

Appendix

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

FEB 27 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

KORAN MCKINLEY ALLEN, Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee.

No. 17-55444

D.C. No. 2:16-cv-07225-DSF
Central District of California,
Los Angeles

ORDER

Before: CANBY, GRABER, and McKEOWN, Circuit Judges.

We have reviewed appellant's briefing of uncertified issues and treat those arguments as a motion to expand the certificate of appealability. So treated, the motion is denied. *See* 9th Cir. R. 22-1(e); *Hiivala v. Wood*, 195 F.3d 1098, 1104-05 (9th Cir. 1999); *see also United States v. Bankston*, 901 F.3d 1100 (9th Cir. 2018); *United States v. Watson*, 881 F.3d 782 (9th Cir.), *cert. denied*, 139 S. Ct. 203 (2018). *Compare* 18 U.S.C. § 924(c)(3)(A) *with* U.S.S.G. § 4B1.2(a)(1) (2001).

Appellee's motion for summary affirmance (Docket Entry No. 23) is granted. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (stating standard); *see also Watson*, 881 F.3d 782.

AFFIRMED.

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CENTRAL DISTRICT OF CALIFORNIA

JS-6

MEMORANDUM

Case No. CV 16-7225 DSF
CR 02-904 DSF

Date 3/30/17

Title United States v. Koran McKinley Allen

Present: The
Honorable

DALE S. FISCHER, United States District Judge

Debra Plato

Not Present

Deputy Clerk

Court Reporter

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Not Present

Not Present

Proceedings: (In Chambers) Order DENYING Motion to Vacate, Set Aside, or Correct Sentence

Defendant was convicted of armed bank robbery in violation of 21 U.S.C. §§ 2113(a) and (d) and received an increased mandatory minimum sentence for use of a firearm in the commission a crime of violence under 18 U.S.C. § 924(c). He also received a sentence enhancement under the career offender guideline of the United States Sentencing Guidelines, U.S.S.G. § 4B1.2. In his motion to vacate, set aside, or correct sentence, Defendant contends that the residual clauses of the crime of violence definitions in 18 U.S.C. § 924(c) and in § 4B1.2 are unconstitutionally vague and his sentence must be set aside.

The motion as to § 924(c) fails because under binding Ninth Circuit precedent both armed bank robbery under 21 U.S.C. § 2113 (a), (d) and the lesser included offense of bank robbery, 21 U.S.C. § 2113(a), are crimes of violence under the elements clause of 18 U.S.C. § 924(c)(3). Section 924(c)(3)(A) defines a crime of violence, in part, as “a felony [that] has as an element the use, attempted use, or threatened use of physical force against the person or property of another.” The Ninth Circuit has previously ruled that both federal armed bank robbery and federal bank robbery are crimes of violence under identical elements clauses of other statutes. See United States v. Wright, 215 F.3d 1020, 1028 (9th Cir. 2000) (armed bank robbery); United States v. Selfa, 918 F.2d 749 (9th Cir. 1990) (bank robbery).

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Defendant argues that any use of force or threatened force is required to be intentional rather than reckless and contends that armed bank robbery does not necessarily require intentional use or threat of force. This argument is based on Fernandez-Ruiz v. Gonzales, 466 F.3d 1121 (9th Cir. 2006), which interpreted and extended the Supreme Court's decision in Leocal v. Ashcroft, 543 U.S. 1 (2004), a decision issued after both Wright and Selfa.

Wright and Selfa are not "clearly irreconcilable" with Leocal and Fernandez-Ruiz and are, therefore, binding on this Court. See Miller v. Gammie, 335 F.3d 869, 893 (9th Cir. 2003). Even if Defendant's argument had some potential merit as applied to simple bank robbery, armed bank robbery under § 2113(d) requires that the defendant have "assault[ed] any person, or put[] in jeopardy the life of any person by the use of a dangerous weapon or device." 21 U.S.C. § 2113(d). It is difficult to see how a defendant could be convicted under this statute and not have intended to use or threaten physical force given the inherently threatening and dangerous nature of the "dangerous weapon or device" that the defendant would have been required to have "used." Ninth Circuit law makes clear that "use" of the firearm under § 2113(d) means that the defendant has to "knowingly ma[k]e one or more victims at the scene of the robbery aware that he had a gun." United States v. Odom, 329 F.3d 1032, 1035 (9th Cir. 2003). Secretly possessing the weapon is not enough.¹ Defendant fails to propose any scenario, plausible or not, in which a defendant would rob a bank while knowingly making a person aware of the defendant's possession of a weapon, and the defendant yet would have failed to have intentionally assaulted that person. Defendant seems to believe that if a robber tells (or shows) people in a bank that he is armed with a dangerous weapon while robbing the bank, he has not committed assault as long as he has no subjective intent to use that weapon. He provides no support for this unlikely proposition. The only plausible reason to make people in a bank aware that you have a weapon while you are robbing that bank is to intentionally provoke fear of physical harm in those people. Defendant's further assertion that knowing use of a "dangerous weapon or device" in a bank robbery would not be sufficiently violent to satisfy the elements clause is simply not viable. To the degree it is supported at all, it is supported by cases that do not involve threatened

¹ In this important respect the federal statute differs from the Massachusetts armed robbery statute that the Ninth Circuit found not to categorically satisfy the elements clause of the crime of violence definition. United States v. Parnell, 818 F.3d 974 (9th Cir. 2016). The Massachusetts statute only requires possession of a weapon during the crime. Id. at 978. In contrast, the federal statute explicitly requires assaulting or putting in jeopardy the life of a person by use of a dangerous weapon or device.

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physical force through the use of a “dangerous weapon or device,” such as a firearm.

Defendant’s attack on his career offender enhancement fails because the Supreme Court has held that the Sentencing Guidelines are not subject to Constitutional vagueness challenges. Beckles v. United States, – S.Ct. –, 2017 WL 855781 (March 6, 2017).

The motion is DENIED. A certificate of appealability is GRANTED with respect to the § 924(c) related claim in order to determine whether federal armed bank robbery remains a crime of violence in light of Leocal and Fernandez-Ruiz.

IT IS SO ORDERED.