No. 17-6340

IN THE
Supreme Court of the United States

KEISHAN HERBERT ENIX,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

SECOND SUPPLEMENTAL BRIEF

Donna Lee Elm
Federal Defender

Conrad Kahn, Counsel of Record
Research and Writing Attorney
Federal Defender's Office
201 South Orange Avenue, Suite 300
Orlando, Florida 32801
Telephone: (407) 648-6338
Facsimile: (407) 648-6765
E-mail: Conrad_Kahn@fd.org

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SECOND SUPPLEMENTAL BRIEF

Petitioner Keishan Herbert Enix, pursuant to Supreme Court Rule 15.8, brings to this Court's attention the following decisions issued after this Court's recent decision in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018):

In *United States v. Salas*, the Tenth Circuit held that *Dimaya* compelled the conclusion that 18 U.S.C. § 924(c)'s residual clause is unconstitutionally vague. --- F.3d ---, 2018 WL 2074547, at *4 (10th Cir. May 4, 2018) ("*Dimaya*'s reasoning for invalidating § 16(b) applies equally to § 924(c)(3)(B).").

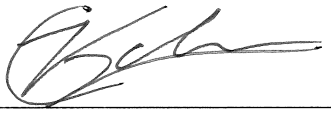
In *United States v. Wiles*, on the other hand, the Eleventh Circuit further entrenched itself in its view that *Dimaya* does not affect § 924(c). --- F. App'x ---, 2018 WL 2017905, at *1 (11th Cir. Apr. 30, 2018) ("Wiles's contention that the risk-of-force clause in § 924(c)(3)(B) is unconstitutionally vague is foreclosed by *Ovalles*, notwithstanding *Dimaya*."); *see also Myrthil v. United States*, --- F. App'x ---, 2018 WL 2068558, at *2–3 (11th Cir. May 3, 2018) (holding post-*Dimaya* that *Ovalles* remains binding precedent on whether *Johnson* applies to § 924(c)'s residual clause).

With *Salas*, the Tenth Circuit has now joined the Seventh Circuit in holding that § 924(c)'s residual clause is unconstitutionally vague, deepening a circuit split on the issue. What's more, the Eleventh Circuit continues to rely on *Ovalles* even though *Dimaya* rejected almost all of its reasoning. *See Salas*, 2018 WL 2074547, at *4 ("There is ostensibly a circuit split on the issue of § 924(c)(3)(B)'s constitutionality . . . . . [b]ut *Dimaya* has since abrogated the reasoning of those cases."). Thus, even after *Dimaya*, the circuits are, and will remain, split. This Court's intervention is needed.

Mr. Enix therefore respectfully requests that this Court grant his petition and schedule briefing and oral argument.

Respectfully submitted,

Donna Lee Elm
Federal Defender



Conrad Kahn
Research and Writing Attorney
Federal Defender's Office
201 South Orange Avenue, Suite 300
Orlando, Florida 32801
Telephone: (407) 648-6338
Facsimile: (407) 648-6765
E-mail: Conrad_Kahn@fd.org
Counsel of Record for Petitioner

2018 WL 2074547
Only the Westlaw citation is currently available.
United States Court of Appeals, Tenth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Clifford Raymond SALAS, Defendant–Appellant.

No. 16-2170
|
May 4, 2018

Synopsis

Background: Defendant was convicted in the United States District Court for the District of New Mexico, No. 2:12-CR-03183-RB-3, of conspiracy to commit arson, of aiding and abetting commission of arson, of being felon in possession of explosive device, and of using destructive device in furtherance of crime of violence, and he appealed.

Holdings: The Court of Appeals, Kelly, Circuit Judge, held that:

[1] as matter of first impression, residual clause in definition of "crime of violence," for purpose of statute prohibiting use of destructive device in furtherance of crime of violence, was unconstitutionally vague, and

[2] district court's error in relying on unconstitutional residual clause in definition of "crime of violence," for purpose of statute prohibiting use of destructive device in furtherance of crime of violence, in order to find that arson that defendant committed by fire bombing tattoo parlor with Molotov cocktail was "crime of violence" that supported his conviction for using destructive device in furtherance of crime of violence, was clear or obvious.

Remanded with instructions to vacate.

West Headnotes (12)

[1] Criminal Law

Issue raised for first time on appeal would be reviewed only for plain error.

Cases that cite this headnote

[2] Criminal Law

Plain error occurs when there is (1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects fairness, integrity, or public reputation of judicial proceedings.

Cases that cite this headnote

[3] Criminal Law

Plain error rule is applied less rigidly when reviewing a potential constitutional error.

Cases that cite this headnote

[4] Weapons

Residual clause in definition of "crime of violence," for purpose of statute prohibiting use of destructive device in furtherance of crime of violence, was unconstitutionally vague in violation of defendant's due process rights. U.S. Const. Amend. 5; 18 U.S.C.A. § 924(c)(3).

Cases that cite this headnote

[5] Criminal Law

Law can be unconstitutionally vague even if it is criminal statute that requires a determination of guilt beyond a reasonable doubt.

Cases that cite this headnote

[6] Weapons

Whether the crime allegedly furthered by defendant's use of destructive device was a

"crime of violence," as required to support defendant's conviction of using a destructive device in furtherance of crime of violence, is question of law, which court must attempt to answer using "categorical" approach, without inquiring into specific conduct of defendant. 18 U.S.C.A. § 924(c)(1).

Cases that cite this headnote

[7] **Criminal Law**

Error is plain, as required to be correctable on "plain error" review, if it is clear or obvious at time of appeal.

Cases that cite this headnote

[8] **Criminal Law**

Error is clear or obvious at time of appeal, as required to be redressable on "plain error" review, when it is contrary to well-settled law.

Cases that cite this headnote

[9] **Criminal Law**

In general, in order for unpreserved error to be clear or obvious as being "contrary to well-settled law," either the Supreme Court or the Circuit Court of Appeals must have addressed the issue; however, absence of such precedent will not prevent finding of "plain error" if district court's interpretation was clearly erroneous.

Cases that cite this headnote

[10] **Criminal Law**

In absence of Supreme Court or circuit precedent directly addressing a particular issue, a circuit split on issue weighs against a finding of "plain error."

Cases that cite this headnote

[11] **Criminal Law**

Disagreement among the circuits will not prevent a finding of plain error, if the law is well settled in the Tenth Circuit itself.

Cases that cite this headnote

[12] **Criminal Law**

District court's error in relying on unconstitutional residual clause in definition of "crime of violence," for purpose of statute prohibiting use of destructive device in furtherance of crime of violence, in order to find that arson that defendant committed by fire bombing tattoo parlor with Molotov cocktail was "crime of violence" that supported his conviction for using destructive device in furtherance of crime of violence, was clear or obvious under Tenth Circuit precedent that existed at time of appeal, and warranted relief on "plain error" review, given that there was Tenth Circuit case law holding identical language unconstitutionally vague in definition of "crime of violence" in another criminal statute. 18 U.S.C.A. §§ 844(i), 924(c)(1, 3).

Cases that cite this headnote

Appeal from the United States District Court for the District of New Mexico, (D.C. No. 2:12-CR-03183-RB-3)

Attorneys and Law Firms

Howard Pincus, Assistant Federal Public Defender (and Virginia L. Grady, Federal Public Defender, with him on the briefs), Denver, Colorado, for Defendant–Appellant.

Aaron Jordan, Assistant United States Attorney (and James D. Tierney, Acting United States Attorney, with him on the brief), Las Cruces, New Mexico, for Plaintiff–Appellee.

Before HOLMES, KELLY, and BACHARACH, Circuit Judges.

Opinion

KELLY, Circuit Judge.

***1** Defendant–Appellant Clifford Raymond Salas was found guilty of various arson-related offenses, and he now appeals from his conviction and sentence under 18 U.S.C. § 924(c)(1) for using a destructive device in furtherance of a crime of violence. We have jurisdiction under 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291, and we remand to the district court with instructions to vacate Mr. Salas's § 924(c)(1) conviction and resentence him because § 924(c)(3)(B), the provision defining a "crime of violence" for the purposes of his conviction, is unconstitutionally vague.

Background

After using a Molotov cocktail to firebomb a tattoo parlor, Mr. Salas was convicted under 18 U.S.C. § 844(n) for conspiracy to commit arson (count 1), 18 U.S.C. §§ 2 and 844(i) for aiding and abetting the commission of arson (count 2), and 18 U.S.C. § 842(i) for being a felon in possession of an explosive (count 4). 1 R. 5–7, 82–83. He was also convicted under 18 U.S.C. § 924(c)(1) for using a destructive device in furtherance of a crime of violence (count 3)—the "destructive device" being a Molotov cocktail,[1] and the "crime of violence" being arson. Id. For his offenses, Mr. Salas was sentenced to a total of 35 years' imprisonment: 5 years for counts 1, 2, and 4 and, pursuant to § 924(c)(1)(B)(ii)'s mandatory minimum sentence, 30 years for count 3. Id. at 84; 5 R. 13–14. He was also sentenced to 3 years' supervised release. 1 R. 85.

Section 924(c)(3) defines the term "crime of violence" as either a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another" or a felony "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." Both parties agree that the first definition, known as the "elements clause," does not apply here because § 844(i) arson does not require, as an element, the use of force against the property "of another"; for example, § 844(i) may apply to a person who destroys his or her own property. See 18 U.S.C. § 844(i) (2012) (prohibiting damaging or destroying "any building, vehicle, or other real or personal property" used or affecting interstate or foreign commerce (emphasis added)); see also Torres v. Lynch, —— U.S. ——, 136 S.Ct. 1619, 1629–30, 194 L.Ed.2d 737 (2016) (noting that a similar "crime of violence" provision would not apply to definitions of arson that include the destruction of one's own property). Consequently, Mr. Salas could have been convicted only under the second definition, known as § 924(c)(3)'s "residual clause."

At trial, Mr. Salas did not argue that § 844(i) arson does not satisfy § 924(c)(3)'s crime-of-violence definition, and he did not object when the district court determined that arson is a crime of violence and instructed the jury to that effect. On appeal, Mr. Salas argues that § 924(c)(3)'s residual clause is unconstitutionally vague.

Discussion

***2** **[1]** **[2]** **[3]** Because Mr. Salas raises this issue for the first time on appeal, we review for plain error. See United States v. Avery, 295 F.3d 1158, 1181–82 (10th Cir. 2002). "Plain error occurs when there is (1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." United States v. Price, 265 F.3d 1097, 1107 (10th Cir. 2001). "However, we apply this rule less rigidly when reviewing a potential constitutional error." United States v. James, 257 F.3d 1173, 1182 (10th Cir. 2001); accord United States v. Benford, 875 F.3d 1007, 1016 (10th Cir. 2017). The government concedes that if Mr. Salas can prove the first two elements, the third and fourth would be satisfied, too. Aplee. Br. at 12 n.11. The issues, then, are whether there was error—that is, whether § 924(c)(3)(B) is unconstitutionally vague—and, if so, whether that error was plain.

A. Section 924(c)(3)(B) Is Unconstitutionally Vague

[4] In Sessions v. Dimaya, —— U.S. ——, 138 S.Ct. 1204, —— L.Ed.2d —— (2018), the Supreme Court held that 18 U.S.C. § 16(b)'s definition of a "crime of violence" is unconstitutionally vague in light of its reasoning in Johnson v. United States, —— U.S. ——, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), which invalidated the similarly worded residual definition of a "violent felony" in the Armed Career Criminal Act (ACCA). 138 S.Ct. at 1210; see also Golicov v. Lynch, 837 F.3d 1065, 1072 (10th Cir. 2016) (ruling that § 16(b) "must be

deemed unconstitutionally vague in light of Johnson"). The Dimaya Court explained that the same two features rendered the clauses unconstitutionally vague: they " 'require[ ] a court to picture the kind of conduct that the crime involves in "the ordinary case," and to judge whether that abstraction presents' some not-well-specified-yet-sufficiently-large degree of risk." Dimaya, 138 S.Ct. at 1216 (quoting Johnson, 135 S.Ct. at 2557). The Court also rejected several reasons for distinguishing § 16(b) from the ACCA, namely that § 16(b) requires a risk that force be used in the course of committing the offense, focuses on the use of physical force rather than physical injury, does not contain a confusing list of enumerated crimes, and does not share the ACCA's history of interpretive failures. Id. at 1218–24.

Mr. Salas argues that § 924(c)(3)(B)'s definition of a "crime of violence," which is identical to § 16(b)'s,[2] is likewise unconstitutionally vague. Indeed, we have previously noted the similarity between the two provisions and consequently held that "cases interpreting [§ 16(b)] inform our analysis" when interpreting § 924(c)(3)(B). United States v. Serafin, 562 F.3d 1105, 1108 & n.4 (10th Cir. 2009). Other circuits interpret § 16(b) and § 924(c)(3)(B) similarly, as well. See In re Hubbard, 825 F.3d 225, 230 n.3 (4th Cir. 2016) ("[T]he language of § 16(b) is identical to that in § 924(c)(3)(B), and we have previously treated precedent respecting one as controlling analysis of the other."). In fact, the Seventh Circuit has faced the same scenario that we face now: it ruled that § 16(b) was unconstitutionally vague in United States v. Vivas–Ceja, 808 F.3d 719 (7th Cir. 2015), and then addressed the constitutionality of § 924(c)(3)(B) in United States v. Cardena, 842 F.3d 959 (7th Cir. 2016). In Cardena, the Seventh Circuit ruled that § 924(c)(3)'s residual clause was "the same residual clause contained in [§ 16(b)]" and accordingly held that "§ 924(c)(3)(B) is also unconstitutionally vague." Cardena, 842 F.3d at 996.

***3** In support of § 924(c)(3)(B)'s constitutionality, the government "submits that § 924(c)(3)(B) is distinguishable from the ACCA's residual clause for the same reasons it argued that § 16(b) was distinguishable." Aplee. Br. at 7. That is, § 924(c)(3)(B) requires the risk that force be used in the course of committing the offense, which the ACCA does not; § 924(c)(3)(B) focuses on the use of physical force rather than physical injury; § 924(c)(3)(B) does not contain the confusing list of enumerated crimes that the ACCA does; and, unlike the ACCA, § 924(c)(3)(B) does not have a history of interpretive failures. Dimaya, however, explicitly rejected all of these arguments. 138 S.Ct. at 1218–24.

The only way the government distinguishes § 924(c)(3)(B) from § 16(b) is by noting that, pursuant to § 924(c)(1)(A), the former requires a sufficient nexus to a firearm, which narrows the class of offenses that could qualify as crimes of violence. See Ovalles v. United States, 861 F.3d 1257, 1265–66 (11th Cir. 2017) ("The required 'nexus' between the § 924(c) firearm offense and the predicate crime of violence makes the crime of violence determination more precise and more predictable."). But this firearm requirement simply means that the statute will apply in fewer instances, not that it is any less vague. The required nexus does not change the fact that § 924(c)(3)(B) possesses the same two features that rendered the ACCA's residual clause and § 16(b) unconstitutionally vague: "an ordinary-case requirement and an ill-defined risk threshold," Dimaya, 138 S.Ct. at 1207. Requiring a sufficient nexus to a firearm does not remedy those two flaws.

Other circuits have upheld § 924(c)(3)(B)'s constitutionality, but they were not faced, as we are here, with binding authority holding § 16(b) unconstitutional. See United States v. Garcia, 857 F.3d 708, 711 (5th Cir. 2017); United States v. Eshetu, 863 F.3d 946, 955 (D.C. Cir. 2017); Ovalles, 861 F.3d at 1265 (11th Cir.); United States v. Prickett, 839 F.3d 697, 699 (8th Cir. 2016); United States v. Hill, 832 F.3d 135, 150 (2d Cir. 2016); United States v. Taylor, 814 F.3d 340, 379 (6th Cir. 2016). For the most part, the grounds for their decisions apply equally to § 16(b) and mirror the distinctions between the ACCA's residual clause and § 16(b) that were rejected in Dimaya.

Notably, only the Sixth Circuit has held that § 924(c)(3)(B) is constitutional while § 16(b) is not. See Shuti v. Lynch, 828 F.3d 440, 446 (6th Cir. 2016) (ruling that § 16(b) is unconstitutionally vague); Taylor, 814 F.3d at 375–76 (rejecting a void-for-vagueness challenge to § 924(c)(3)(B)). The Sixth Circuit stated that the provisions differed because, in contrast to § 16(b), "§ 924(c) is a criminal offense and 'creation of risk is an element of the crime,' " which "requires an ultimate determination of guilt beyond a reasonable doubt—by a jury, in the same proceeding." Shuti, 828 F.3d at 449 (quoting Johnson, 135 S.Ct. at

2557). It further noted that courts evaluate this risk based on the defendant's actual conduct. Id.

[5] **[6]** This is a distinction without a difference, though, and is incorrect to the extent it suggests that whether an offense is a crime of violence depends on the defendant's specific conduct. As an initial matter, a law can be unconstitutionally vague even if it is a criminal offense that requires a determination of guilt beyond a reasonable doubt. E.g., Papachristou v. City of Jacksonville, 405 U.S. 156, 171, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972) (invalidating a vagrancy ordinance). Additionally, "[w]hether a crime fits the § 924(c) definition of a 'crime of violence' is a question of law," United States v. Morgan, 748 F.3d 1024, 1034 (10th Cir. 2014), and we employ the categorical approach to § 924(c)(3)(B), meaning we determine whether an offense is a crime of violence "without inquiring into the specific conduct of this particular offender," Serafin, 562 F.3d at 1107–08 (quoting United States v. West, 550 F.3d 952, 957 (10th Cir. 2008)). Consequently, § 924(c)(3)(B), like § 16(b), "requires a court to ask whether 'the ordinary case' of an offense poses the requisite risk." Dimaya, 138 S.Ct. at 1207 (quoting James v. United States, 550 U.S. 192, 208, 127 S.Ct. 1586, 167 L.Ed.2d 532 (2007), overruled on other grounds by Johnson, 135 S.Ct. 2551). Regardless of whether a jury must find the defendant guilty of § 924(c) beyond a reasonable doubt, then, this "ordinary-case requirement and an ill-defined risk threshold" combines "in the same constitutionally problematic way" as § 16(b) and "necessarily 'devolv[es] into guesswork and intuition,' invit[es] arbitrary enforcement, and fail[s] to provide fair notice." Id. at 1207, 1223 (quoting Johnson, 135 S.Ct. at 2559).

***4** Ultimately, § 924(c)(3)(B) possesses the same features as the ACCA's residual clause and § 16(b) that combine to produce "more unpredictability and arbitrariness than the Due Process Clause tolerates," Id. at 1223 (quoting Johnson, 135 S.Ct. at 2558), and Dimaya's reasoning for invalidating § 16(b) applies equally to § 924(c)(3)(B). Section 924(c)(3)(B) is likewise unconstitutionally vague.

B. Mr. Salas's Conviction Constitutes Plain Error

[7] **[8]** **[9]** **[10]** **[11]** **[12]** Even though Mr. Salas's conviction and sentence under 18 U.S.C. § 924(c)(1) was erroneous because § 924(c)(3)(B) is unconstitutionally vague, we can grant him relief only if the error was "plain" because Mr. Salas did not raise that argument at the district court level. See United States v. Ruiz–Gea, 340 F.3d 1181, 1187 (10th Cir. 2003). An error is plain if it is "clear or obvious at the time of the appeal." United States v. Gonzalez–Huerta, 403 F.3d 727, 732 (10th Cir. 2005); see also Henderson v. United States, 568 U.S. 266, 276, 133 S.Ct. 1121, 185 L.Ed.2d 85 (2013) ("[A]n appellate court must apply the law in effect at the time it renders its decision." (quoting Thorpe v. Hous. Auth., 393 U.S. 268, 281, 89 S.Ct. 518, 21 L.Ed.2d 474 (1969))). In turn, "[a]n error is clear and obvious when it is contrary to well-settled law." United States v. Whitney, 229 F.3d 1296, 1309 (10th Cir. 2000). "In general, for an error to be contrary to well-settled law, either the Supreme Court or this court must have addressed the issue. The absence of such precedent will not, however, prevent a finding of plain error if the district court's interpretation was 'clearly erroneous.' " Ruiz–Gea, 340 F.3d at 1187 (citation omitted). In the absence of Supreme Court or circuit precedent directly addressing a particular issue, "a circuit split on that issue weighs against a finding of plain error." United States v. Wolfname, 835 F.3d 1214, 1221 (10th Cir. 2016). But disagreement among the circuits will not prevent a finding of plain error if the law is well settled in the Tenth Circuit itself. See id. at 1221–22.

We have found plain error where a holding was "implicit" in a previous case but have declined to find plain error where a previous case addressed the relevant issue merely in dicta. Compare id. at 1218, with Whitney, 229 F.3d at 1309. Here, although neither the Supreme Court nor this circuit has explicitly addressed the constitutionality of § 924(c)(3)(B), both have directly ruled on the constitutionality of identical language in § 16(b). See Dimaya, 138 S.Ct. at 1210; Golicov, 837 F.3d at 1072. The identical wording of § 16(b) and § 924(c)(3)(B) means that the provisions contain the same two features of the ACCA's residual clause that "conspire[d] to make it unconstitutionally vague." Dimaya, 138 S.Ct. at 1223 (alteration in original) (quoting Johnson, 135 S.Ct. at 2557). Accordingly, Dimaya compels the conclusion that § 924(c)(3)(B) is unconstitutional, too.

There is ostensibly a circuit split on the issue of § 924(c)(3)(B)'s constitutionality, which ordinarily weighs against a finding of plain error. See Wolfname, 835 F.3d at 1221. But Dimaya has since abrogated the reasoning of those cases. Moreover, we do not view a circuit split as persuasive evidence that an error was not plain if the other

circuits were "writing on a clean slate," while we have relevant precedent to consider. Id. at 1221 n.3.

***5** The government makes two additional points for why error, if found, would not be plain. The first is that this circuit has repeatedly upheld § 924(c) convictions that were based on § 844(i) predicates. All of those cases, though, were pre-Dimaya (and pre-Johnson, for that matter), and none of them addressed a void-for-vagueness challenge. The second additional point is that the Eleventh Circuit found no plain error regarding a challenge to § 924(c)(3)(B)'s constitutionality in United States v. Langston, 662 Fed.Appx. 787, 794 (11th Cir. 2016), cert. denied, —— U.S. ——, 137 S.Ct. 1583, 197 L.Ed.2d 712 (2017). When that case was decided, however, neither the Supreme Court nor the Eleventh Circuit had ruled that § 16(b) was unconstitutionally vague, which distinguishes Langston from the current appeal.

In sum, the reasons why § 16(b) is unconstitutionally vague apply equally to § 924(c)(3)(B). Because they are identically worded, we interpret § 16(b) and § 924(c)(3)(B) similarly and apply caselaw interpreting the former to the latter. Serafin, 562 F.3d at 1108 & n.4. Additionally, we apply the plain error rule "less rigidly when reviewing a potential constitutional error." James, 257 F.3d at 1182. As a result, Mr. Salas's conviction under § 924(c)(1) was clearly erroneous under Supreme Court and Tenth Circuit precedent and constitutes plain error.

REMANDED for resentencing, with instructions to the district court to vacate count 3 of Mr. Salas's conviction.

All Citations

--- F.3d ----, 2018 WL 2074547

Footnotes

1 A Molotov cocktail qualifies as a "destructive device" for the purposes of § 924(c)(1)(B)(ii) and as an "explosive" for the purposes of § 844(i). E.g., United States v. Gillespie, 452 F.3d 1183, 1185 (10th Cir. 2006).

2 For the sake of comparison, § 16 provides:

> The term "crime of violence" means ... (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

And § 924(c)(3) provides:

> For purposes of this subsection the term "crime of violence" means an offense that is a felony and ... (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

2018 WL 2017905
Only the Westlaw citation is currently available.
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Jhirmack WILES, Defendant-Appellant.

Nos. 17-12671, 17-13409
|
Non-Argument Calendar
|
(April 30, 2018)

Appeals from the United States District Court for the Southern District of Florida, D.C. Docket No. 1:16-cr-20195-UU-1

Attorneys and Law Firms

Lisette Marie Reid, Jason Wu, Assistant U.S. Attorney, Emily M. Smachetti, U.S. Attorney Service—Southern District of Florida, U.S. Attorney's Office, Miami, FL, Sivashree Sundaram, U.S. Attorney's Office, Fort Lauderdale, FL, for Plaintiff-Appellee

Ian McDonald, Joaquin E. Padilla, Michael Caruso, Federal Public Defender, Federal Public Defender's Office, Miami, FL, for Defendant-Appellant

Before TJOFLAT, ROSENBAUM, and NEWSOM, Circuit Judges.

Opinion

PER CURIAM:

***1** In these consolidated appeals, Jhirmack Wiles appeals his convictions after pleading guilty to two counts of brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii). The sole substantive issue he raises on appeal is whether Hobbs Act robbery, 18 U.S.C. § 1951(a), is a "crime of violence" for purposes of § 924(c). [1] Wiles maintains that it is not because it does not meet the definition of a crime of violence under the use-of-force clause in § 924(c)(3)(A), and because the risk-of-force or residual clause in § 924(c)(3)(B) is unconstitutionally vague, in light of *Johnson v. United States*, —— U.S. ——, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015). We affirm.

Section 924(c)(1)(A) provides for a separate consecutive sentence if any person uses or carries a firearm during and in relation to a crime of violence, or possesses a firearm in furtherance of such a crime. 18 U.S.C. § 924(c)(1)(A). For purposes of § 924(c), a "crime of violence" is defined as an offense that is a felony and

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Id. § 924(c)(3). Section 924(c)(3)(A) is commonly referred to as the use-of-force clause, while § 924(c)(3)(B) is commonly referred to as the risk-of-force or residual clause. *United States v. St. Hubert*, 883 F.3d 1319, 1327 (11th Cir. 2018).

After Wiles filed his brief with this Court, we held in *St. Hubert* that Hobbs Act robbery constitutes a crime of violence under § 924(c)(3)(A)'s use-of-force clause. *St. Hubert*, 883 F.3d at 1328–29. Further, we rejected the argument that the Supreme Court's decision in *Johnson* invalidated the similarly worded clause in § 924(c)(3)(B). *Id.* at 1327–28. We stated that, in *Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017), we had already ruled that *Johnson* did not invalidate § 924(c)(3)(B), and we found we were bound to follow *Ovalles*. *Id.* at 1328. We further concluded that, regardless of the Supreme Court's ruling in *Sessions v. Dimaya*, No. 15-1498 (U.S., argued Oct. 2, 2017), involving the residual clause in 18 U.S.C. § 16(B), that ruling would not undermine *Ovalles* because *Dimaya* concerned a different substantive section than § 924(c)(3)(B), as well as different analytical frameworks. *See id.* at 1336–37.

Here, Wiles's arguments are foreclosed by binding precedent. *See United States v. Brown*, 342 F.3d 1245, 1246 (11th Cir. 2003) (stating that we are bound by

our prior decisions unless and until they are overruled by the Supreme Court or this Court *en banc*). We are bound by *St. Hubert*'s holding that Hobbs Act robbery qualifies as a crime of violence under the use-of-force clause in § 924(c)(3)(A). And Wiles's contention that the risk-of-force clause in § 924(c)(3)(B) is unconstitutionally vague is foreclosed by *Ovalles*, notwithstanding *Dimaya*. Accordingly, we affirm Wiles's convictions.

***2 AFFIRMED.**

All Citations

--- Fed.Appx. ----, 2018 WL 2017905 (Mem)

Footnotes

1 Wiles also argues that the sentence-appeal waiver in his plea agreement does not bar his appeal, but the government does not seek to enforce the waiver or otherwise contest our authority to decide the issue raised.

2018 WL 2068558
Only the Westlaw citation is currently available.
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals, Eleventh Circuit.

EMILE MYRTHIL, Petitioner-Appellant,
v.
UNITED STATES OF AMERICA,
Respondent-Appellee.

No. 17-11531
|
(May 3, 2018)

D.C. Docket Nos. 1:16-cv-22647-MGC; 1:10-cr-20855-MGC-4

Appeal from the United States District Court for the Southern District of Florida

Before MARCUS, ROSENBAUM and FAY, Circuit Judges.

Opinion

PER CURIAM:

***1** Federal prisoner Emile Myrthil appeals the district court's dismissal of his second motion to vacate, set aside, or correct his sentence, pursuant to 28 U.S.C. § 2255. We affirm.

I. BACKGROUND

Myrthil pled guilty to conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a), attempted Hobbs Act robbery, also in violation of § 1951(a), and possession of a firearm in furtherance of a "crime of violence," in violation of 18 U.S.C. § 924(c)(1)(A)(iii). The "crimes of violence" that supported Myrthil's § 924(c) conviction were his convictions for conspiracy to commit Hobbs Act robbery and attempted Hobbs Act robbery. Myrthil received a 151-month total sentence of imprisonment.

Myrthil filed his first § 2255 motion in 2013; the district court denied it on the merits. In 2016, he filed the instant second or successive § 2255 motion with our authorization, arguing that he was actually innocent of his § 924(c) conviction. He contended that § 924(c)(3)(B)'s "risk-of-force" clause was void for vagueness in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), and, further, that his convictions for conspiracy to commit Hobbs Act robbery and attempted Hobbs Act robbery were not appropriate § 924(c) companion convictions because they were not categorically "crimes of violence" under § 924(c)(3)(A)'s "use-of-force" clause. The district court denied Myrthil's § 2255 motion on the merits, based on its finding that Myrthil's conviction for attempted Hobbs Act robbery was a valid "crime of violence" companion conviction under § 924(c)(3)(A)'s "use-of-force" clause. The district court also denied Myrthil a certificate of appealability ("COA").

Myrthil appealed; we granted him a COA on the following two issues:

> (1) Whether Myrthil's conviction for attempted Hobbs Act robbery, in violation of 18 U.S.C. § 1951, qualifies as a crime of violence necessary to support his 18 U.S.C. § 924(c) conviction, in light of *Johnson v. United States*, 135 S. Ct. 2251 (2015).
>
> (2) Whether Myrthil's conviction for conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951, qualifies as a crime of violence necessary to support his 18 U.S.C. § 924(c) conviction, in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015).

On appeal, Myrthil argues that § 924(c)'s "risk-of-force" clause is void for vagueness for the same reasons that led the Supreme Court to declare in *Johnson* that § 924(e)'s similar "residual" clause was unconstitutionally vague. Therefore, he contends that, absent § 924(c)'s "risk-of-force" clause, his § 924(c) conviction can stand only if his convictions for attempted Hobbs Act robbery and conspiracy to commit Hobbs Act robbery qualify as "crimes of violence" under § 924(c)'s "use-of-force" clause. He argues that those convictions are not categorically "crimes of violence" necessary to support his § 924(c) conviction.

II. DISCUSSION

In reviewing a § 2255 proceeding, we review legal conclusions de novo and factual findings for clear error. *Osley v. United States*, 751 F.3d 1214, 1222 (11th Cir. 2014). Under the Armed Career Criminal Act ("ACCA"), a defendant convicted of being a felon in possession of a firearm who has 3 or more prior convictions for a "serious drug offense" or "violent felony" faces a mandatory minimum 15-year sentence. *See* 18 U.S.C. § 924(e)(1). The ACCA defines a violent felony as any crime punishable by a term of imprisonment exceeding one year that:

> ***2** (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

§ 924(e)(2)(B)(i), (ii).

The first prong of this definition is referred to as the "elements clause," while the second prong contains the "enumerated crimes" clause, and finally, what is commonly called the "residual clause." *United States v. Owens*, 672 F.3d 966, 968 (11th Cir. 2012). In 2015, the Supreme Court, in *Johnson v. United States*, struck down the ACCA's "residual" clause as unconstitutionally vague. 135 S. Ct. 2551 (2015). The Court clarified, in holding that the "residual" clause was void, that it did not call into question the application of the "elements" and "enumerated offense" clauses of the ACCA's definition of a violent felony. *Id.* at 2563. In 2016, the Supreme Court held that *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016).

Distinct from the provision in § 924(e), § 924(c) provides for a mandatory consecutive sentence for any defendant who uses a firearm during a "crime of violence" or a "drug-trafficking crime." 18 U.S.C. § 924(c)(1). A conviction and sentence under § 924(c) requires only one companion conviction, not two. *See* § 924(c)(1)(A). For purposes of § 924(c), "crime of violence" means an offense that is a felony and:

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

§ 924(c)(3)(A), (B). The first prong of the definition is referred to as the "use-of-force" clause; the second prong is referred to as the "risk-of-force" or "residual" clause. *Ovalles v. United States*, 861 F.3d 1257, 1263 (11th Cir. 2017).

In *Ovalles*, we held that the Supreme Court's decision in *Johnson* did not invalidate § 924(c)(3)(B)'s "risk-of-force" clause. *Id.* at 1267. We affirmed the denial of a defendant's § 2255 motion to vacate her conviction and sentence for using and carrying a firearm during and in relation to a crime of violence, namely, attempted carjacking, in violation of 18 U.S.C. § 2119. *Id.* at 1258-60. We determined that *Johnson*'s void-for-vagueness ruling did not extend to § 924(c)(3)(B), because the "risk-of-force" clause in § 924(c)(3)(B) had a distinct purpose of punishing firearm use in connection with a specific crime rather than recidivism, had not caused the same difficulty in interpretation, did not encompass risks arising after the offense is completed, and lacked the confusing enumerated offenses. *Id.* at 1265-66. Accordingly, because Ovalles had never argued that her attempted-carjacking offense would not qualify as a crime of violence under the "risk-of-force" clause if that clause were constitutionally valid, we determined that her conviction for attempted carjacking qualified as a "crime of violence" under § 924(c)(3)(B). *Id.* at 1267.

***3** Most recently, we held that a conviction for Hobbs Act robbery was a valid § 924(c) companion conviction because it qualified as a "crime of violence" under both of the clauses of § 924(c)(3). *United States v. St. Hubert*, 883 F.3d 1319, 1328-29 (11th Cir. 2018). We also held that a conviction for attempted Hobbs Act robbery is categorically a "crime of violence" under § 924(c)(3)(A)'s "use-of-force clause." *Id.* at 1334.

Here, the district court did not err in denying Myrthil's § 2255 motion, as *Ovalles* holds that *Johnson* did not invalidate § 924(c)(3)(B)'s "risk-of-force" clause. *Ovalles*, 861 F.3d at 1259. Therefore, Myrthil's conviction and

sentence under § 924(c) are still valid following *Johnson*, and his claim is foreclosed by Circuit precedent.

Additionally, even assuming that *Johnson* invalidated § 924(c)(3)(B)'s "risk-of-force" clause, Myrthil's § 924(c) conviction and sentence is still valid because his conviction for attempted Hobbs Act robbery still qualifies as a "crime of violence" companion conviction under § 924(c)(3)(A)'s "use-of-force" clause. *St. Hubert*, 883 F.3d at 1334. That conclusion also means that we need not consider whether Myrthil's conviction for conspiracy to commit Hobbs Act robbery is a "crime of violence" under § 924(c)(3)(A) or (B), because a conviction and sentence under § 924(c) requires only one companion conviction, not two. *See* § 924(c)(1)(A).

AFFIRMED.

All Citations

--- Fed.Appx. ----, 2018 WL 2068558

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