

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 98-4076

Thomas McGhee,	*	
	*	
Appellant,	*	Appeal from the United States
	*	District Court for the Eastern
v.	*	District of Missouri.
	*	
United States of America,	*	[UNPUBLISHED]
	*	
Appellee.	*	

Submitted: June 2, 1999

Filed: June 9, 1999

Before HANSEN, FAGG, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

PER CURIAM.

A jury found Thomas McGhee guilty of a drug trafficking offense, and of using or carrying a firearm during and in relation to a drug trafficking crime. The trial evidence showed McGhee, who was carrying a significant amount of cocaine base, drew a loaded firearm from his waistband while being pursued by police. We affirmed McGhee's conviction on direct appeal. See United States v. Sparks, 949 F.2d 1023, 1024-28 (8th Cir. 1991), cert. denied, 504 U.S. 927 (1992). McGhee then brought this 28 U.S.C. § 2255 proceeding, contending the evidence was insufficient to convict him of using a firearm, in light of Bailey v. United States, 516 U.S. 137 (1995).

Having reviewed the record and the parties' briefs, we conclude the district court correctly denied McGhee's motion. See Swedzinski v. United States, 160 F.3d 498, 501 (8th Cir. 1998) (affirming denial of § 2255 motion where jury instruction on "use" was contrary to Bailey, but jury was given option of finding "carry" violation; holding movant must show that jury instruction worked actual and substantial disadvantage amounting to constitutional error, and that properly instructed jury would have acquitted movant). Accordingly, we affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.