

United States Court of Appeals
For the Eighth Circuit

No. 17-1988

Seab Nolen

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from United States District Court
for the Western District of Missouri - Kansas City

Submitted: February 11, 2019

Filed: April 30, 2019
[Unpublished]

Before SMITH, Chief Judge, BENTON and STRAS, Circuit Judges.

PER CURIAM.

Seab A. Nolen pled guilty to being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1). The district court¹ sentenced him

¹The Honorable Beth Phillips, Chief Judge, United States District Court for the Western District of Missouri.

App. A

as an armed career criminal to 192 months' imprisonment. He appeals. Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

The Armed Career Criminal Act enhances sentences for defendants who possess firearms after three convictions for a "violent felony or a serious drug offense." 18 U.S.C. § 924(e)(1). The term "violent felony" is defined, in part, as a crime "punishable by imprisonment for a term exceeding one year" that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). Nolen was convicted of unlawfully using a weapon in violation of § 571.030.1(4) RSMo for "knowingly exhibiting, in the presence of one or more persons, in an angry or threatening manner, a weapon readily capable of lethal use." He contends this conviction is not a violent felony under the force clause. This court reviews the issue de novo. *See Jones v. United States*, 870 F.3d 750, 752 (8th Cir. 2017).

Nolen's argument is without merit. This court repeatedly has held that a "conviction for unlawful use of a weapon in Missouri" under § 571.030.1(4) RSMo is "a conviction for a violent felony under § 924(e)." *United States v. Swopes*, 892 F.3d 961, 962 (8th Cir. 2018). *See United States v. Hudson*, 851 F.3d 807, 808 (8th Cir. 2017) (holding the same). Nolen believes these decisions were wrongly decided. But this court is bound by them. *See United States v. Parrow*, 844 F.3d 801, 804 (8th Cir. 2016).

* * * * *

The judgment is affirmed.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

SEAB NOLEN,)
)
)
 Movant,)) Case No. 16-1284-CV-W-BP
)) Crim. No. 12-00169-01-CR-W-BP
 v.)
)
)
 UNITED STATES OF AMERICA,))
)
)
 Defendant.))

**ORDER AND OPINION DENYING AMENDED MOTION TO CORRECT SENTENCE
AND GRANTING IN PART A CERTIFICATE OF APPEALABILITY**

Pending is Seab Nolen's Amended Motion to Correct Sentence, (Doc. 6), which contends that Movant was improperly sentenced under the Armed Career Criminal Act ("the ACCA") and seeks relief pursuant to 28 U.S.C. § 2255. For the following reasons, the Amended Motion is **DENIED**, but the Court grants a Certificate of Appealability as to one of the issues raised in the Amended Motion.

I. BACKGROUND

Movant pleaded guilty to one count of being a felon in possession of a firearm. "In general, the law punishes [this crime] by up to 10 years' imprisonment. [18 U.S.C.] § 922(g). But if the violator has three or more earlier convictions for a 'serious drug offense' or a 'violent felony,' the Armed Career Criminal Act increases his prison term to a minimum of 15 years and a maximum of life." *Johnson v. United States*, 135 S. Ct. 2551, 2555 (2015). A "violent felony" is defined as a felony 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." 18 U.S.C. § 924(e)(2)(B). The portion in bold is referred to as the "force clause," and the italicized portion of the definition constitutes the "residual clause."

The Presentence Investigation Report ("PSR") revealed that Movant had prior convictions for aggravated battery in Kansas, second degree domestic assault in Missouri, and unlawful use of a weapon in Missouri. The PSR further concluded that these three convictions constituted "violent felonies" under the ACCA. There were no objections to this determination and it was accepted by the Court. Significantly, there was no specific determination as to why any of Movant's prior convictions constituted violent felonies, largely because it was generally accepted at the time that these crimes qualified as crimes of violence under the residual clause.

The Court's finding that Movant had three prior convictions for violent felonies triggered the ACCA's fifteen year mandatory minimum sentence. The Court sentenced Movant to 192 months imprisonment.

In *Johnson*, the Supreme Court determined the residual clause was unconstitutionally vague, and in *Welch v. United States*, 136 S. Ct. 1257 (2016), the Supreme Court determined that *Johnson* announced a new rule that could be applied retroactively. Movant now challenges his classification as an armed career criminal, contending that with the residual clause's invalidation he does not have three violent felony convictions. The Government contends that these three convictions still qualify as violent felonies under the force clause.¹ The Court resolves the parties' arguments below.

¹ Movant also had a prior conviction for burglary in Kansas. The Government does not contend that this is a violent felony within the meaning of the ACCA.

II. DISCUSSION

A. Aggravated Battery and Second Degree Domestic Assault

The Court addresses the crimes of aggravated battery and second degree domestic assault together because the parties' arguments are similar. Eighth Circuit precedent dictates that both crimes are violent felonies under the force clause. *E.g., United States v. Scott*, 818 F.3d 424, 435 (8th Cir. 2016) (discussing Missouri domestic assault statute); *United States v. Rice*, 813 F.3d 704, 705-06 (8th Cir. 2016) (discussing Arkansas battery statute, which is similar to Kansas' statute). Significantly, Movant concedes this point; he argues that there is a circuit split and raises the issue solely to preserve it for further review. (Doc. 6, p. 5.) In the meantime, the Court is required to follow the Eighth Circuit's decisions, and therefore concludes that Movant's convictions for aggravated battery and domestic assault are violent felonies.

B. Unlawful Use of a Weapon

Movant contends that his conviction for unlawful use of weapon does not qualify as a violent felony. Movant was convicted of violating § 571.030.1(4) of the Missouri statutes, which makes it unlawful to knowingly “[e]xhibit[], in the presence of one or more persons, any weapon readily capable of lethal use in an angry or threatening manner.” In 2009, the Eighth Circuit held that a conviction under § 571.030.1(4) constitutes a crime of violence under the ACCA's force clause. *United States v. Pulliam*, 566 F.3d 784, 788 (8th Cir. 2009). And, the Court of Appeals has adhered to this determination on several occasions. *See United States v. Long*, 651 F. App'x 566 (8th Cir. 2016) (applying *Pulliam* to determine if § 571.030.1(4) is a crime of violence under the Sentencing Guidelines), *United States v. Maid*, 772 F.3d 1118, 1120-21 (8th Cir. 2014) (relying on *Pulliam* to find a similar Iowa statute constitutes crime of violence

under ACCA); *United States v. Money*, 457 F. App'x 600 (8th Cir. 2012) (similar ruling as in *Long*).

Movant primarily argues that *Pulliam* was wrongly decided, characterizing it as “flawed and dated.” (Doc. 8, p. 1.) In particular, he points out that *Pulliam* was decided before the Supreme Court decided *Johnson v. United States*, 559 U.S. 133 (2010) (interpreting the ACCA’s force clause) and *Mathis v. United States*, 136 S. Ct. 2243 (2016) (addressing how a state crime’s elements should be ascertained). However, there is no intervening decision of either the Court of Appeals or the Supreme Court that clearly overrules *Pulliam*; to the contrary, the cases cited above suggests the Eighth Circuit’s belief that the 2010 decision in *Johnson* does not affect *Pulliam*’s validity, and the Court does not believe that *Mathis* undercuts *Pulliam*’s analysis. For these reasons, the Court is obligated to adhere to *Pulliam* and conclude that Movant’s conviction for violating § 571.030.1(4) of the Missouri statutes constitutes a crime of violence.

C. Certificate of Appealability

In order to appeal, Movant must obtain a Certificate of Appealability, which should be issued only if he “has made a substantial showing of a denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). This showing is established if reasonable jurists could disagree as to how the issue should be resolved. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

The Court does not believe that the issues addressed in Part II(A) are subject to debate among reasonable jurists, so the Court declines to issue a Certificate of Appealability with respect to those matters. However, there is presently a debate among jurists as to whether a conviction under § 571.030.1(4) qualifies as a crime of violence under the ACCA’s force clause: at least one judge on this court has concluded that *Pulliam* is not valid in light of subsequent Supreme Court decisions. *See Phillips v. United States*, No. 16-3225-CV-S-BCW, Doc. 10 (Dec.

16, 2016). Therefore, the Court grants Movant a Certificate of Appealability with respect to the issue discussed in Part II(B).

III. CONCLUSION

The Amended Motion for Postconviction Relief is **DENIED**. Movant is granted a Certificate of Appealability, limited to the issue of whether a conviction under § 571.030.1(4) of the Missouri statutes constitutes a crime of violence under the Armed Career Criminal Act.

IT IS SO ORDERED.

DATE: March 15 , 2016

/s/ Beth Phillips

BETH PHILLIPS, JUDGE

UNITED STATES DISTRICT COURT