APPENDIX A

United States v. Ricks,
756 F. App'x 488 (2019)
unpublished opinion

756 Fed.Appx. 488 (Mem)
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. 5th Cir. Rules 28.7 and 47.5.
United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff-Appellee
v.
Todd RICKS, Defendant-Appellant

No. 17-50586
|
Summary Calendar
|
Filed March 12, 2019

Appeal from the United States District Court for the Western District of Texas, USDC No. 1:16-CV-950, USDC No. 1:06-CR-206-1

Attorneys and Law Firms

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Before JOLLY, COSTA, and HO, Circuit Judges.

Opinion

PER CURIAM: *

Todd Ricks, federal prisoner # 83035-180, is serving a lengthy sentence for drug and firearm crimes. His sentence was enhanced under 18 U.S.C. § 924(e) of the Armed Career Criminal Act (ACCA), based on prior convictions for Texas burglaries that were deemed "violent felonies" ***489** under § 924(e)(2)(B)(ii). We affirmed the conviction and sentence and denied Ricks's first 28 U.S.C. § 2255 motion.

When Ricks was sentenced, violent felonies were defined in pertinent part as certain enumerated crimes, including generic burglary, or any crime involving "conduct that presents a serious potential risk of physical injury to another." § 924(e)(2)(B)(ii); *see Mathis v. United States*, —— U.S. ——, 136 S.Ct. 2243, 2247-48, 195 L.Ed.2d 604 (2016). The latter definition, known as the residual clause, was later invalidated by *Johnson v. United States*, —— U.S. ——, 135 S.Ct. 2551, 2557, 192 L.Ed.2d 569 (2015). *Johnson* was made retroactive to cases on collateral review. *Welch v. United States*, —— U.S. ——, 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016).

After Ricks moved for authorization to file a successive § 2255 motion citing *Johnson* and *Mathis*, we granted authorization but explained that it was "tentative in the sense that if the district court concludes, after a thorough review, that Ricks has not satisfied the requirements for filing a successive motion, the district court must dismiss the motion."

In his successive § 2255 motion in the district court, Ricks argued that his Texas burglary convictions could not be used to enhance his sentence because they were neither generic burglaries in light of *Mathis* nor violent felonies in light of *Johnson*. The district court denied the motion on the merits and applied this court's then-controlling precedent holding that Texas burglary was generic burglary as contemplated by § 924(e)(2)(B)(ii). *See United States v. Uribe*, 838 F.3d 667, 670-71 (5th Cir. 2016), *overruled by United States v. Herrold*, 883 F.3d 517 (5th Cir. 2018) (en banc).

Shortly thereafter, we overruled *Uribe* and held that Texas burglaries were not generic burglaries and thus could not be used to enhance sentences under § 924(e). *See Herrold*, 883 F.3d at 520-21, 529. We thus granted Ricks a certificate of appealability (COA) on whether "he no longer qualifies for ACCA sentencing as a result of changes in the law concerning ACCA predicate offenses, particularly the classification of Texas burglary offenses."

We first must determine whether the district court had jurisdiction to address the merits of the successive § 2255 motion, because if it did not, then we also lack jurisdiction to reach the merits. *See United States v. Wiese*, 896 F.3d 720, 723-24 (5th Cir. 2018). *Wiese* is on point and controls the resolution of Ricks's appeal.

Herrold, unlike *Johnson*, offers no basis for a successive § fv2255 motion because it did not announce "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court." § 2255(h)(2); *see Wiese*, 896 F.3d at 725-26. Accordingly, Ricks must establish that *Johnson* is the basis for his successive § 2255 motion. *See id.* at 724-25. To do so, he must show that the sentencing court imposed the ACCA enhancement by relying on the residual clause that *Johnson* invalidated. *See id.*

Under the most favorable standard for Ricks, he must show that the sentencing court "may have" relied on the residual clause. *See id.* When Ricks was sentenced in March 2008, all violations of the Texas burglary statute were deemed generic burglary. *See id.* at 725. Thus, "at the time of sentencing, there was absolutely nothing to put the residual clause on the sentencing court's radar." *Id.* Nothing about the record, the legal environment, or other relevant circumstances suggests that sentencing court may have relied on the residual clause.

Because Ricks's sentence was not based on the residual clause, his successive ***490** § 2255 motion was not based on *Johnson* and did not meet the requirements of § 2255(h)(2). Consequently, we VACATE the district court's judgment and DISMISS the § 2255 motion for lack of jurisdiction. *See Wiese*, 896 F.3d at 726.

All Citations

756 Fed.Appx. 488 (Mem)

Footnotes

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

APPENDIX B

18 U.S.C. 922(g)(1)

18 U.S.C. § 924(A)(2)

18 U.S.C. § 924(e) (Armed Career Criminal Act)

28 U.S.C. § 2244

28 U.S.C. § 2255

18 U.S.C. § 922(g)(1)

It shall be unlawful for any person who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year … to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 924(a)(2)

Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

18 U.S.C. § 924(e)

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C.

802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

28 U.S.C. § 2244—Finality of determination.

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on

collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals

has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2255—Federal custody; remedies on motion attacking sentence.

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.