FILED
United States Court of Appeal
Tenth Circuit

July 18, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DYMOND CHARLES BROWN,

Defendant - Appellant.

No. 17-7029
(D.C. Nos. 6:16-CV-00251-RAW &
6:06-CR-00069-RAW-1)
(E.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **PHILLIPS**, **McKAY**, and **McHUGH**, Circuit Judges.

Dymond Charles Brown, a federal prisoner proceeding pro se, seeks a certificate of appealability (COA) under 28 U.S.C. § 2253(c)(1) to challenge the district court's dismissal of his second or successive 28 U.S.C. § 2255 petition.[1] We decline to issue him a COA and accordingly now dismiss the appeal.

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* This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[1] We liberally construe pro se litigants' pleadings, holding them to "a less stringent standard than formal pleadings drafted by lawyers." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (citing *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972)). Though we can't "assume the role of advocate," we'll excuse citation gaps, untangle confused legal theories, and overlook poor syntax. *Id.*

((Appendix A))

BACKGROUND

On February 12, 2007, a jury convicted Brown of one count of possession of cocaine base with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(iii).[2] Later that year, a judge sentenced him to 262 months imprisonment after imposing a career-offender enhancement under § 4B1.1 of the United States Sentencing Guidelines (U.S.S.G.). U.S. Sentencing Guidelines Manual § 4B1.1 (U.S. Sentencing Comm'n 2007). The court enhanced his sentence under U.S.S.G. § 4B1.1 because he had two prior convictions for crimes of violence: (1) feloniously pointing a firearm in violation of Okla. Stat. tit. 21, § 1289-16; and (2) shooting with intent to kill.[3]

On June 10, 2016, Brown timely moved to file a second or successive 28 U.S.C. § 2255 motion based on *Johnson v. United States*, 135 S. Ct. 2551 (2015). In that motion, Brown moved to vacate his sentence because he was sentenced under U.S.S.G. § 4B1.1, which relies on U.S.S.G. § 4B1.2's crime of violence definition. And U.S.S.G. § 4B1.2's crime of violence definition, he contended, is unconstitutionally vague under *Johnson*. This court granted leave for him to file his second or successive § 2255 motion. The government then filed a motion to stay the proceedings pending resolution of *Beckles v. United States*, 137 S. Ct. 886, 895, 897

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[2] The court sentenced Brown two years after the Supreme Court ruled that the sentencing guidelines are advisory in *United States v. Booker*, 543 U.S. 220, 245–46 (2005).

[3] It is unclear from the record what statute Brown was convicted under for this offense. Because Brown doesn't contend that his conviction for shooting with intent to kill isn't a crime of violence, this gap in the record is immaterial.

Armed Career Criminal Act's definition of crime of violence, *see* 18 U.S.C. § 924(e)(2)(B), is unlawful under *Johnson*. Despite Brown's efforts to frame his argument to avoid *Beckles*, that precedent precludes his challenge. *Beckles*, 137 S. Ct. at 892 ("[T]he Guidelines are not subject to a vagueness challenge under the Due Process Clause. The residual clause in § 4B1.2(a)(2) therefore is not void for vagueness."). So he hasn't shown that reasonable jurists could debate the district court's dismissal of his petition.

CONCLUSION

For these reasons, we decline to issue a certificate of appealability. Appellant's "Motion to Clarify the Previously filed Certificate of Appealability Request and Combined Opening Brief," and the "Motion to Supplement the Previously filed Request for COA and Combined Opening Brief Based on Intervening Change in Law Namely Sessions v. Dimaya," are denied.

Entered for the Court

Gregory A. Phillips
Circuit Judge

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

DYMOND CHARLES BROWN,	)	
	)	
Defendant/Movant,	)	
	)	**Case No. CIV-16-251-RAW**
v.	)	
	)	**Criminal Case No. CR-06-69-RAW**
UNITED STATES OF AMERICA,	)	
	)	
Plaintiff/Respondent.	)	

ORDER

On June 10, 2016, Defendant Dymond Charles Brown (hereinafter "Defendant") filed a motion for authorization with the Tenth Circuit Court of Appeals, seeking an order authorizing Defendant to file a second or successive § 2255 motion in district court. Soon thereafter, the Tenth Circuit granted authorization for Defendant to file a second or successive § 2255 motion based upon *Johnson v. United States*, 135 S. Ct. 2551 (2015).[1] In *Johnson*, the Supreme Court held that the residual clause of the "violent felony" definition within the Armed Career Criminal Act is unconstitutionally vague. *See generally Johnson*, 135 S. Ct. 2551. In this case, however, Defendant was not sentenced as an Armed Career Criminal under the ACCA's residual clause.[2]

Until recently, there was much debate whether the *Johnson* holding should be extended to the U.S. Sentencing Guidelines. The issue was analyzed in detail and has now been resolved by the United States Supreme Court in *Beckles v. United States*, ___U.S.___, 137 S. Ct. 886 (2017). In summary, the *Beckles* Court determined the advisory Sentencing Guidelines are not subject to a vagueness challenge under the Due Process Clause. *Id.* at 892. Of particular importance, the *Beckles* Court decided that the vagueness holding in the *Johnson* case does not apply to the Career Offender provisions of the advisory Sentencing Guidelines. *Id.*

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1 See, Order filed July 12, 2016 in CR-06-69-RAW [Doc. No. 106].

2 As noted in the Presentence Report ("PSR"), Defendant was sentenced as a Career Offender under § 4B1.1 of the United States Sentencing Guidelines, having at least two prior qualifying offenses for crimes of violence. [PSR, ¶¶ 21, 24 and 25].

"Appendix B"

The Beckles decision came down on March 6, 2017. On March 23, 2017, Defendant filed a motion to supplement his second or subsequent § 2255 motion [Doc. No. 10]. On April 6, 2017, the Government filed its objection to Defendant's motion to supplement [Doc. No. 12]. Defendant had previously contended in his authorized second or subsequent § 2255 motion that he was sentenced under the residual clause of U.S.S.G. § 4B1.2 and that the residual clause of § 4B1.2 was unconstitutionally vague under *Johnson*. Nonetheless, in his motion to supplement, Defendant restructured his argument to include a challenge to the statutory language of "§ 994(h), § 924(e)(2)(b), and § 841(b)(1)(B)(iii)" based upon Johnson's invalidation of the residual clause, claiming for the first time that his enhanced sentence was actually based upon a "mandatory" statute. [Doc. No. 10 at 1-3]. In its objection, the Government asserted Defendant's motion to supplement was "nothing more than a veiled attempt to avoid the holding in Beckles", that Defendant cannot transform his § 2255 motion "into a pre-*Booker* mandatory guideline case", and that Defendant "seeks to manufacture a viable due process claim where none exists by relying upon 28 U.S.C. § 994(h)." [3] [Doc. No. 12 at 2-3].

On May 2, 2017, almost thirty (30) days after the Government had filed its objection, the matter was ripe for ruling. This Court entered its order denying the relief requested in Defendant's second or successive § 2255 motion and Defendant's motion to supplement [Doc. No. 13]. In its order, this Court explained that Defendant was sentenced under the advisory sentencing guidelines and that *Beckles* controls the outcome here, that *Johnson* does not apply and that Defendant is not entitled to sentencing relief. [*Id.* at 2]. The Court also declined to issue a certificate of appealability. [*Id.* at 3].

Now before the Court is Defendant's Request for Reconsideration of a Certificate of Appealability [Doc. No. 16] filed on May 15, 2017. In particular, Defendant asserts he was "denied a constitutional right", supported by claims that Defendant did not receive a copy of the Government's "response", that Defendant was denied the opportunity to respond to the

[3] It should be noted that the Government filed one motion and one objection in this case. The Government filed its motion requesting a stay pending the outcome of *Beckles*, and its objection to Defendant's motion to supplement. The Government was willing to file a full response (including any affirmative defenses) but there was no need since *Beckles* controlled the outcome here [Doc. No. 12 at 4].

Government's argument, and that the Government's argument "was accepted as true".[4] [Doc. No. 16 at 1-2]. Defendant also claims "in the Tenth Circuit vagueness challenges were cognizable under § 2255" and that the Government "specifically conceded that the residual clause contained in 4B1.1 were [sic] void for vagueness."[5] [Doc. No. 16 at 2]. Lastly, Defendant rehashes some of his arguments provided in his motion to supplement filed on March 23, 2017. [*Id.*].

This Court has carefully reviewed the Defendant's pleadings and again, this Court is not persuaded. Defendant was sentenced by this Court in 2007. Defendant was sentenced more than two years after the Supreme Court declared the sentencing guidelines advisory in *United States v. Booker,* 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). In Defendant's Request for Reconsideration of a Certificate of Appealability, Defendant once again links 28 U.S.C. § 994(h) and § 924(e)(2)(b) with U.S.S.G. § 4B1.1, perhaps in an attempt to distance himself from the *Beckles* decision. [Doc. No. 16 at 2]. Defendant's situation, however, is no different than others negatively impacted by *Beckles*. The sentencing guidelines in question resulted from a congressional directive, but that does not mean the advisory post-*Booker* guidelines applied at Defendant's sentencing should now be recast by this Court as mandatory. As the Government previously asserted, "[t]hat the career-offender guideline resulted from a specific congressional directive, specifically 28 U.S.C. § 994(h), does not transform the career offender guideline into a 'statute' or 'law.' " [Doc. No. 12 at 3]. Further, as explained in the *Beckles* decision, the advisory guidelines "merely guide the exercise of a court's discretion in choosing an appropriate

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[4] This assertion is without merit. Defendant claims he did not receive a copy of the Government's objection to his motion to supplement and was denied the opportunity to resp citing 28 U.S.C. § 2248 as a basis for a due process violation, but the statute does not ap herein. [Doc. No. 16 at 2]. Further, a reply to the Government's objection is not required o expected by this Court, and the absence of a reply to the Government's objection did not impact this Court's decision. Defendant's claim for relief was denied in light of *Beckles*.

[5] This assertion is also without merit. *Beckles* has foreclosed claims for relief in numerous Tenth Circuit cases with similar facts. *See e.g., United States v. Snyder*, No. 16-8108, 852 F.3d 972 (10th Cir. Mar. 28, 2017); *United States v. Ramos*, No. 16-5128, ___Fed.Appx.___, 2017 WL 894428 (10th Cir. March 7, 2017) (unpublished). Moreover, the Government conceded that Johnson's holding applies to the residual clause definition of a "crime of violence" in U.S.S.G. § 4B1.2's Career Offender Guideline in cases on direct review, but the Government disputed "that it does so retroactively for purposes of Guidelines challenges on collateral review", which is the case here. [Doc. No. 6 at 2-4]. This matter was therefore stayed pending the outcome in *Beckles*.

sentence within the statutory range." *Beckles*, 137 S. Ct. at 892. Relying on *Beckles*, the Tenth Circuit has consistently denied sentencing relief to numerous other Defendants that were sentenced under the exact same advisory guidelines, and this Court is unaware of any precedent supporting Defendant's position.

A certificate of appealability may issue only if Defendant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To satisfy this standard, Defendant must demonstrate "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotation marks omitted). Here, once more, Defendant has not satisfied this standard. The relief requested in Defendant's Request for Reconsideration of a Certificate of Appealability is denied.

The Court has reviewed Defendant's Request for Reconsideration of a Certificate of Appealability [Doc. No. 16] and finds no basis to grant Defendant's request for relief. Accordingly, the order filed herein on May 2, 2017 [Doc. No. 13], denying the relief requested in Defendant's second or successive § 2255 motion and Defendant's motion to supplement and declining to issue a certificate of appealability, shall remain in full force and effect. [6]

It is so ordered this 6th day of June, 2017.

Ronald A. White
United States District Judge
Eastern District of Oklahoma

[6] *See* Rule 11(a) of the Rules Governing Section 2255 Proceedings. If Defendant wants to appeal the court's ruling on his motion, he must seek a certificate from the Tenth Circuit Court of Appeals under Federal Rule of Appellate Procedure 22.

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

DYMOND CHARLES BROWN,	)	
	)	
Defendant/Movant,	)	
	)	**Case No. CIV-16-251-RAW**
v.	)	
	)	**Criminal Case No. CR-06-69-RAW**
UNITED STATES OF AMERICA,	)	
	)	
Plaintiff/Respondent.	)	

JUDGMENT

Pursuant to this Court's Order entered on this date, denying the relief requested in Defendant's second or successive motion for relief under 28 U.S.C. § 2255 [Doc. No. 1] and Defendant's motion to supplement [Doc. No. 10], the Court hereby enters judgment in favor of the Plaintiff/Respondent, United States of America, and against Defendant/Movant, Dymond Charles Brown.

It is so ordered this 2nd day of May, 2017.

Ronald A. White

THE HONORABLE RONALD A. WHITE
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF OKLAHOMA

FILED
United States Court of Appeals
Tenth Circuit

October 2, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DYMOND CHARLES BROWN,

Defendant - Appellant.

No. 17-7029

ORDER

Before **PHILLIPS**, **McKAY**, and **McHUGH**, Circuit Judges.

Appellant's petition for rehearing is denied.

Appellant's motion to supplement the petition is granted.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

Appendix C