

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 17-1691

United States of America

Plaintiff - Appellee

v.

Gene Lemay Barris

Defendant - Appellant

Appeal from U.S. District Court for the Eastern District of Missouri - Cape Girardeau
(1:14-cr-00002-JAR-1)

JUDGMENT

Before GRUENDER, BOWMAN and ERICKSON, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the appeal is dismissed in accordance with the opinion of this Court.

March 21, 2018

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

United States Court of Appeals
For the Eighth Circuit

No. 17-1691

United States of America

Plaintiff - Appellee

v.

Gene Lemay Barris

Defendant - Appellant

Appeal from United States District Court
for the Eastern District of Missouri - Cape Girardeau

Submitted: March 13, 2018

Filed: March 21, 2018

[Unpublished]

Before GRUENDER, BOWMAN, and ERICKSON, Circuit Judges.

PER CURIAM.

Gene Barris pleaded guilty to drug and firearm charges pursuant to a plea agreement that contained an appeal waiver. He was subsequently granted relief under 28 U.S.C. § 2255 and resentenced. He now directly appeals the new sentence

imposed by the district court.¹ His counsel has moved to withdraw and has filed a brief under *Anders v. California*, 386 U.S. 738 (1967), arguing that the court committed substantive and procedural sentencing errors. Barris has filed a supplemental brief asserting ineffective assistance of counsel claims.

We decline to consider Barris's ineffective-assistance claims. *See United States v. Hernandez*, 281 F.3d 746, 749 (8th Cir. 2002) (noting that, in general, an ineffective-assistance claim is not cognizable on direct appeal and that such a claim is properly raised in a § 2255 action). As to the remaining issues, we enforce the appeal waiver. *See United States v. Scott*, 627 F.3d 702, 704 (8th Cir. 2010) (stating that this court reviews *de novo* the validity and applicability of an appeal waiver); *United States v. Andis*, 333 F.3d 886, 889-92 (8th Cir. 2003) (en banc) (stating that an appeal waiver will be enforced if the appeal falls within the scope of the waiver, defendant knowingly and voluntarily entered into the plea agreement and the waiver, and enforcing the waiver would not result in a miscarriage of justice).

Having independently reviewed the record pursuant to *Penson v. Ohio*, 488 U.S. 75 (1988), we find no nonfrivolous issues outside the scope of the appeal waiver. Accordingly, we dismiss this appeal, and we grant counsel leave to withdraw.

¹The Honorable John A. Ross, United States District Judge for the Eastern District of Missouri.

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 17-1691

United States of America

Appellee

v.

Gene Lemay Barris

Appellant

Appeal from U.S. District Court for the Eastern District of Missouri - Cape Girardeau
(1:14-cr-00002-JAR-1)

ORDER

The petition for rehearing by the panel is denied.

May 09, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

GENE LEMAY BARRIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

No. 1:16-CV-207 JAR

JUDGMENT

In accordance with the Memorandum and Order entered on this date and incorporated herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Petitioner Gene Lemay Barris's motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255 is **GRANTED.**

Dated this 10th day of January, 2017.



JOHN A. ROSS
UNITED STATES DISTRICT JUDGE

**GENE LEMAY BARRIS, Petitioner, v. UNITED STATES OF AMERICA, Respondent,
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI,
SOUTHEASTERN DIVISION
2017 U.S. Dist. LEXIS 3296
No. 1:16-CV-207 JAR
January 10, 2017, Decided
January 10, 2017, Filed**

Counsel

Gene Lemay Barris, Petitioner, Pro se, POLLOCK, LA.

For **Gene Lemay Barris**, Petitioner: Cape Fed Public Defender,
LEAD ATTORNEY, FEDERAL PUBLIC DEFENDER, Cape Girardeau, MO.

For USA, Respondent: Keith D. Sorrell, LEAD ATTORNEY,
OFFICE OF U.S. ATTORNEY, Cape Girardeau, MO; Tiffany G. Becker, LEAD ATTORNEY,
OFFICE OF U.S. ATTORNEY, St. Louis, MO.

Judges: JOHN A. ROSS, **UNITED STATES DISTRICT JUDGE.**

Opinion

Opinion by: JOHN A. ROSS

Opinion

MEMORANDUM AND ORDER

This matter is before the Court on Petitioner **Gene Lemay Barris**'s amended motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (Doc. 10), and the Federal Public Defender's motion to withdraw as Petitioner's counsel (Doc. 11). For the following reasons, the Court will grant the motions.

On September 15, 2014, Petitioner pled guilty to one count each of possession with intent to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)(viii); and being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1) (Crim. Docs. 36-37 in **United States v. Barris**, No. 1:14-cr-2-JAR-1 (E.D. Mo.)). The presentence investigation report revealed that Petitioner had several prior felony convictions, and recommended that the Court impose an enhanced sentence on the felon-in-possession count pursuant to the Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA"), as well as the U.S. Sentencing Guidelines' career-offender provision, U.S.S.G. § 4B1.2(a) (Crim. Doc. 40).

On December 15, 2014, the Court sentenced Petitioner to two concurrent 216-month terms of imprisonment, followed by two concurrent five-year terms of supervised release (Crim. Docs. 53-54). Notably, without objection, the Court enhanced Petitioner's sentence on the felon-in-possession count under the ACCA, and applied the career-offender Guideline provision in calculating Petitioner's advisory Guidelines range.

On August 2, 2016, Petitioner initiated this proceeding by filing a motion to vacate, set aside, or correct his sentence, under 28 U.S.C. § 2255 (Doc. 1). In his motion, as amended, he argues that his sentence should not have been enhanced under the ACCA, as he did not have three or more

previous qualifying convictions, and that the career-offender Guidelines provision also should not have been applied (Doc. 10). The Federal Public Defender has also moved to withdraw as counsel for Petitioner, citing a conflict of interest (Doc. 11). Respondent agrees that Petitioner should be resentenced without application of the ACCA or the career-offender Guideline provision. Moreover, Respondent has agreed to waive the statute of limitations set forth in 28 U.S.C. § 2255(f) (Doc. 13).

The sentence for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) is generally no more than ten years in prison. 18 U.S.C. § 924(a)(2). If, however, the defendant has three prior convictions for either a "violent felony" or a "serious drug offense," or both, the ACCA increases the statutory range of punishment in felon-in-possession cases to a mandatory minimum of fifteen years, and maximum of life, in prison. 18 U.S.C. § 924(e).

Here, the parties agree that Petitioner did not have at least three prior convictions for a "violent felony" or a "serious drug offense," as those terms are defined in the ACCA. The Court has carefully reviewed the record, and agrees that Petitioner did not have three or more ACCA predicate offenses at the time he committed the instant offenses. The Court therefore concludes that Petitioner's sentence on his felon-in-possession count is unconstitutional because it exceeds that statutorily authorized sentence for his offense of conviction. Sun Bear v. United States, 644 F.3d 700, 705 (8th Cir. 2011) (en banc) (sentence imposed in excess of statutory authority is illegal).

Accordingly,

IT IS HEREBY ORDERED that the Petitioner's amended motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (Doc. 10) is **GRANTED**. A new sentencing hearing will be scheduled forthwith.

IT IS FURTHER ORDERED that the Clerk of the Court is directed to docket a copy of this Memorandum and Order in Petitioner's criminal case, United States v. Barris, No. 1:14-cr-00002-JAR-1 (E D. Mo.).

IT IS FURTHER ORDERED that the Federal Public Defender's motion for leave to withdraw (Doc. 11) is **GRANTED**.

IT IS FINALLY ORDERED that, pursuant to 18 U.S.C. § 3143(a)(1), Petitioner shall remain in the custody of the Federal Bureau of Prisons pending resentencing. A separate order setting a new sentencing hearing and appointing new defense counsel will be entered in Petitioner's criminal case.

Dated this 10th day of January, 2017.

/s/ John A. Ross

JOHN A. ROSS

UNITED STATES DISTRICT JUDGE

merica, Plaintiff - Appellee v. Gene Lemay Barris, Defendant - Appellant
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
2018 U.S. App. LEXIS 7040
No. 17-1691
March 13, 2018, Submitted
March 21, 2018, Filed

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Prior History

Appeal from United States District Court for the Eastern District of Missouri - Cape Girardeau.

Counsel

For United States of America, Plaintiff - Appellee:

Keith D. Sorrell, Timothy J. Willis, Assistant U.S. Attorney, U.S.

ATTORNEY'S OFFICE, Eastern District of Missouri, Cape Girardeau, MO.

Gene Lemay Barris, Defendant - Appellant, Pro se, Lewisburg,

PA.

Judges: Before GRUENDER, BOWMAN, and ERICKSON, Circuit Judges.

Opinion

PER CURIAM.

Gene Barris pleaded guilty to drug and firearm charges pursuant to a plea agreement that contained an appeal waiver. He was subsequently granted relief under 28 U.S.C. § 2255 and resentenced. He now directly appeals the new sentence imposed by the district court.¹ His counsel has moved to withdraw and has filed a brief under *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), arguing that the court committed substantive and procedural sentencing errors. Barris has filed a supplemental brief asserting ineffective assistance of counsel claims.

We decline to consider Barris's ineffective-assistance claims. See *United States v. Hernandez*, 281 F.3d 746, 749 (8th Cir. 2002) (noting that, in general, an ineffective-assistance claim is not cognizable on direct appeal and that such a claim is properly raised in a § 2255 action). As to the remaining issues, we enforce the appeal waiver. See *United States v. Scott*, 627 F.3d 702, 704 (8th Cir. 2010) (stating that this court reviews *de novo* the validity and applicability of an appeal waiver); *United States v. Andis*, 333 F.3d 886, 889-92 (8th Cir. 2003) (en banc) (stating that an appeal waiver will be enforced if the appeal falls within the scope of the waiver, defendant knowingly and voluntarily entered into the plea agreement and the waiver, and enforcing the waiver would not result in a miscarriage of justice).

Having independently reviewed the record pursuant to *Person v. Ohio*, 488 U.S. 75, 109 S. Ct. 346, 102 L. Ed. 2d 300 (1988), we find no nonfrivolous issues outside the scope of the appeal waiver. Accordingly, we dismiss this appeal, and we grant counsel leave to withdraw.

CIRHOT

Footnotes

1

The Honorable John A. Ross, United States District Judge for the Eastern District of Missouri.

CIRHOT

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from this filing is
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Clerk's Office.**