asking and talking about Seibert's prior inconsistent statements or his silence, and the former would be permissible. n2 Second, without objection, the trial judge could not know whether the defense attorney was purposely withholding objection to objectionable material, in order to lead the prosecution into something that would open up useful evidence for the defense. n3 Also, there was no prejudice from whatever error there may have been, because the evidence of guilt was overwhelming.

- - - - - Footnotes - - - - -

n1 See [United States v. Sanchez, 176 F.3d 1214, 1218 \(9th Cir. 1999\)](#).

n2 See [Anderson v. Charles, 447 U.S. 404, 408, 65 L. Ed. 2d 222, 100 S. Ct. 2180 \(1980\).](#)

n3 See [United States v. Molina, 934 F.2d 1440, 1448 \(9th Cir. 1991\).](#)

- - - - - End Footnotes - - - - -

The district court did not err by imposing separate sentences for ^{HN2} possessing a sawed-off shotgun n4 and for being a felon in possession of a shotgun. n5 The two offenses did not merge, because they are not the same thing. One applies [***3**] to sawed-off shotguns whether the person in possession is a felon or not, the other applies to felons possessing shotguns, whether they are sawed-off or not. ^{HN3} Where each offense contains an element not contained in the other, they do not merge, and separate punishment does not amount to double jeopardy. n6

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n4 [26 U.S.C. § 5861\(d\) \(2003\).](#)

n5 [18 U.S.C. § 922\(g\)\(1\) \(2003\).](#)

n6 See [United States v. Dixon, 509 U.S. 688, 696-97, 125 L. Ed. 2d 556, 113 S. Ct. 2849 \(1993\)](#); [Brown v. Ohio, 432 U.S. 161, 168-69, 53 L. Ed. 2d 187, 97 S. Ct. 2221 \(1977\)](#); [Blockburger v. United States, 284 U.S. 299, 304, 76 L. Ed. 306, 52 S. Ct. 180 \(1932\)](#); [United States v. Cedar, 437 F.2d 1033, 1036 \(9th Cir. 1971\)](#); see also [United States v. Parker, 960 F.2d 498, 499-500 \(5th Cir. 1992\).](#)

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Because the Supreme Court's decision in *United States v. Booker* n11 changes the context in which district judges impose sentences, review of Seibert's sentence imposed under pre-Booker law is unnecessary. We remand [***4**] so that the district judge may determine whether the change in the law would make a difference in the sentencing of this case. If the district judge determines that it does, he may vacate the sentence and resentence Seibert.

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n11 [United States v. Booker, 543 U.S. , 160 L. Ed. 2d 621, 125 S. Ct. 738 \(2005\).](#)

- - - - - End Footnotes - - - - -

AFFIRMED in part and REMANDED.

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