

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007 IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT’S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION “SUMMARY ORDER”). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1 At a stated term of the United States Court of Appeals for the Second Circuit, held at
2 the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York,
3 on the 22nd day of June, two thousand seventeen.
4

5 PRESENT:

6 RICHARD C. WESLEY,
7 SUSAN L. CARNEY,
8 CHRISTOPHER F. DRONEY,
9 *Circuit Judges.*

10 _____
11
12 UNITED STATES OF AMERICA,

13
14 *Appellee,*

15
16 v.

No. 16-1829

17
18 HERMAN AVERY GUNDY, AKA HERMAN
19 GRUNDY,

20
21 *Defendant-Appellant.*
22 _____

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24 FOR APPELLANT:

SARAH BAUMGARTEL, Federal Defenders
of New York, Inc., New York, NY.

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28 FOR APPELLEE:

EMIL J. BOVE III (Brendan F. Quigley,
Brian R. Blais, *on the brief*), Assistant United

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1 States Attorneys, *for* Preet Bharara, United
2 States Attorney for the Southern District of
3 New York, New York, NY.
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5 Appeal from a judgment of the United States District Court for the Southern District
6 of New York (Oetken, J.).
7

8 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED,**
9 **ADJUDGED, AND DECREED** that the June 16, 2016 judgment of the District Court is
10 **AFFIRMED.**

11 Defendant-appellant Herman Gundy appeals his conviction and sentence, following a
12 bench trial on stipulated facts, for one count of failing to register as a sex offender after
13 traveling in interstate commerce, in violation of the Sex Offender Registration and
14 Notification Act (“SORNA”), 18 U.S.C. § 2250(a). We assume the parties’ familiarity with the
15 underlying facts and the procedural history of the case, to which we refer only as necessary to
16 explain our decision to affirm.

17 While serving a federal sentence for violating Maryland Criminal Law § 3-306, Sexual
18 Offense in the Second Degree, during his supervised release for a prior federal offense, Gundy
19 was transferred from Maryland to a federal prison in Pennsylvania. *See United States v. Gundy*,
20 804 F.3d 140, 143 (2d Cir. 2015). As he approached the end of his federal sentence, Gundy
21 authorized the Department of Justice to make arrangements for his move to community-based
22 custody. He was ordered to be transferred to the Bronx Residential Re-Entry Center, a halfway
23 house in New York, and he was granted a furlough to travel unescorted on a commercial bus
24 on July 17, 2012, from Pennsylvania to the Bronx. Gundy arrived at the Re-Entry Center as
25 planned, and, on August 27, 2012, was released from federal custody there to a private
26 residence in the Bronx. Gundy did not register as a sex offender in either Maryland or New
27 York, as state law required, and was arrested and charged under 18 U.S.C. § 2250. *Id.* at 144.
28 After the District Court granted Gundy’s motion to dismiss the prosecution for the absence of
29 a trigger for SORNA’s registration requirement, this Court reversed the dismissal and

1 reinstated the indictment, holding that the requirement was triggered because Gundy was
2 “required to register” under SORNA no later than August 1, 2008. *See id.* at 145.

3 Upon the indictment’s reinstatement, Gundy renewed his motion to dismiss on the
4 basis that the interstate travel requirement of the statute was not satisfied because he was still
5 in custody when he traveled from Pennsylvania to the Bronx. The District Court denied the
6 motion, holding that the statute did not include an exception to the interstate travel element
7 based on a defendant’s custodial status. The District Court also held that, even if the statute
8 did include a voluntariness or *mens rea* requirement, the allegations of the indictment were
9 sufficient for that issue to be resolved at trial.

10 A bench trial followed on stipulated facts. The District Court found that each element
11 of the offense had been proven beyond a reasonable doubt, including the interstate travel
12 element and any voluntariness or *mens rea* requirement that may apply, and thus found Gundy
13 guilty of violating § 2250. Following a sentencing hearing, the District Court entered judgment
14 imposing a sentence of time served and a five-year term of supervised release. Gundy now
15 appeals from that judgment.

16 Section 2250(a) imposes criminal liability on anyone who (1) is required to register
17 under SORNA; (2) travels in interstate or foreign commerce; and (3) knowingly fails to register
18 or update a required registration. 18 U.S.C. § 2250(a). We held in our consideration of Gundy’s
19 earlier appeal that Gundy satisfies the first requirement. There is no dispute that he knowingly
20 failed to register, thus satisfying the third requirement. On appeal, Gundy asks us to read in an
21 exception to the second requirement, travel in interstate commerce, for a defendant who
22 crosses state lines while in federal custody. He contends that holding otherwise would violate
23 the usual requirement of criminal law that criminal acts be committed voluntarily. The parties
24 also dispute whether, on the stipulated facts and conclusions of the District Court following
25 the bench trial, Gundy’s travel from Pennsylvania to New York was voluntary.

