No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ANTHONY SWATZIE,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
Eleventh Circuit

APPENDIX

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Only the Westlaw citation is currently available.
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals, Eleventh Circuit.

Anthony SWATZIE, Petitioner-Appellant,
v.
UNITED STATES of America, Respondent-Appellee.

No. 18-13018
|
Non-Argument Calendar
|
(January 9, 2019)

Synopsis

Background: Defendant, who had been convicted of drug possession charges and sentenced to life imprisonment pursuant to the Armed Career Criminal Act (ACCA), filed petition for postconviction relief, after earlier petition was denied. The United States District Court for the Northern District of Florida, D.C. Docket Nos. 4:16-cv-00348-RH-GRJ, 4:99-cr-00062-RH-GRJ-1, denied motion, and defendant appealed.

[Holding:] The Court of Appeals held that defendant could not establish that he was sentenced under unconstitutional residual clause of ACCA.

Affirmed.

West Headnotes (1)

[1] Sentencing and Punishment

Defendant, who was sentenced to life imprisonment for drug and firearm possession under the Armed Career Criminal Act (ACCA) before the Act's residual clause was held to be unconstitutionally vague, was not entitled to postconviction relief; although the record was silent as to basis for ACCA enhancement, undisputed facts in defendant's presentence report indicated his four prior convictions for burglary under Florida law involved unlawful entry into a building or structure, so that it was just as likely that sentencing court relied on ACCA's enumerated offenses clause instead of or in addition to the residual clause. 18 U.S.C.A. § 924(e)(2)(B)(ii); 28 U.S.C.A. § 2255.

Cases that cite this headnote

Attorneys and Law Firms

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Appeal from the United States District Court for the Northern District of Florida, D.C. Docket Nos. 4:16-cv-00348-RH-GRJ, 4:99-cr-00062-RH-GRJ-1

Before WILLIAM PRYOR, ROSENBAUM, and FAY, Circuit Judges.

Opinion

PER CURIAM:

***1** Anthony Swatzie appeals the district court's denial of his successive 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence, which raised a challenge to his sentence under *Johnson v. United States*, 576 U.S. ——, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015). Because Swatzie has not met his burden to establish relief under *Johnson*, we affirm the denial of his § 2255 motion.

At his sentencing in 2000, the district court determined that Swatzie qualified for the Armed Career Criminal Act ("ACCA") sentencing enhancement based on four

prior convictions for Florida burglary. The court found that these convictions were "violent felonies" within the meaning of the ACCA. It did not state under which of the ACCA's three definitions of the term "violent felony"—often referred to as the "elements clause," the "residual clause," and the "enumerated offenses" clause definitions—the convictions qualified.

Much has changed since Swatzie's sentencing. In 2015 the Supreme Court invalidated the ACCA's residual clause as unconstitutionally vague. *Johnson*, 135 S.Ct. at 2557–58. In 2016 it held that *Johnson* applied retroactively. *See Welch v. United States*, 578 U.S. ——, 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016). We then permitted Swatzie to file a successive § 2255 motion based on *Johnson*. Later that same year, this Court held that Florida burglary categorically did not qualify as a violent felony under the ACCA. *United States v. Esprit*, 841 F.3d 1235, 1240–41 (11th Cir. 2016). So if had Swatzie been sentenced today, his convictions would not qualify as violent felonies, and he would not have been sentenced under the ACCA. *See id.* at 1241.

Nevertheless, the district court denied Swatzie's § 2255 motion. Applying our decision in *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017), the court concluded that Swatzie could not obtain relief on his *Johnson* claim because he had not shown that it was more likely than not that he was sentenced solely under the ACCA's residual clause. *Id.* at 1221–22. According to *Beeman*, the *Johnson* inquiry in the § 2255 context is one of "historical fact," looking to the basis for the sentence at the time of sentencing, rather than how a defendant would be sentenced today. *Id.* at 1224 n.5. And "[i]f it is just as likely that the sentencing court relied on the elements or enumerated offenses clause, solely or as an alternative basis for the enhancement, then the movant has failed to show that his enhancement was due to use of the residual clause." *See id.* at 1222. The district court found that Swatzie's ACCA enhancement was likely based on the enumerated offenses clause, not the residual clause, and so denied relief.

Swatzie concedes that, in light of *Beeman*, we are "obligated to affirm the district court's decision denying his § 2255 motion." We agree.

The district court properly found that Swatzie failed to meet his burden under *Beeman*. The record of Swatzie's sentencing is silent as to the basis for the ACCA enhancement. And the relevant law as of the date he was sentenced does not suggest he was, in fact, sentenced as an armed career criminal "solely because of the residual clause." *Beeman*, 871 F.3d at 1224. As the district court explained, sentencing courts in this Circuit in 2000 could rely on undisputed facts in a presentence investigation report to determine that a conviction under a non-generic burglary statute—like Florida's burglary statute—still constituted the generic offense of burglary. *See United States v. Adams*, 91 F.3d 114, 115 (11th Cir. 1996); *United States v. Spell*, 44 F.3d 936, 938–39 (11th Cir. 1995). In other words, at the time of Swatzie's sentencing, if undisputed facts in the PSR showed that the offense involved entry into a "burglary or structure," the prior conviction could have qualified under the enumerated-offenses clause as the equivalent of generic burglary. That is the case here. Undisputed facts in his PSR indicated that each of Swatzie's four convictions for Florida burglary involved unlawful entry into a building or structure. So it is just as likely that the sentencing court relied on the enumerated offenses clause, instead of or in addition to the residual clause. Accordingly, Swatzie "has failed to show that his enhancement was due to use of the residual clause." See *Beeman*, 871 F.3d at 1222.

***2** For purposes of further review, Swatzie maintains that *Beeman* was wrongly decided and that it sets an impossible standard for § 2255 movants to obtain relief under *Johnson*. He suggests, instead, that we follow the approach of the Third Circuit. *See United States v. Peppers*, 899 F.3d 211, 222–24, 229–30 (3d Cir. 2018). We, however, are bound by *Beeman*.

AFFIRMED.

All Citations

--- Fed.Appx. ----, 2019 WL 141062

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

UNITED STATES OF AMERICA

v. CASES NO. 4:99cr62-RH/GRJ
4:16cv348-RH/GRJ

ANTHONY SWATZIE,

Defendant.

_____/

ORDER DENYING RELIEF UNDER § 2255

The defendant Anthony Swatzie has moved under 28 U.S.C. § 2255 for relief from his armed-career-criminal sentence. He says the sentence is unconstitutional under *Johnson v. United States*, 135 S. Ct. 2551 (2015). This order denies the motion.

I

A jury convicted Mr. Swatzie on two counts: possessing cocaine with intent to distribute and possessing a firearm as a convicted felon in violation of 18 U.S.C. § 922(g). He was sentenced on February 3, 2000 to concurrent sentences of life in prison on each count. The sentence included supervised release of 8 years on the drug count and 5 years concurrent on the firearm count.

Mr. Swatzie appealed. The Eleventh Circuit affirmed. Mr. Swatzie moved for relief under § 2255. The motion was denied. Mr. Swatzie filed a second § 2255 motion. It was denied because a defendant may file a second or successive § 2255 motion only if the court of appeals authorizes it, and the Eleventh Circuit had not authorized the filing of the second § 2255 motion.

After *Johnson*, Mr. Swatzie applied for and received Eleventh Circuit authorization to file this successive § 2255 motion. The motion is properly before the court, has been fully briefed, and is ripe for a decision.

II

The maximum sentence for violating § 922(g)(1) is ordinarily 10 years in prison and 3 years on supervised release. *See id.* § 924(a)(2); *id*. § 3559(a)(3); *id*. § 3583(b)(2). But if the defendant is an armed career criminal as defined in 18 U.S.C. § 924(e), the minimum prison sentence is 15 years, the maximum is life, and the maximum term of supervised release is 5 years. *See id*. §§ 924(e)(1), 3583(b)(1).

A defendant is an armed career criminal if the defendant has three previous convictions "for a violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. § 924(e)(1). Offenses that qualify as violent felonies under § 924(e) can be divided into three groups.

First, the term violent felony includes an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." § 924(e)(2)(B)(i). This is sometimes referred to as the 924(e) "element clause."

Second, the term violent felony includes an offense that "is burglary, arson, or extortion, [or] involves use of explosives." § 924(e)(2)(B)(ii). This is sometimes referred to as the 924(e) "enumerated-offenses clause."

Third, the statute says the term violent felony includes an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." *Id*. This is sometimes called the 924(e) "residual clause." *Johnson* held the residual clause unconstitutionally vague, so a conviction can no longer qualify as a violent felony on this basis.

III

Mr. Swatzie was treated as an armed career criminal based on four prior burglary convictions. These were violent felonies under the law of the circuit at that time. But the law has changed. These are no longer violent felonies. *See United States v. Esprit*, 841 F.3d 1235 (11th Cir. 2016); *see also Descamps v. United States*, 570 U.S. 254 (2013).

If Mr. Swatzie was being sentenced today, he would not be treated as an armed career criminal or even as a career offender under the United States

Sentencing Guidelines Manual. His guideline range would be lower than the range of 360 months to life that applied at the original sentencing based on his treatment as a career offender. His sentence on both counts might be lower.

But Mr. Swatzie is not being sentenced today. Nor is he here on a first § 2255 motion. He is here on a second or successive § 2255 motion. *Johnson* claims—claims based on the unconstitutionality of the 924(e) residual clause—may be pursued on such a motion, but not claims based only on decisions affecting the sentencing guidelines or other parts of the 924(e) definition of violent felony. Mr. Swatzie may prevail only by showing that the residual clause "actually adversely affected the sentence he received." *Beeman v. United States*, 871 F.3d 1215, 1221 (11th Cir. 2017).

Mr. Swatzie has not made that showing. In February 2000, when Mr. Swatzie was sentenced, the most relevant authority on whether Florida burglary was a violent felony was *United States v. Spell*, 44 F.3d 936, 940 (11th Cir. 1995). There the issue was whether a Florida burglary conviction was a "crime of violence" under the career-offender guideline. *See* U.S. Sentencing Guidelines Manual § 4B1.2 (1992). The definition of that term closely tracked the definition of "violent felony" in § 924(e), including both an enumerated-offenses clause and a residual clause.

Spell held that Florida burglary was a crime of violence if the defendant burglarized a dwelling, not another structure. And *Spell* said a court could look behind an ambiguous judgment of conviction to a limited set of documents to determine whether the defendant burglarized a dwelling. The court vacated the defendant's career-offender sentence and remanded for proper consideration of whether the defendant was convicted of burglarizing a dwelling. The court did not refer to, or instruct the district court to consider on remand, whether the conviction was a crime of violence under the residual clause.

According to the presentence report, Mr. Swatzie was charged in each of his four prior cases with burglarizing a dwelling. Mr. Swatzie did not object to that description. Under *United States v. Adams*, 91 F.3d 114, 116 (11th Cir. 1996), reliance on the presentence report's description of a prior burglary was proper even under the stricter standard that applied under § 924(e). The analysis might be different under later authorities, including *Shepard v. United States*, 544 U.S. 13, 26 (2005), and *United States v. Day*, 465 F.3d 1262, 1266 (11th Cir. 2006). But the issue on this § 2255 motion is not the analysis that would be followed under later authorities or today; the issue is the analysis that was followed then. Especially in light of *Spell*, the overwhelming likelihood is that Mr. Swatzie's burglary convictions were treated as violent felonies based on the enumerated-offenses clause, not based on the residual clause.

I reach this conclusion based on the record and the reported decisions, independently of my recollection of sentencing practices at the time. For what it may be worth, I do not recall any analysis of this issue specifically in Mr. Swatzie's case, but my general recollection is that during that period, I treated burglary of a dwelling as a violent felony based on the enumerated-offenses clause, not based on the residual clause. This changed only later, when the Eleventh Circuit held burglary a violent felony under the residual clause. *See United States v. Matthews*, 466 F.3d 1271, 1275 (11th Cir. 2006).

Under *Beeman*, Mr. Swatzie is not entitled to relief.

IV

A defendant may appeal the denial of a § 2255 motion only if the district court or court of appeals issues a certificate of appealability. Under 28 U.S.C. § 2253(c)(2), a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." *Miller-El v. Cockrell*, 537 U.S. 322, 335-38 (2003); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983); *see also Williams v. Taylor*, 529 U.S. 362, 402-13 (2000) (setting out the standards applicable to a § 2254 petition on the merits). As the Court said in *Slack*:

> To obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot*, includes showing 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."

529 U.S. at 483-84 (quoting *Barefoot*, 463 U.S. at 893 n.4). Further, in order to obtain a certificate of appealability when dismissal is based on procedural grounds, a petitioner must show, "at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* at 484.

Mr. Swatzie has made the required showing. The Eleventh Circuit granted authority to file this successive § 2255 motion. He is serving a sentence that departs from current law. *Beeman* was a 2–1 decision whose analysis varies from that of other circuits. In the last few years the Supreme Court has disapproved more than one career-offender precedent. The issue under § 2253(c) is whether an issue is fairly debatable and so could eventually be resolved in the defendant's favor—not just at the first level of review, but upon en banc or Supreme Court review. This order grants a certificate of appealability.

V

For these reasons,

IT IS ORDERED:

1. The motion for relief under 28 U.S.C. § 2255, ECF No. 111, is denied.

2. A certificate of appealability is granted on this issue: whether the defendant is entitled to relief from his armed-career-criminal sentence, which was based on Florida burglary convictions that, under *Johnson v. United States*, 135 S. Ct. 2551 (2015), are not violent felonies within the meaning of the armed-career-criminal statute, 18 U.S.C. § 924(e).

3. The clerk must close Case No. 4:16cv348.

SO ORDERED on June 19, 2018.

s/Robert L. Hinkle
United States District Judge