IN THE
SUPREME COURT OF THE UNITED STATES

Jason Greer v. United States of America

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

APPENDIX B
Order of the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
LEWIS T. BABCOCK, JUDGE

Criminal Case No. 02-cr-00184-LTB
Civil Case No. 16-cv-01111-LTB

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

v.

JASON GREER,

Defendant/Movant.

ORDER

This matter is before me on a Motion to Vacate Sentence filed pursuant to 28 U.S.C. §2255 by Defendant-Movant Jason Greer, a federal prisoner, by and through counsel. [**Doc #90**] The Government has filed a response to the motion, objecting to the relief sought [Doc #94], and Mr. Greer has filed a reply. [Doc #95] After consideration of the motions and pleadings filed, I DENY Mr. Greer's motion seeking to vacate his sentence for the reasons set forth below.

I. Background

Mr. Greer was convicted after he pled guilty to one count of armed bank robbery, in violation of 18 U.S.C. §2113(a)&(d), pursuant to a plea agreement. He was sentenced to 188 months' of imprisonment, followed by a five-year term of supervised release. His judgment of conviction and sentence was affirmed on direct appeal on January 24, 2004. *See United States v. Greer*, 85 Fed.Appx. 181, 183-84 (10th Cir. 2004)(not selected for publication). Mr. Greer filed his first post-conviction motion in January of 2005 [Doc #86], which was subsequently denied by my order dated August 5, 2005. [Doc # 89] Thereafter, on May 13, 2016, the Tenth Circuit

issued an order granting Mr. Greer's request to file this second successive motion under 28 U.S.C. §2255. [Doc #91]

II. Motion

In this §2255 motion, Mr. Greer contends that his sentence violates the Due Process Clause of the Fifth Amendment because his offense level and, in turn, the applicable sentencing range was enhanced under the "residual clause" of the career offender section of the applicable United States Sentencing Guidelines. Mr. Greer bases his argument on the ruling in *Johnson v. United States*, ___ U.S. ___, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (June 26, 2015), in which the Supreme Court found that the residual clause in the definition of a "violent felon," set forth in the Armed Career Criminal Act (the "ACCA") at 18 U.S.C. §922(g), was unconstitutionally vague. *See* 18 U.S.C. §924(e)(2)(B)(identifying a qualifying prior offence as one that "otherwise involves conduct that presents a serious potential risk of physical injury to another . . .). Because the residual clause in the definition of a violent felon in the ACCA and the residual clause in the definition of a "crime of violence" in the Sentencing Guidelines at U.S.S.G. §4B1.2(a)(2) are identical – in that they both include prior offenses that "otherwise involve[] conduct that presents a serious potential risk of physical injury to another" – Mr. Greer argues that his enhanced offense level/sentence range based on prior convictions as crimes of violence defined by the residual clause in the Sentencing Guidelines was likewise unconstitutionally vague. *See United States v. Madrid*, 805 F.3d 1204 (10th Cir. 2015)(ruling that the invalidation of the unconstitutionally vague residual clause in the ACCA by *U.S. v. Johnson, supra*, led to the same result for the career-offender Sentence Guideline). As a result, because his offense level and sentencing range was enhanced in this case based on his prior crimes of violence, as defined by

the residual clause of §4B1.2(a), Mr. Greer now requests that I vacate his imposed sentence and set this matter for resentencing.

The Government opposes this request for post-conviction relief on the basis that: 1) Mr. Greer's §2255 motion is untimely filed; 2) the holding of *U.S. v. Johnson, supra*, does not apply retroactively to collateral attacks on enhanced Sentencing Guideline ranges pursuant to §4B1.2(a), because it only constitutes a new procedural rule, as opposed to a new substantive rule or a water-shed procedural rule; 3) although Mr. Greer claimed error in his career offender designation on direct appeal, he did not assert the Due Process challenge raised here and, as such, his claim is now procedurally barred; and 4) because Mr. Greer stipulated to a sentence of 188 months pursuant to a plea agreement, he cannot now show that the stipulated sentence was affected by a career offender designation under the residual clause of §4B1.2(a)(2). I do not reach these arguments, however, as I agree with the Government that because two of Mr. Greer's prior convictions qualify as crimes of violence under the Sentencing Guidelines without application of the residual clause, he still is a career offender for the purposes of offence level/sentencing range enhancement under U.S.S.G. §4B1.1.

III. Analysis

Mr. Greer received a sentence enhanced under the Sentencing Guideline as a career offender because he had "two prior qualifying felony convictions of . . . a crime of violence" pursuant to U.S.S.G. §4B1.1. The Sentencing Guidelines at §4B1.2(a) define a "crime of violence" as ". . . any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that"

> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

> (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

The record indicates that at the time of sentencing, the Court was aware of the following prior felony convictions: (1) a second-degree burglary conviction in 1991; (2) a conviction for second-degree assault in 1996; (3) a conviction for escape in 1991; and (4) two third-degree assault convictions in 1991. The court determined that all these convictions were crimes of violence for purposes of applying U.S.S.G. § 4B1.1 and determining career offender status. *See* Transcript of Continued Sentencing Hearing, dated November 29, 2003. [Doc #96 pp. 13-19] On direct appeal, the Tenth Circuit ruled that "there is no legal or factual basis for a challenge to the district court's application of the career offender provision of the Guidelines to Mr. Greer" because he "had at least two prior convictions that qualified as crimes of violence under U.S.S.G. § 4B1.2." *U.S. v. Greer, supra*, 85 F. App'x at 184 (relying specifically on his conviction for second-degree assault in 1996, and his conviction for escape in 1991).

Although the Supreme Court has ruled that a prior conviction cannot be deemed a crime of violence for purposes of increasing a defendant's offense level/sentencing range pursuant to the residual clause of U.S.S.G. §4B1.2(a)(2) – if the crime "otherwise involves conduct that presents a serious potential risk of physical injury to another" – a prior conviction still qualifies as such, under the remainder of §4B1.2(a), if it "(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives." *See Johnson v. United States, supra*, 135 S. Ct. at 2563 (indicating that the remainder of the ACCA's definition of violent felony is not called into question by its ruling that the residual clause definition is unconstitutional). In its briefing,

the Government concedes that Mr. Greer's prior convictions for escape in 1991 and third-degree assault in 1991 do not otherwise qualify. However, I agree with the Government that Mr. Greer's prior convictions for second-degree burglary in 1991 and for second-degree assault in 1996 are crimes of violence that support his sentence enhancement.

As to his conviction for burglary, the record is clear that at sentencing I found reasonably reliable evidence that the burglary that is the subject of this conviction constitutes burglary of a dwelling and, therefore, a "crime of violence" pursuant to the *enumerated offenses clause* of U.S.S.G §4B1.2(a)(2)(indicating that "burglary of a dwelling" constitutes a crime of violence). Mr. Greer does not dispute this finding or that his prior conviction for buglarly is a crime of violence under U.S.S.G §4B1.2(a)(2).

At issue then is whether his conviction for second degree assault in 1996 constitutes a crime of violence pursuant to the *element of physical force clause* of U.S.S.G. §4B1.2(a)(1). The element of physical force clause provides that if a state law offense "has as an element the use, attempted use, or threatened use of physical force against the person of another" it constitutes a crime of violence. Plaintiff's conviction for second degree assault was pursuant to Colorado Revised Statute §18-3-203(f), which required that the offender "knowingly and violently applie[d] physical force against . . . " a peace officer. *Id.* Because the crime of second degree assault under Colorado law "has as an element the use, attempted use, or threatened use of physical force against the person of another," the Government asserts that it clearly constitutes a crime of violence under the element of physical force clause of U.S.S.G. §4B1.2(a)(1).

Mr. Greer argues, in response, that the term "physical force" as used in U.S.S.G §4B1.2(a)(1) has a different meaning than the term as a required element under the Colorado

statute. In so arguing, Mr. Greer first refers me to decision in *Curtis Johnson v. United States*, 559 U.S. 133, 136-37, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010), in which the Supreme Court determined that a defendant's prior conviction for battery under Florida law did not constitute a "violent felony," as defined by the ACCA's element of physical force clause, because physical force in the ACCA requires "violent force," and a conviction of the Florida offense was not necessarily a violent felony because a Florida battery could be a mere touching. *Id.* Plaintiff then argues that because the Colorado crime of second degree assault against a peace officer under §18-3-203(f) does not specify the magnitude of the force which is proscribed, it likewise cannot be deemed a crime of violence under the element of physical force clause of U.S.S.G. §4B1.2(a)(1). *See People v. Schoondermark*, 699 P.2d 411, 414 (Colo. 1985)(ruling that a conviction for assault under §18-3-203(f) does not require force sufficient for the "infliction of either injury or pain," because it does not specify the amount of physical force necessary).

I disagree. In *United States v. Miller*, 98 Fed. App'x 801, 804 (10th Cir. 2004)(not selected for publication), the Tenth Circuit indicated that "[u]nder Colorado law it is clear that assault involves 'the use, attempted use, or threatened use of physical force' as set forth in the element of physical force clause of U.S.S.G. §4B1.2(a)(1)" and, indicting that "[w]e have been unable to find a single Colorado case that has found a defendant guilty of third-degree assault under the above statute when a defendant has not used, attempted to use, or threatened to use physical force against another person." *Id.* Furthermore, on direct appeal of this case the Tenth Circuit specifically ruled that Mr. Greer's prior conviction for felony second-degree assault in 1996 constituted a crime of violence becuase Colo. Rev. Stat. § 18-3-203(1)(g) defines second-degree assault to include "caus[ing] serious bodily injury to . . . another" "[w]ith intent to cause

bodily injury." *United States v. Greer*, *supra*, 85 Fed. App'x at 183.

In conclusion, Mr. Greer does not challenge my ruling that his prior conviction constituted burglary of a dwelling which, in turn, constitutes a "crime of violence" pursuant to the enumerated offences clause of U.S.S.G. §4B1.2(a)(2). Additionally, I have ruled that his prior conviction for second degree assault under Colorado Revised Statute §18-3-203(f) – which requires that the offender "knowingly and violently applie[d] physical force against . . . " a peace officer – also constitutes a "crime of violence" pursuant to the element of physical force clause of U.S.S.G. §4B1.2(a)(1) in that it "has as an element the use, attempted use, or threatened use of physical force against the person of another." Because two of Mr. Greer's prior convictions qualify as crimes of violence under the Sentencing Guidelines without application of the residual clause, he still qualifies as a career offender for the purposes of sentence enhancement under U.S.S.G. §4B1.2(a) and, as a result, his sentence should not be vacated. Therefore, I deny his motion seeking post conviction relief under 28 U.S.C. §2255.

ACCORDINGLY, for the reasons stated, I DENY Mr. Greer's Motion to Vacate Sentence Pursuant to 28 U.S.C. §2255. [**Doc #90**]

Dated: July 6, 2016 in Denver, Colorado.

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK