UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

ORDER

April 30, 2018

Before

JOEL M. FLAUM, *Circuit Judge*
DANIEL A. MANION, *Circuit Judge*
AMY C. BARRETT, *Circuit Judge*

No. 16-3596	MARIO ZUNIGA, Petitioner - Appellant v. UNITED STATES OF AMERICA, Respondent - Appellee
Originating Case Information:	
District Court No: 1:15-cv-09273 Northern District of Illinois, Eastern Division District Judge Charles R. Norgle	

The following are before the court:

1. **APPELLANT MARIO ZUNIGA'S STATEMENT OF POSITION IN RESPONSE TO THIS COURT'S DECISION IN HILL V. UNITED STATES,** filed on December 27, 2017, by counsel for the appellant.

2. **POSITION STATEMENT OF THE UNITED STATES,** filed on December 28, 2017, by counsel for the appellee.

3. **APPELLANT MARIO ZUNIGA'S PRO SE MOTION TO AMEND COUNSEL'S STATEMENT OF POSITION IN RESPONSE TO THIS COURT'S DECISION IN HILL V. UNITED STATES,** filed on January 16, 2018, by the pro se appellant.

4. **MOTION TO WITHDRAW AS COUNSEL,** filed on April 3, 2018, by counsel for the appellant.

IT IS ORDERED that the appellant's pro se motion to amend counsel's statement of position is **GRANTED** to the extent that the panel considered the arguments contained in the motion, along with the statements of position filed by appellant's counsel and the appellee and the briefs filed in the appeal.

The court previously granted a certificate of appealability on the issue whether the appellant's prior conviction for attempted murder in Illinois is a violent felony pursuant to the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B) (ACCA), in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). After the appeal was fully briefed, the court suspended proceedings when *Hill v. United States*, 877 F.3d 717 (7th Cir. 2017), *reh'g en banc denied*, April 9, 2018, was argued. The sole issue in this appeal is resolved by our holding in *Hill* that attempted murder in Illinois is categorically a violent felony under § 924(e). Accordingly, the judgment of the district court is **AFFIRMED** in light of our decision in *Hill*, 877 F.3d 717. Appellant Zuniga has preserved his argument for possible further review.

IT IS FURTHER ORDERED that the motion to withdraw as counsel is **DENIED** without prejudice to renewal if the appellant continues to want to proceed pro se after discussing the final order with counsel.

form name: **c7_Order_3J**(form ID: **177**)

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

June 13, 2018

Before

JOEL M. FLAUM, *Circuit Judge*

DANIEL A. MANION, *Circuit Judge*

AMY C. BARRETT, *Circuit Judge*

No. 16-3596

MARIO ZUNIGA,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 1:15-cv-09273

Charles R. Norgle,
Judge.

ORDER

On consideration of the petition for rehearing and rehearing en banc, no judge in active service has requested a vote on the petition for rehearing en banc and the judges on the panel have voted to deny rehearing. It is, therefore, ORDERED that the rehearing and rehearing en banc are DENIED.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

MARIO ZUNIGA,	)	
	)	
Petitioner,	)	Civil Action No. 15 CV 9273
	)	Criminal Action No. 11 CR 156-1
v.	)	
	)	Hon. Charles R. Norgle
UNITED STATES OF AMERICA.	)	
	)	

ORDER

Petitioner's Motion under 28 U.S.C. § 2255 To Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody [1] is denied. In addition, a Certificate of Appealability is denied pursuant to Rule 11(a) of the Rules Governing § 2255 Proceedings for the United States District Courts. Petitioner's Request for Disposition of Pending Motion Under 28 U.S.C. § 2255 [13] is denied as moot.

STATEMENT

Before the Court is Petitioner Mario Zuniga's ("Petitioner") motion to vacate his sentence pursuant to 28 U.S.C. § 2255; in the alternative Petitioner requests the appointment of counsel and an evidentiary hearing. For the following reasons, the motion is denied.

On November 3, 2009, Petitioner was involved in an altercation with a woman, Ms. Beatrice Suarez, while outside a Chicago bar. A third party saw a gun, called police, and went outside in hopes of de-escalating tensions, moments later police arrived. As police arrived Petitioner and Ms. Suarez were trying to climb the fence to flee but were unsuccessful and climbed back down to the area behind the building. Police, while investigating the situation between Petitioner and Ms. Suarez, searched the surrounding area and discovered a Bryco Arms model Bryco .38. Prior to this, Petitioner had been convicted of a crime that was punishable by imprisonment of more than one year.

On November 17, 2011, a grand jury returned an indictment against Petitioner for charges of: (1) being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and § 922(e)(1); and (2) for possession of cocaine in violation of 21 U.S.C. § 844(a). The case was tried before a jury, and at the conclusion of trial, the jury returned a verdict of guilty on both counts. On March 1, 2013, Petitioner was sentenced to 188-months' incarceration on the first count of the indictment, and a 364-day term on the second. On September 11, 2014, the Seventh Circuit affirmed the Court's ruling; and on January 12, 2015, the U.S. Supreme Court denied Petitioner's *writ of certiorari*. On October 19, 2015, Petitioner timely filed the instant motion.

Petitioner brings this action under 28 U.S.C. § 2255, which allows a prisoner to petition the court to vacate, set aside, or correct the sentence if it was imposed: (1) in violation of the Constitution or law of the United States; (2) without jurisdiction; (3) in excess of the maximum allowed by law; or (4) is otherwise subject to collateral attack. 28 U.S.C. § 2255(a). Here, Petitioner argues that he received constitutionally ineffective assistance

of counsel and that his previous conviction for attempted murder in state court is not sufficient to apply enhanced penalties under the Armed Career Criminal Act.

The Court first turns to Petitioner's ineffective assistance of counsel argument. While arguments not raised on direct appeal are typically barred from being the subject of a collateral attack, an ineffective assistance of counsel may be raised for the first time on a § 2255 motion. Ballinger v. United States, 379 F.3d 427, 429-30 (7th Cir. 2004).

> To prevail on an ineffective assistance of counsel claim, [Petitioner] must satisfy the familiar two-part test articulated in Strickland v. Washington, 466 U.S. 668, (1984). First, [Petitioner] 'must show that counsel's representation fell below an objective standard of reasonableness,' Strickland, 466 U.S. at 688, and second, that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different,' id. at 694."

Martin v. United States, 789 F.3d 703, 706 (7th Cir. 2015) (duplicate citations omitted).

Petitioner argues that if he had been adequately represented his attorney would have called Ms. Suarez to testify on his behalf at trial. He avers that Ms. Suarez would testify consistent with her statements to police and before the grand jury, and she would testify that she recalls seeing him without a gun on the night in question. However, as the Government points out, Ms. Suarez did testify before the grand jury that she believed that Petitioner had a firearm on the night in question and that Petitioner regularly carried a firearm—the same one that was recovered on the night in question. Moreover, Ms. Suarez's credibility was questionable. She stated that she had consumed a bottle of vodka and met with Petitioner to buy cocaine. She also had had a long standing intimate relationship with Petitioner. "'[A] lawyer's decision to call or not to call a witness is a strategic decision generally not subject to review. The Constitution does not oblige counsel to present each and every witness that is suggested to him.'" United States v. Best, 426 F.3d 937, 945 (7th Cir. 2005) (quoting United States v. Williams, 106 F.3d 1362, 1367 (7th Cir.1997)). Here, Petitioner's lawyer's decision to not call on Ms. Suarez to testify was a trial strategy that appears reasonable and not subject to challenge.

Turning to Petitioner's request for an evidentiary hearing. "It is well-established that a district court need not grant an evidentiary hearing in all § 2255 cases. Such a hearing is not required if the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief. . . . [Thought] A district court, however, must grant an evidentiary hearing if the petitioner alleges facts that, if proven, would entitle him to relief. Martin, 789 F.3d at 706 (internal citations omitted). Here, Petitioner has provided no proof or affidavits aside from his own unsworn, un-notarized statement. Because Petitioner has provided no evidence that would entitle him to relief and the record before the Court shows Petitioner is not entitled to relief, Petitioner's request for an evidentiary hearing is denied.

Petitioner's second argument, that Johnson v. United States, the 1996 Attempted Murder conviction does not qualify as a predicate offense under the Armed Career Criminal Act ("ACCA"). The gravamen of Petitioner's argument is that the statute under which he was convicted does not include the requisite element of physical force.

In Johnson the Supreme Court found that the residuary clause of the ACCA, which includes conduct that presents a serious potential risk of physical injury to another, was unconstitutional. Petitioner argues that his conviction for attempted murder falls under the residuary clause and not one of the other enumerated offense clauses. The statute underlying Petitioner's attempted murder conviction provides: "A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death:

(1) he either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another[.]" 720 Ill. Comp. Stat. 5/9-1(a)(1) (emphasis added).

Because the statute that underlies Petitioner's attempted murder conviction calls for the use of physical force against another person his ACCA enhancement does not depend on the residuary clause. Instead, Petitioner's ACCA enhancement is applied under 18 U.S.C. § 924(e)(2)(B)(i), defining a "violent felony" as an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another[.]" Id. (emphasis added).

For the foregoing reasons, Petitioner's § 2255 petition is denied. Because Petitioner's motion is denied on the briefs and the record presently before the Court, there is no need to appoint counsel. In addition, a Certificate of Appealability is denied pursuant to Rule 11(a) of the Rules Governing § 2255 Proceedings for the United States District Courts because Petitioner did not make a substantial showing that he was denied a constitutional right. Petitioner's Request for Disposition of Pending Motion Under 28 U.S.C. § 2255 [13] is denied as moot.

IT IS SO ORDERED.

ENTER:

CHARLES RONALD NORGLE, Judge
United States District Court

DATE: August 8, 2016

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