

FILED: February 6, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-6977
(7:10-cr-00429-BHH-1)
(7:16-cv-01473-BHH)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

DIFANKH ASAR, a/k/a James Walter Gist

Defendant - Appellant

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wynn, Judge Thacker and Senior Judge Hamilton.

For the Court

/s/ Patricia S. Connor, Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-6977

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DIFANKH ASAR, a/k/a James Walter Gist,

Defendant - Appellant.

Appeal from the United States District Court for the District of South Carolina, at Spartanburg. Bruce H. Hendricks, District Judge. (7:10-cr-00429-BHH-1; 7:16-cv-01473-BHH)

Submitted: November 21, 2017

Decided: November 28, 2017

Before WYNN and THACKER, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Difankh Asar, Appellant Pro Se. Maxwell B. Cauthen, III, Assistant United States Attorney, Greenville, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Difankh Asar seeks to appeal the district court's order denying relief on his 28 U.S.C. § 2255 (2012) motion. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B) (2012). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2012). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the motion states a debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484-85.

We have independently reviewed the record and conclude that Asar has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

This matter is before the Court upon Difankh Asar's ("Asar" or "Movant") pro se motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, wherein he seeks relief pursuant to *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015).

For the reasons stated below, the Court denies Asar's § 2255 motion.

BACKGROUND

On July 26, 2010, Asar pleaded guilty to being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2), and 924(e). On December 7, 2010, the Court determined that Asar had at least three prior convictions for violent felonies and sentenced him under Armed Career Criminal Act of 1984 ("ACCA") to 180 months' imprisonment, to be followed by five years' supervised release. Judgment was entered on December 9, 2010.

Asar filed a notice of appeal, contending that the Court erred in sentencing him under ACCA, but the Fourth Circuit Court of Appeals affirmed. *United States v. Asar*, No. 10-5263, 480 F. App'x 207 (4th Cir. May 8, 2012).

Asar filed a motion pursuant to § 2255 on June 14, 2012, alleging, *inter alia*, that his

counsel was ineffective for failing to properly challenge the Court's application of ACCA. The Court, in an order filed on October 10, 2012, rejected Asar's argument and denied his § 2255 motion.

After receiving permission from the Fourth Circuit Court of Appeals to file a second or successive § 2255 motion, Asar filed the instant § 2255 motion on May 6, 2016. The government filed a response in opposition, following which Asar filed two motions for summary judgment.

STANDARD OF REVIEW

Courts are required to liberally construe pleadings filed by pro se litigants to allow for the development of potentially meritorious claims. *Boag v. MacDougall*, 454 U.S. 364, 365 (1982). Further, pro se complaints are held to a less stringent standard than formal pleadings drafted by lawyers. *Haines v. Kerner*, 404 U.S. 519, 596 (1972).

Movant proceeds under 28 U.S.C. § 2255, which provides in relevant part:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255. On a motion to vacate, set aside, or correct a sentence pursuant to 28 U.S.C. § 2255, the movant bears the burden of proving the grounds for collateral attack by a preponderance of the evidence. *Miller v. United States*, 261 F.2d 546, 547 (4th Cir. 1958). In deciding a § 2255 motion, a court need not hold a hearing if "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255. Here, the Court has thoroughly reviewed the motions, files, and records in this case and finds that no hearing is necessary.

DISCUSSION

In his § 2255 motion, Asar seeks relief pursuant to *Johnson*, which was decided on June 26, 2015. Specifically, Asar asserts that his two prior convictions for pointing a firearm and his prior conviction for armed robbery no longer qualify as predicate offenses for an enhanced sentence under ACCA, pursuant to the Supreme Court's holding in *Johnson*.

ACCA mandates an enhanced sentence for defendants convicted of being a felon in possession of a firearm who have three or more prior convictions for a serious drug offense or "violent felony." Under 18 U.S.C. § 924(e)(2)(B), the term "violent felony" means:

any crime punishable by imprisonment for a term exceeding one year . . .
that—

(i) has 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.

18 U.S.C. § 924(e)(2)(B).

In *Johnson*, the Court held that the language known as the residual clause of ACCA—i.e., "or otherwise involves conduct that presents a serious potential risk of physical injury to another"—is unconstitutionally vague. 18 U.S.C. § 924(e)(2)(B)(ii). The Court held that the residual clause of ACCA violates due process because it "denies fair notice to defendants and invites arbitrary enforcement by judges." 576 U.S. at —, 135 S.Ct. at 2557 (2015). On April 18, 2016, the Supreme Court decided *Welch v. United States*, 578 U.S. —, 136 S.Ct. 1257 (2016), holding that the newly established right recognized in *Johnson*

is retroactive to cases on collateral review.

As the government points out in its response to Asar's motion, at the time of sentencing, ASAR was classified as an armed career criminal pursuant to 18 U.S.C. § 924(e) based on multiple separate convictions for: burglary, aggravated assault, assault and battery of a high and aggravated nature, pointing a firearm, and armed robbery. Based on the development of the law, however, Asar's convictions for burglary, aggravated assault and battery, and assault and battery of a high and aggravated nature no longer qualify as predicate convictions for purposes of ACCA. Nevertheless, it appears that Asar's remaining prior convictions—two for pointing a firearm and one for armed robbery—still qualify as predicate convictions for purposes of his sentencing as an armed career criminal, even in light of *Johnson*.

First, with respect to Asar's two prior convictions for pointing a firearm, the South Carolina Code makes it "unlawful for a person to present or point at another person a loaded or unloaded firearm." S.C. Code Ann. § 16-23-410. On direct appeal, Asar raised the issue of whether a conviction for pointing a firearm constitutes a violent felony under ACCA. The government, in its appellate brief, cited cases finding that such a conviction qualified as a crime of violence pursuant to the Sentencing Guidelines, § 4B1.2, both under the "threatened use of physical force" clause and the residual clause.¹ The Fourth Circuit

¹ The United States Sentencing Guidelines formerly defined "crime of violence" as follows:

any offense under federal or state law, punishable by imprisonment for a term exceeding one year that --
(1) has 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.

ultimately determined that a conviction for pointing a firearm did constitute a violent felony under ACCA, and in doing so, the Fourth Circuit cited cases confirming that the offense qualified as a crime of violence under § 4B1.2(a)(2), the residual clause. See *Asar*, 480 F. App'x at 209.

Because *Johnson* declared the residual clause of ACCA invalid, and because the government previously argued that a conviction for pointing a firearm constituted a violent felony under the residual clause of ACCA, *Asar* asserts that he is entitled to relief. In addition, *Asar* asserts that the government should be estopped from arguing that a conviction for pointing a firearm constitutes a violent felony under the "physical force" clause of ACCA. In one of his motions for summary judgment, *Asar* states:

Movant contends that on direct appeal, the Fourth Circuit held that his 1994 pointing and presenting a firearm conviction qualified as a violent felony pursuant to the now defunct residual clause and since the reasoning in *Johnson* invalidated the residual clause and applies it retroactively, his prior convictions can no longer serve as predicate offenses to increase his sentence above the statutory maximum 10-years allowed for a violation of 922(g). The government's claim that Movant is not entitled to any relief because his pointing and presenting a firearm qualifies as a crime of violence under the first clause of the Guidelines Definition of that term is a violation of the Doctrine of Estoppel. Movant contends that the government is estopped from arguing that the 1994 convictions qualify under 4B1.2(a)(1) because the government conceded on direct appeal that this conviction(s) did not qualify under the first clause 4B1.2(a)(1) and instead prevailed on its residual clause argument.

(ECF No. 142 at 2.)

After consideration, the Court disagrees with *Asar* for the following reasons. First, although *Asar* is correct that the government argued on direct appeal in 2011 that a South

U.S.S.G. § 4B1.2(a). As with ACCA, the clause beginning with "or otherwise" is known as the residual clause.

Here
→

Carolina conviction for pointing a firearm constitutes a violent felony under the residual clause, Asar's estoppel arguments overlook the fact that when the Fourth Circuit decided Asar's appeal in May of 2012, the Fourth Circuit had already decided *United States v. King*, 673 F.3d 274 (4th Cir. 2012), in March. In *King*, the court held, *inter alia*, that the South Carolina offense of pointing a firearm was a crime of violence under the "force clause" of the Guidelines. Thus, regardless of the government's arguments on appeal and the Fourth Circuit's citation in Asar to cases finding that a conviction for pointing a firearm constituted a crime of violence under the residual clause, at the time the Fourth Circuit decided Asar, binding Fourth Circuit authority already existed holding that such a conviction constitutes a crime of violence under the force clause. Under the circumstances, the Court sees no reason to apply the doctrine of estoppel. In light of *King*, it appears that Asar's two prior convictions for pointing a firearm constitute predicate offenses under the force clause of ACCA. Thus, the Court finds that Asar is not entitled to relief pursuant to *Johnson*.

Next, with respect to Asar's prior conviction for armed robbery, the Fourth Circuit recently considered the issue of whether a South Carolina robbery conviction meets the definition of the "force clause" of ACCA, § 924(e)(2)(B)(i). See *United States v. Doctor*, 842 F.3d 306 (4th Cir. 2016). In *Doctor*, the court held:

South Carolina has defined its common law robbery offense, whether committed by means of violence or intimidation, to necessarily include as an element the "use, attempted use, or threatened use of physical force against the property of another." Accordingly, we conclude that Doctor's prior conviction for South Carolina robbery qualifies as a predicate violent felony within the meaning of ACCA.

Id. at 312. Because Asar's prior conviction for armed robbery constitutes a "violent felony" under the force clause of ACCA, Asar is not entitled to relief pursuant to *Johnson*.

See also *United States v. Weston*, 2017 WL 937471, — F. App'x — (4th Cir. March 9, 2017) (relying on *Doctor* and finding that the defendant's South Carolina convictions for strong arm robbery and armed robbery constitute violent felonies under the force clause of ACCA).

CONCLUSION

For the foregoing reasons, Asar's § 2255 motion (ECF No. 133) is DENIED; Asar's pro se motions for summary judgment (ECF Nos. 142 and 149) are DENIED; and counsel's motion to be relieved (ECF No. 152) is GRANTED.

AND IT IS SO ORDERED.

/s/Bruce H. Hendricks

The Honorable Bruce Howe Hendricks
United States District Judge

July 19, 2017
Charleston, South Carolina

Certificate of Appealability

A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A prisoner satisfies this standard by demonstrating that reasonable jurists would find that any assessment of the constitutional claims by the district court is debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable. *Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003); *Rose v. Lee*, 252 F.3d 676, 683-84 (4th Cir. 2001). After consideration, the Court concludes that Movant has not made the requisite showing. Accordingly, the Court denies a certificate of appealability.

**Additional material
from this filing is
available in the
Clerk's Office.**