

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

August 14, 2018
DCO-104

No. 17-3504

United States of America

v.

Lamar Sowell,
Appellant

(E.D. Pa. No. 2-16-cr-00375-001)

Present: JORDAN, SHWARTZ and KRAUSE, Circuit Judges

1. Motion by Appellee for Permission to be Excused from Filing a Brief and for Summary Affirmance.

Respectfully,
Clerk/slc

ORDER

The foregoing Motion by Appellee for Permission to be Excused from Filing a Brief and for Summary Affirmance is granted.

By the Court,

s/ Cheryl Ann Krause
Circuit Judge

Dated: August 28, 2018
SLC/cc: Eric B. Henson, Esq.
Brett G. Sweitzer, Esq.
Robert A. Zauzmer, Esq.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES

v.

LAMAR SOWELL

CRIMINAL ACTION

NO. 16-375

ORDER

AND NOW, this 17th day of February, 2017, upon consideration of Defendant's Motion to Dismiss Counts Three, Five, Seven, and Nine of Indictment Under Federal Rule of Criminal Procedure 12(b)(3)(B)(v) (Document No. 22, filed Feb. 2, 2017), and Government's Response in Opposition to the Defendant Sowell's Motion to Dismiss Counts Three, Five, Seven, and Nine (Document No. 23, filed Feb. 8, 2017), **IT IS ORDERED** that Defendant's Motion to Dismiss Counts Three, Five, Seven, and Nine of Indictment Under Federal Rule of Criminal Procedure 12(b)(3)(B)(v) is **DENIED**.

The decision of the Court is based on the following:

1. On September 15, 2016, a grand jury returned an Indictment charging defendant Lamar Sowell with five counts of robbery which interferes with interstate commerce ("Hobbs Act robbery"), in violation of 18 U.S.C. § 1951(a) (Counts One, Two, Four, Six, and Eight); and, in relationship to four of the alleged robberies, three counts of brandishing a firearm during and in relation to a crime of violence (Counts Three, Five, and Seven) and one count of discharging a firearm during and in relation to a crime of violence (Count Nine), in violation of 18 U.S.C. § 924(c)(1).

2. Presently before the Court is Defendant's Motion to Dismiss Counts Three, Five, Seven, and Nine of the Indictment Under Federal Rule of Criminal Procedure 12(b)(3)(B)(v) for failure to state an offense. Defendant argues that these four counts fail to state an offense

because Hobbs Act robbery cannot be considered a “crime of violence,” a required element under 18 U.S.C. § 924(c)(1)(A).

3. 18 U.S.C. § 924(c)(1)(A) prohibits carrying, brandishing, or discharging a firearm “during and in relation to any crime of violence or drug trafficking crime.” 18 U.S.C. § 924(c)(3) defines a “crime of violence” as a felony that “(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.”

4. 18 U.S.C. § 1951(b)(1) defines “robbery” for the purposes of Hobbs Act robbery as “the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property”

5. Defendant argues that Hobbs Act robbery cannot constitute a “crime of violence” under § 924(c) because the minimum culpable conduct required for conviction under § 1951(a) does not require “the use, attempted use, or threatened use of physical force” as required by § 924(c)(3)(A) (the “elements clause”) and that § 924(c)(3)(B) (the “residual clause”) is unconstitutionally vague under *United States v. Johnson*, 135 S. Ct. 2551 (2015) (holding that the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e), is unconstitutionally vague). However, defendant acknowledges that the United States Court of Appeals for the Third Circuit has held that, where the offenses of Hobbs Act robbery and brandishing a gun under § 924(c)(1)(A) ‘have been tried together and the jury has reached a verdict on both offenses, the Hobbs Act robbery qualifies as a crime of violence under the ‘elements clause’ of 18 U.S.C. § 924(c)(3)(A).’ *United States v. Robinson*, 844 F.3d 137, 139 (3d Cir. 2016).

In *Robinson*, the defendant argued that Hobbs Act robbery could not constitute the predicate crime of violence required for § 924(c) because the minimum conduct that would violate the prohibition of § 1651(a)—“actual or threatened force, or violence, or fear of injury” to person or property—does not qualify as a crime of violence as defined by § 924(c)(3)(A)—“the use, attempted use, or threatened use of physical force against the person or property of another.” *Id.* at 143-44. The Third Circuit rejected this argument and concluded that, because the defendant was contemporaneously convicted of Hobbs Act robbery and brandishing a firearm while committing Hobbs Act robbery, “the combined convictions . . . make clear that the ‘actual or threatened force, or violence, or fear of injury’ in [the defendant’s] Hobbs Act robbery sprang from the barrel of gun,” and that the defendant’s Hobbs Act robbery was thus a crime of violence under § 924(c). *Id.* at 144.

6. The Court concludes that Counts Three, Five, Seven, and Nine of the Indictment state an offense because the Hobbs Act robberies alleged in this case may constitute crimes of violence under § 924(c)(3)(A).¹ The Indictment charges that defendant committed five Hobbs Act robberies and brandished or discharged a firearm during four of the robberies. If a jury finds, or defendant admits in a plea,² that defendant committed four Hobbs Act robberies and brandished or discharged a firearm while committing these robberies, the “actual or threatened force, or violence, or fear of injury” in defendant’s Hobbs Act robberies would satisfy “the use, attempted use, or threatened use of physical force against the person or property of another” definition of a crime of violence under § 924(c)(3)(A). Thus, as in *Robinson*, convictions for

¹ The Court denies defendant’s request to defer deciding the Motion to Dismiss pending further review of *Robinson* and *United States v. Galati*, 844 F.3d 152 (3d Cir. 2016) (applying *Robinson*).

² “The only facts that may support the conclusion that a particular crime is a ‘crime of violence’ are those that have either been found by the jury or admitted by the defendant in a plea.” *Robinson*, 844 F.3d at 143.

four of the Hobbs Act robberies, coupled with contemporaneous convictions for the four charged weapons offenses for brandishing or discharging a firearm, would constitute crimes of violence under § 924(c).

7. Because Hobbs Act robbery that involves the brandishing or discharge of a firearm constitutes a crime of violence under 18 U.S.C. § 924(c)(3)(A), the Court does not address defendant's argument that 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague. *See Robinson*, 844 F.3d at 141 (declining to address residual clause argument because element clause of § 924(c) satisfied).

BY THE COURT:

/s/ Hon. Jan E. DuBois

DuBOIS, JAN E., J.