

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
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No. 13-2301

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

FILED
Sep 03, 2014
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,)
)
Plaintiff-Appellee,)
)
v.)
)
TYREE WASHINGTON,)
)
Defendant-Appellant.)
_____)

ON APPEAL FROM THE
UNITED STATES DISTRICT
COURT FOR THE EASTERN
DISTRICT OF MICHIGAN

OPINION

Before: MOORE and STRANCH, Circuit Judges; HOOD, District Judge.*

KAREN NELSON MOORE, Circuit Judge. Tyree Washington was convicted and sentenced for his role in a series of carjackings. He appealed the convictions and sentence. In a previous decision, we affirmed the convictions, but vacated his sentence and remanded to allow the district court to reorder for sentencing the three convictions under 18 U.S.C. § 924(c). *See United States v. Washington*, 714 F.3d 962 (6th Cir. 2013).¹

Before Washington was resentenced, the Supreme Court decided *Alleyne v. United States*, 133 S. Ct. 2151 (2013), holding that a jury, not a judge, must find that a defendant brandished a firearm during and in relation to a crime of violence under § 924(c). *Id.* at 2162–

*The Honorable Joseph M. Hood, Senior United States District Judge for the Eastern District of Kentucky, sitting by designation.

¹The prior opinion provides an ample background on the crimes committed and the court proceedings. Consequently, we will not duplicate those details here except as necessary to our reasoning.

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63. Without such a finding by the jury, the district court could not sentence the defendant to the enhanced statutory mandatory-minimum sentence for brandishing. *See id.*

During resentencing, Washington argued that *Alleyne* required not only that a jury must find that Washington brandished the gun in each of the carjackings, but also that, in order to apply § 924(c)'s 25-year mandatory-minimum sentence to “second or subsequent” convictions, the jury had to find that the convictions were “second or subsequent.” The district court rejected this argument based on our decision in *United States v. Mack*, 729 F.3d 594, 606–09 (6th Cir. 2013). In *Mack*, we reasoned that a failure to submit the brandishing determination to a jury was plain error, but this did not affect the defendant’s substantial rights because it was harmless as the brandishing question was not in dispute in that case. *Id.* We also rejected an identical argument regarding consecutive 25-year sentences. *See id.* at 609 (following *Almendarez-Torres v. United States*, 523 U.S. 224, 247 (1998), while acknowledging that *Almendarez-Torres* “stand[s] on shifting sands”).

In this appeal, Washington presses both arguments that he made at his resentencing. As to the brandishing element, Washington argues that *Mack* is distinguishable because in *Mack* the argument was made for the first time on appeal, thus leading to plain-error review, while here Washington made the argument at his resentencing. As to the “second or subsequent” sentences, Washington acknowledges that *Mack* and *Almendarez-Torres* tie our hands, but presses the argument in order to preserve it.

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Washington may have a good argument that his case is indeed distinguishable from *Mack*. Stronger yet would be an argument that Washington's sentence for brandishing a firearm was an impermissible constructive amendment of his indictment. *See United States v. Hackett*, -- F.3d --, 2014 WL 3865994, at *6–7 (6th Cir. 2014) (holding that where an indictment charges only “use and carry,” a post-trial, ten-year, mandatory-minimum sentence for discharging a firearm is a constructive amendment of the indictment, an error not subject to harmless error analysis). *But see United States v. Yancy*, 725 F.3d 596, 601–03 (6th Cir. 2013) (rejecting a similar argument where the defendant pleaded guilty, admitting to brandishing a firearm and acknowledging through counsel that he understood the consequences of such an admission). Washington has failed to make this argument that there was a constructive amendment of the indictment, and we therefore do not consider it.

We cannot review either of the substantive arguments Washington does raise because our previous remand was a limited remand. *See Washington*, 714 F.3d at 965 (stating that “[b]ecause we agree that the district court erroneously imposed the defendant’s sentences under § 924(c) in the order in which he committed each crime, we **VACATE** the judgment of the district court on this ground only, and **REMAND** for the limited purpose of recalculating the defendant's sentence”); *id.* at 971 (concluding that “[t]he district court’s judgment is **VACATED IN PART** with respect to the ordering of the defendant’s convictions for sentencing under § 924(c)”); *see also United States v. Campbell*, 168 F.3d 263, 265 (6th Cir. 1999) (“Limited remands explicitly outline the issues to be addressed by the district court and create a narrow framework within

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which the district court must operate.”). “Under the doctrine of the law of the case, determinations of the court of appeals of issues of law [such as the scope of a remand] are binding on both the district court on remand and the court of appeals upon subsequent appeal.” *Campbell*, 168 F.3d at 265. The district court recognized that our remand was limited to reviewing the ordering of the § 924(c) convictions only. R. 173 (Re-Sentencing Tr. at 23) (Page ID #1664). And we are so limited as well.

As the district court has followed our instructions with regard to reordering the § 924(c) convictions, we **AFFIRM** the district court’s judgment.