
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee-Cross-Appellant

v.

PHILIP ANTICO,

Defendant-Appellant-Cross-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

REPLY BRIEF FOR THE UNITED STATES
AS APPELLEE-CROSS-APPELLANT

ERIC S. DREIBAND
Assistant Attorney General

THOMAS E. CHANDLER
CHRISTOPHER C. WANG
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-9115
Chris.Wang@usdoj.gov

United States v. Philip Antico

**CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT**

Pursuant to Eleventh Circuit Rules 26.1-1 - 26.1-3 and 27-1(a)(9), counsel for appellee-cross-appellant United States hereby certifies that the certificate contained in appellant's opening brief comprises a complete list of the persons or entities who may have an interest in the outcome of this case except for the following individual omitted from that list:

Dreiband, Eric, Counsel for the United States

s/ Christopher C. Wang
CHRISTOPHER C. WANG
Attorney

Date: November 16, 2018

TABLE OF CONTENTS

PAGE

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE
DISCLOSURE STATEMENT

ARGUMENT

THE DISTRICT COURT ERRED IN DECLINING TO USE
AGGRAVATED ASSAULT AS ANTICO’S UNDERLYING
OFFENSE2

A. *The Appropriate Standard Of Review*2

B. *Because Antico Obstructed The FBI’s Investigation Into
Brown’s Assault Of J.B., The Correct Underlying Offense Is
Aggravated Assault*.....4

C. *The District Court Erred In Concluding That Brown Did
Not Tase J.B. With The Intent To Cause Bodily Injury*.....7

CONCLUSION11

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF CITATIONS

CASES:	PAGE
<i>*Brown v. City of Golden Valley</i> , 574 F.3d 491 (8th Cir. 2009).....	10
<i>*United States v. Harrell</i> , 524 F.3d 1223 (11th Cir.), cert. dismissed, 554 U.S. 940 (2008).....	6-7
<i>United States v. Hill</i> , 783 F.3d 842 (11th Cir. 2015).....	2
<i>United States v. Park</i> , 988 F.2d 107 (11th Cir.), cert. denied, 510 U.S. 882 (1993).....	8
<i>United States v. Quiver</i> , 805 F.3d 1269 (10th Cir. 2015).....	8
<i>United States v. Velasco</i> , 855 F.3d 691 (5th Cir. 2017)	8
 STATUTES:	
18 U.S.C. 242.....	4-5, 7
18 U.S.C. 1512(b)(3).....	2, 4, 6-7
18 U.S.C. 1519.....	5
 GUIDELINES:	
Sentencing Guidelines § 2A2.2.....	5, 10
Sentencing Guidelines § 2A2.2, comment. (n.1).....	2
Sentencing Guidelines § 2H1.1.....	4
Sentencing Guidelines § 2H1.1(a)(1)	4-5
Sentencing Guidelines § 2J1.2.....	4, 6
Sentencing Guidelines § 2J1.2(a)	6

TABLE OF CITATIONS (continued):	PAGE
Sentencing Guidelines § 2J1.2(c)(1).....	4, 6
Sentencing Guidelines § 2X3.1.....	4, 6
Sentencing Guidelines § 2X3.1(a)(1)	4

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 18-10972-AA, 18-11447

UNITED STATES OF AMERICA,

Plaintiff-Appellee-Cross-Appellant

v.

PHILIP ANTICO,

Defendant-Appellant-Cross-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

REPLY BRIEF FOR THE UNITED STATES
AS APPELLEE-CROSS-APPELLANT

As the United States explained in its opening brief (U.S. Br. 53-63),¹ this Court should vacate Antico's sentence and remand for resentencing because the district court erred in calculating his Sentencing Guidelines range. Specifically, the district court erred in declining to use aggravated assault as Antico's

¹ This brief uses the following abbreviations: "U.S. Br. __" refers to page numbers in the United States' opening brief filed with this Court; "Def. R. Br. __" refers to page numbers in Antico's response/reply brief filed with this Court; and "Doc. __, at __" refers to the document number assigned on the district court's docket sheet.

underlying offense in calculating his Sentencing Guidelines range. Aggravated assault is the appropriate underlying offense here because Antico's offense of conviction, 18 U.S.C. 1512(b)(3), involved obstructing the investigation of "a felonious assault that involved * * * a dangerous weapon *with intent to cause bodily injury (i.e., not merely to frighten) with that weapon.*" Sentencing Guidelines § 2A2.2, comment. (n.1) (emphasis added).

Antico contends (Def. R. Br. 23-25) that aggravated assault should not be his underlying offense because the basis for his conviction for obstruction of justice had nothing to do with Officer Michael Brown's assault of J.B. He further argues (Def. R. Br. 25-29) that even if Brown's wrongdoing is attributable to him (Antico) in calculating his base offense level, the district court did not clearly err in determining that Brown did not tase J.B. with the intent to cause bodily injury. Neither argument has merit.

ARGUMENT

THE DISTRICT COURT ERRED IN DECLINING TO USE AGGRAVATED ASSAULT AS ANTICO'S UNDERLYING OFFENSE

A. The Appropriate Standard Of Review

As we set forth in our opening brief (U.S. Br. 53), the Court "reviews the district court's interpretation and application of the guidelines to factual findings *de novo.*" *United States v. Hill*, 783 F.3d 842, 844 (11th Cir. 2015). We then argued (U.S. Br. 54-62) that the district court committed legal error in declining to

apply the aggravated assault guideline because the court applied an incorrect legal standard to determine whether Michael Brown, Antico's fellow police officer, had the "intent to cause bodily injury" when he tased J.B. while J.B. was sitting in a car's passenger seat. We concluded (U.S. Br. 62-63) that because the district court did not apply the correct legal standard for "intent to cause bodily injury," and the government proved by a preponderance of the evidence that Brown tased J.B. with that intent, this Court should vacate Antico's sentence and remand for resentencing using aggravated assault as the underlying offense.

Antico suggests (Def. R. Br. 21-22) that the issue before this Court is simply whether the district court's factual finding that Brown lacked the intent to cause bodily injury is clearly erroneous. But that is incorrect and does not respond to our argument. It is undisputed that Brown knowingly deployed the taser and believed that the taser's probes had struck and penetrated J.B.'s body. See U.S. Br. 58-59. But the district court concluded that Brown could not have discharged the taser with the intent to cause bodily injury because, instead, he tased J.B. with the intent to *gain control* over J.B. Doc. 278, at 17. Because this conclusion—suggesting that an intent to control and an intent to cause bodily injury are mutually exclusive—is more akin to a legal interpretation of the phrase "intent to cause bodily injury" than a factual finding, it warrants no deference from this Court. See U.S. Br. 53-54.

B. Because Antico Obstructed The FBI's Investigation Into Brown's Assault Of J.B., The Correct Underlying Offense Is Aggravated Assault

Antico first argues (Def. R. Br. 23-25) that aggravated assault cannot be his underlying offense because the basis for his conviction for obstruction of justice had nothing to do with Brown's assault of J.B. This argument is not correct and misunderstands how the Guidelines are applied.

1. Antico was convicted of violating 18 U.S.C. 1512(b)(3) by lying to FBI interviewers about various Officer Reports that subordinate officers submitted to him, and that he reviewed, documenting their use of force. The applicable guideline for a violation of 18 U.S.C. 1512(b)(3) is Sentencing Guidelines § 2J1.2 (Obstruction of Justice). Under the cross-reference in subpart (c)(1), "if the offense involved obstructing the investigation * * * of a criminal offense," and a higher offense level would result, courts apply Sentencing Guidelines § 2X3.1 (Accessory After the Fact). Section 2X3.1(a)(1) provides a base offense level of "6 levels lower than the offense level for the underlying offense."

The Presentence Investigation Report (PSR) determined that deprivation of rights, 18 U.S.C. 242, was the underlying offense. Doc. 221, at 9. The guideline for a violation of Section 242, Section 2H1.1 (Offenses Involving Individual Rights), provides that the base offense level is "the offense level from the offense guideline applicable to any underlying

offense.” Sentencing Guidelines § 2H1.1(a)(1). The PSR determined that the underlying offense was “Aggravated Assault,” Sentencing Guidelines § 2A2.2. Doc. 221, at 9.

In the district court, Antico objected to the PSR’s use of deprivation of rights (18 U.S.C. 242) rather than falsification of reports (18 U.S.C. 1519) as the underlying offense in calculating his Sentencing Guidelines range because the crux of the government’s case was that Antico was not truthful with respect to the reports he returned to officers after reviewing the video, and those reports did not include Brown’s report on Brown’s use of force. Doc. 233, at 5-6; see U.S. Br. 8-11. The United States responded that the PSR correctly applied the cross-reference to deprivation of rights, the more serious offense, because “the FBI agents who interviewed [Antico] were investigating both the BBPD officers’ use of excessive force and their falsification of their reports.” Doc. 241, at 8.

The district court rejected the PSR’s use of aggravated assault, but not for the reason Antico argued. The court concluded that aggravated assault based on Brown’s conduct could not be the underlying offense because it had concluded at sentencing in Brown’s case (in an order issued the same day) that he had not committed aggravated assault. Doc. 279, at 4. The court reached that conclusion based on its determination that there was insufficient evidence to find that

“Brown’s intent in using the Taser was to cause bodily injury, rather than to gain control over J.B.” Doc. 278, at 17; see also U.S. Br. 54.

2. In this Court, Antico reiterates (Def. R. Br. 23-25) the argument he made in the district court that aggravated assault *based on Brown’s conduct* cannot be the underlying offense because “there is no evidence that [he] specifically obstructed the investigation of assault against Brown.” Antico notes (Def. R. Br. 24) that the Section 1512(b)(3) count of the superseding indictment alleged improper conduct by him relating to the Officer Reports, but did not mention Brown, and that the guilty verdict regarding Section 1512(b)(3) did not make specific findings.

This argument fails. As noted above, the cross-reference in the Obstruction of Justice Guideline (Section 2J1.2) directs the district courts to apply Section 2X3.1 “[i]f the offense involved obstructing the investigation or prosecution of a criminal offense” and doing so would result in a greater offense level. Sentencing Guidelines § 2J1.2(a) and (c)(1). This Court has made clear that this cross-reference is appropriate where the defendant’s “obstruction of justice * * * had the *potential to disrupt* the government’s investigation or prosecution of” the underlying criminal offense. *United States v. Harrell*, 524 F.3d 1223, 1228 (11th Cir.) (emphasis added), cert. dismissed, 554 U.S. 940 (2008). All that is necessary for this cross-reference to apply is that the defendant’s obstructive conduct, “if

successful,” trigger a chain of events that “might * * * derail[]” the government’s investigation or prosecution of the offense. *Ibid.*

Antico’s omissions and misrepresentations to the FBI easily satisfied this standard. By misleading his FBI interviewers into believing that the involved officers had accurately documented their use of force in their Officer Reports and had not altered those Reports, Antico’s conduct had the “potential to disrupt,” *Harrell*, 524 F.3d at 1228, the FBI’s investigation into whether those officers used excessive force. Indeed, as we explained in our opening brief (U.S. Br. 27-28 n.7), the evidence showed that Antico’s false statements and omissions *did* hinder the FBI’s investigation. Moreover, contrary to Antico’s contention otherwise, the superseding indictment recognized as much in charging him with violating Section 1512(b)(3) by preventing the communication to a law enforcement officer of information relating to “the commission and possible commission of * * * the offenses of Deprivation of Rights under Color of Law and Falsification of Records.” Doc. 81, at 8. Accordingly, a cross-reference to Brown’s assault of J.B. (the Section 242 violation) is warranted.

C. The District Court Erred In Concluding That Brown Did Not Tase J.B. With The Intent To Cause Bodily Injury

Antico’s second argument fares no better. He argues (Def. R. Br. 25-29) that even if Brown’s wrongdoing is attributable to him (Antico) in calculating his

base offense level, the district court did not clearly err in determining that Brown did not tase J.B. with the intent to cause bodily injury.

In its opening brief, the United States argued (U.S. Br. 59-60) that the district court erred in concluding that the government failed to show that Brown's intent was to cause bodily injury rather than to gain control over J.B. The United States explained that those two motives are not mutually exclusive, and that Brown intended to achieve J.B.'s compliance by causing him bodily injury through the firing of the taser. The United States further argued (U.S. Br. 55-59) that, with this correct legal understanding, an objective view of the evidence supports the conclusion that Brown intended to cause bodily injury by tasing J.B.

Antico does little to rebut this argument. He seeks (Def. R. Br. 26-28) to distinguish the cases the United States cited in its opening brief for the propositions that the intent to cause bodily injury standard is measured objectively,² and that there need only be an *intent* to cause bodily injury, not actual bodily injury.³ See U.S. Br. 56-57, 61-62. But the United States cited those cases for their general legal principles, not for their ultimate, fact-specific resolutions. Moreover, contrary to Antico's suggestions (Def. R. Br. 27-28), these legal principles do not

² See *United States v. Velasco*, 855 F.3d 691 (5th Cir. 2017); *United States v. Park*, 988 F.2d 107 (11th Cir.), cert. denied, 510 U.S. 882 (1993).

³ See *United States v. Quiver*, 805 F.3d 1269 (10th Cir. 2015).

require the jury to find that the defendant actually used a dangerous weapon with the intent to cause bodily injury; that the defendant be “enraged, angry, or set out to specifically cause bodily injury to” the victim; or that the “defendant engage[] in a course of conduct designed to injure from the outset.” Accordingly, the absence of evidence that Brown satisfied these factors does not contravene the United States’ argument that, applying the correct legal standard for application of the aggravated assault guideline, an objective view of his conduct showed an intent to cause bodily injury to J.B.⁴

Next, Antico (Def. R. Br. 28-29) simply recites the district court’s factual findings concerning Brown’s use of the taser. But none of these facts undermines the United States’ position that, viewed objectively, the facts establish that Brown deployed the taser with the intent to cause bodily injury (as that is the foreseeable and ordinary result of such action), even if he *also* intended to use the taser to bring J.B. under control (albeit in a manner the jury determined to be unlawful, given its verdict that Brown used excessive force against J.B.). See U.S. Br. 57-59. First, the absence of eyewitness testimony that Brown tased J.B. to cause bodily injury,

⁴ In any event, the evidence indicates that Brown did “engage[] in a course of conduct designed to injure from the outset.” As we observed in our opening brief (U.S. Br. 57-58), Brown kicked J.B. without giving him the opportunity to comply with loud verbal commands, then struck and tased him while he was passively resisting arrest. This evidence went toward establishing Brown’s intent to cause bodily injury.

and of evidence as to when Brown deployed his taser and the sequence of events, does not call into question Brown's intent to achieve J.B.'s compliance by causing him bodily injury through the firing of the taser. See U.S. Br. 59-60. Second, J.B.'s refusal to comply with loud verbal commands to exit the vehicle constituted passive resistance, which did not justify Brown's use of a taser in response.⁵ See, e.g., *Brown v. City of Golden Valley*, 574 F.3d 491, 496-498 (8th Cir. 2009) (reasonable jury could conclude that officer's tasing of automobile passenger violated her Fourth Amendment rights where passenger disobeyed officer's command to hang up her cell phone but posed a minimal safety threat and was not actively resisting arrest or attempting to flee). Finally, as we explained in our opening brief, the district court clearly erred in finding that there was no evidence that Brown's taser probes actually penetrated J.B., and in any event, any doubt as to whether Brown successfully deployed his taser is irrelevant to Section 2A2.2's applicability to this case. See U.S. Br. 60-62.

⁵ Antico also notes (Def. R. Br. 28) that Officer Ryan feared that J.B. was reaching for a weapon when J.B. continued to reach between the driver and passenger seat. But *Ryan's* perception of J.B.'s activity is irrelevant to *Brown's* response. Brown acknowledged in all versions of his Officer Report that he used force in response to nothing more than J.B.'s failure to comply with loud verbal commands. See Doc. 208-1, at 85-91. And the jury concluded that his use of force was unlawful.

CONCLUSION

For the reasons set forth in this brief and the United States' opening brief, this Court should vacate Antico's sentence and remand for resentencing with instructions to recalculate his Sentencing Guidelines range using aggravated assault as the underlying offense for his obstruction of justice conviction.

Respectfully submitted,

ERIC S. DREIBAND
Assistant Attorney General

s/ Christopher C. Wang
THOMAS E. CHANDLER
CHRISTOPHER C. WANG
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-9115
Chris.Wang@usdoj.gov

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(g):

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 28.1(e)(2)(C) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 2,333 words.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in Times New Roman, 14-point font.

s/ Christopher C. Wang
CHRISTOPHER C. WANG
Attorney

Date: November 16, 2018

CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2018, I electronically filed the foregoing REPLY BRIEF FOR THE UNITED STATES AS APPELLEE-CROSS-APPELLANT with the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

I further certify that seven paper copies of the foregoing brief were sent to the Clerk of the Court by Federal Express.

s/ Christopher C. Wang
CHRISTOPHER C. WANG
Attorney