

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16-4219

UNITED STATES OF AMERICA

v.

ANTHONY JEROME WHITE, a/k/a Dean Braithwaite,
a/k/a Carlos Valentine, a/k/a Anthony Brown

Anthony Jerome White,
Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 1-06-cr-266-01)
District Judge: Hon. Sylvia H. Rambo

Argued
September 14, 2017

Before: CHAGARES, JORDAN, and NYGAARD, *Circuit Judges*.

(Filed: September 7, 2018)

OPINION*

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

APPENDIX-A

Frederick W. Ulrich [ARGUED]
Office of Federal Public Defender
100 Chestnut Street – Ste. 306
Harrisburg, PA 17101
Counsel for Appellant

Carlo D. Marchioli [ARGUED]
Kate L. Mershimer
United States Attorney's Office
228 Walnut Street, Room 220
Harrisburg, PA 17108
Counsel for Appellee

JORDAN, *Circuit Judge*.

Anthony White appeals the District Court's denial of his motion to correct sentence filed pursuant to 28 U.S.C. § 2255. For the reasons that follow, we will affirm.

I. Background

On March 15, 2006, police and probation officers conducted a search for White, who was wanted for a parole violation. After a brief chase, police apprehended him and found crack cocaine along his flight path. As a result of that encounter, a grand jury indicted White on five counts related to drugs and firearms. At a bench trial, White was found guilty on all counts and the District Court sentenced him for Count 1 under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), because he had three predicate ACCA convictions, namely, two serious drug offenses and a violent felony. But the Court did not specify whether it considered White's prior Pennsylvania conviction for aggravated assault with a deadly weapon to be a "violent felony" under the

“elements” clause of the ACCA or under its now-unconstitutional “residual” clause.¹

Ultimately, the Court imposed a 360-month term of imprisonment for Counts 1, 3, and 4; a concurrent 120-month term for Count 5; and a consecutive 60-month term for Count 2.²

White appealed the Court’s judgment of conviction, which we affirmed. *United States v. White*, 320 F. App’x 120 (3d Cir. 2008). He did not appeal his sentence.

Later, White filed his first § 2255 motion alleging trial errors by the District Court and ineffective assistance of counsel. He again did not challenge his sentence. The Court denied his petition.

White then filed a flurry of motions. The Court deemed two such filings to be § 2255 motions, one based on recent changes to the Sentencing Guidelines and the other based on ineffective assistance of counsel regarding a possible plea. The Court denied both.³

¹ As noted herein, the Supreme Court in *Johnson v. United States*, 135 S. Ct. 2551 (2015) invalidated the ACCA’s residual clause as being unconstitutionally vague.

² The District Court found White guilty on all five counts: (1) felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g) and 924(e); (2) possession of a firearm in furtherance of drug trafficking, in violation of 18 U.S.C. § 924(c); (3) conspiracy to possess with the intent to distribute, and distributing, crack cocaine and marijuana, in violation of 21 U.S.C. § 846; (4) possession with intent to distribute, and distributing, 50 grams or more of crack cocaine and an unspecified amount of marijuana, in violation of 21 U.S.C. § 841(a)(1); and (5) possession of a firearm while in the United States as an illegal alien, in violation of 18 U.S.C. § 922(g)(5)(A) and (B).

³ The Court denied White’s second § 2255 motion, as the changes to the Sentencing Guidelines were effective during the pendency of his first § 2255 motion and, in any case, would not have affected White’s criminal history score and not led to relief. The Court denied White’s third § 2255 motion because he failed to obtain a certificate of appealability.

Following the Supreme Court's invalidation of the ACCA's residual clause as unconstitutionally vague in *Johnson v. United States*, 135 S. Ct. 2551 (2015), White filed another successive § 2255 motion, this one based on *Johnson*. We granted a certificate of appealability to allow that § 2255 motion because White had "made a prima facie showing that his proposed § 2255 motion contains a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court that was previously unavailable." (App. at 77.) See also *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016) (applying *Johnson* retroactively).

At the District Court, White argued that his prior Pennsylvania conviction for aggravated assault with a deadly weapon no longer qualified as a "violent felony" due to *Johnson*'s invalidation of the residual clause. The Court, however, denied White's most recent § 2255 motion based solely on the "concurrent sentence doctrine."⁴ The District Court nevertheless granted White a certificate of appealability, and he has timely appealed.

II. Discussion⁵

⁴ "Under the concurrent sentence doctrine, we have discretion to avoid resolution of legal issues affecting less than all of the counts in an indictment where at least one count will survive and the sentences on all counts are concurrent." *United States v. McKie*, 112 F.3d 626, 628 n.4 (3d Cir. 1997).

⁵ We have jurisdiction pursuant to 28 U.S.C. § 2253(a). We review legal determinations de novo. *United States v. Doe*, 810 F.3d 132, 142 (3d Cir. 2015). Our review of the gatekeeping requirements of § 2255(h) is de novo. *United States v. Peppers*, No. 17-1029, 2018 WL 3827213, at **5, 6 (3d Cir. Aug. 13, 2018). We exercise plenary review over the determination of whether White qualifies as an Armed Career Offender. *United States v. Chapman*, 866 F.3d 129, 131 (3d Cir. 2017).

There are two issues on appeal. First, the government argues that the District Court lacked jurisdiction to review White's successive § 2255 motion. Second, White argues that *Johnson's* invalidation of the ACCA's residual clause may make him ineligible for enhanced sentencing under that statute, preventing application of the concurrent sentence doctrine. We conclude that that the District Court had jurisdiction to review White's successive § 2255 motion and that the Court properly sentenced White under the ACCA.

A. The District Court Had Jurisdiction to Review White's Successive § 2255 Motion.

The government argues that the District Court lacked jurisdiction to review White's successive § 2255 motion because White did not establish that his enhanced sentence was based on the ACCA's residual clause. That argument, however, is foreclosed by our recent opinion in *United States v. Peppers*, --- F.3d ---, No. 17-1029, 2018 WL 3827213, (3d Cir. Aug. 8, 2018), in which we held that "the jurisdictional gatekeeping inquiry for second or successive § 2255 motions based on *Johnson* requires only that a defendant prove he *might have been sentenced* under the now-unconstitutional residual clause of the ACCA, not that he was in fact sentenced under that clause." *Id.* at *1 (emphasis added). Here, the District Court did not specify which clause was the basis for classifying White's aggravated assault conviction as a "violent felony." Accordingly, White has established that he might have been sentenced under the residual clause, and he has thus satisfied § 2255's jurisdictional gatekeeping requirement.

B. White's Conviction for Aggravated Assault with a Deadly Weapon Is a "Violent Felony" Under the ACCA's Elements Clause.

White argues that *Johnson*'s invalidation of the ACCA's residual clause may make him ineligible for enhanced sentencing under that statute, preventing the application of the concurrent sentence doctrine. But recent precedent undermines that argument too. In *United States v. Ramos*, 892 F.3d 599 (3d Cir. 2018), we held that second degree aggravated assault with a deadly weapon, under Pennsylvania law, is categorically a crime of violence under the Sentencing Guidelines. *Id.* at 612. Our prior opinions have interpreted a "violent felony" under the ACCA and a "crime of violence" under the Sentencing Guidelines as interchangeable concepts. *See United States v. Hopkins*, 577 F.3d 507, 511 (3d Cir. 2009) ("While the Court was not called upon to construe the career offender provision of the Sentencing Guidelines, the definition of a violent felony under the ACCA is sufficiently similar to the definition of a crime of violence under the Sentencing Guidelines that authority interpreting one is generally applied to the other"); *see also United States v. Wilson*, 880 F.3d 80, 83 (3d Cir.), *cert. denied*, 138 S. Ct. 2586 (2018) (concluding that "bank robbery by intimidation does indeed qualify as a 'crime of violence' under § 4B1.2(a)(1) or the nearly identically worded 'elements' clause of the ACCA"). Accordingly, White's conviction for aggravated assault was properly classified as a "violent felony," and the District Court rightly sentenced him under the ACCA.⁶

III. Conclusion

⁶ We may affirm the District Court on any grounds supported by the record. *Kossler v. Crisanti*, 564 F.3d 181, 186 (3d Cir. 2009).

For the foregoing reasons, we will affirm the District Court's denial of White's motion to correct his sentence under § 2255.

UNITED STATES OF AMERICA v. ANTHONY JEROME WHITE
UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
2016 U.S. Dist. LEXIS 154609
Crim. No. 1:06-cr-266
November 8, 2016, Decided
November 8, 2016, Filed

Editorial Information: Prior History

United States v. White, 2016 U.S. App. LEXIS 16954 (3d Cir. Pa., Sept. 16, 2016)

Counsel For Clarence King, Unknown Party Type: L. Rex Bickley, LEAD ATTORNEY, L. Rex Bickley, Dillsburg, PA.

For USA, Plaintiff: C D Marchioli, LEAD ATTORNEY, US Attorney's Office - Criminal, Harrisburg, PA.

Judges: SYLVIA H. RAMBO, United States District Judge.

Opinion

Opinion by: SYLVIA H. RAMBO

Opinion

MEMORANDUM

Before the court is a motion to correct sentence under 28 U.S.C. § 2255 in light of *Johnson v. United States*, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015).

I. Background

On June 24, 2007, Defendant was found guilty at a bench trial of possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g) (Count 1); possession of a firearm in furtherance of drug trafficking in violation of 18 U.S.C. § 924(c) (Count 2); conspiracy to distribute and possess with intent to distribute crack cocaine and marijuana in violation of 21 U.S.C. § 846 (Count 3); distribution and possession with intent to distribute crack cocaine and marijuana in violation of 21 U.S.C. § 841 (Count 4); and possession of a firearm by an illegal alien in violation of 18 U.S.C. § 922(g)(5) (Count 5). (Doc. 64.)

This court imposed a prison term of 420 months consisting of 360 months on Counts 1, 3, and 4 and 120 months on Count 5 to run concurrent with one another, and 60 months on Count 2 to run consecutive to the other counts. As to Count 1, Defendant was found to have two prior drug offenses and a prior violent felony (aggravated assault) and sentenced under the Armed Career Criminal Act (ACCA) (18 U.S.C. § 924(e)). This subjected Defendant to a mandatory minimum term of incarceration of 15 years with a maximum of life. Without the application of the ACCA, he would have been subject to a statutory minimum of 10 years.

Defendant alleges that the aggravated assault in Adams County does not qualify as a violent felony and, therefore, his sentence on Count 1 violated due process.

lyccases

1

© 2019 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved. Use of this product is subject to the restrictions and terms and conditions of the Matthew Bender Master Agreement.

APPENDIX-B

17

The government seeks denial of the requested relief for the following reasons: (1) the court lacks jurisdiction because Defendant has not made the showing required to present a successive § 2255 motion; (2) the concurrent sentence doctrine counsels against adjudicating Defendant's claim; and (3) Defendant's challenged conviction remains valid. (Doc. 164.)

II. Discussion

This motion will be disposed of under the concurrent sentence doctrine. "[A] federal court may decline to review an alleged error where concurrent sentences were imposed on separate counts, where the alleged error is associated with only one count, and where the remaining sentences are unassailable." *Nosov v. Schuylkill FCI*, 634 Fed. App'x 379, 380 (3d Cir. 2016) (citing *United States v. McKie*, 112 F.3d 626, 628 n.4, 36 V.I. 367 (3d Cir. 1997)).

This court recognizes this doctrine should be applied only where it is apparent that the defendant will not suffer collateral consequences from the unreviewed conviction. *United States v. Clemons*, 843 F.2d 741, 743 n.2 (3d Cir. 1988). Defendant has not shown any continuing collateral consequences now or in the future. His lengthy criminal history, his multiple convictions in this case, and his concurrent and consecutive convictions undermine any collateral consequences in the future.

Based on the foregoing, Defendant is ineligible for relief under § 2255. An appropriate order will issue.

/s/ Sylvia Rambo

SYLVIA H. RAMBO

United States District Judge

Dated: November 8, 2016

ORDER

AND NOW, this 8th day of November, 2016, the motion filed pursuant to 28 U.S.C. § 2255 (Doc. 153) is **DENIED**.

/s/ Sylvia Rambo

SYLVIA H. RAMBO

United States District Judge

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 16-4219

UNITED STATES OF AMERICA

v.

ANTHONY JEROME WHITE, a/k/a Dean Braithwaite,
a/k/a Carlos Valentine, a/k/a Anthony Brown

Anthony Jerome White,
Appellant

(M.D. Pa. No. 1-06-cr-00266-001)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN,
HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS,
PORTER and NYGAARD,* Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is DENIED.

BY THE COURT

s/ Kent A. Jordan
Circuit Judge

DATE: January 10, 2019
tyw/cc: Anthony Jerome White
Carlo d. Marchioli, Esq.

*Judge Nygaard's vote is limited to panel rehearing only.

APPENDIX-C

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