

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-16198
Non-Argument Calendar

D.C. Docket Nos. 8:16-cv-01641-EAK-MAP,
8:11-cr-00181-EAK-MAP-1

KENNETH H. BURKE, JR.,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(November 27, 2018)

Before MARTIN, JORDAN, and ROSENBAUM, Circuit Judges.

PER CURIAM:

We sua sponte vacate our earlier opinion in this case and affirm the district court's judgment denying Kenneth Burke's motion to vacate his conviction and sentence under 28 U.S.C. § 2255.

Burke says the Supreme Court's decision in Johnson v. United States, 135 S. Ct. 2551 (2015), invalidated his conviction for carrying a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c). Section 924(c) defines a crime of violence in part as any felony "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." Id. § 924(c)(3)(B). Johnson held similar language in 18 U.S.C. § 924(e)(2)(B)(ii) unconstitutionally vague. 135 S. Ct. at 2557. This Court recently ruled in In re Garrett, No. 18-13680 (11th Cir. Nov. 2, 2018), that neither Johnson nor Sessions v. Dimaya, 138 S. Ct. 1204 (2018), invalidate § 924(c). Garrett thus forecloses Burke's argument. For this reason, we AFFIRM.

ROSENBAUM, Circuit Judge, concurring:

I concur in the panel's order affirming the district court's denial of Kenneth Burke's 28 U.S.C. § 2255 petition. One of Burke's companion offenses for his conviction under 18 U.S.C. § 924(c) was attempted Hobbs Act robbery. We have held that attempted Hobbs Act robbery qualifies as a "crime of violence" under § 924(c)(3)(A)'s elements clause, without consideration of § 924(c)(3)(B)'s risk-of-force clause. *United States v. St. Hubert*, No. 16-10874, 2018 WL 5993528 (Nov. 15, 2018). Therefore, we are bound by that holding, and *Johnson v. United States*, 135 S. Ct. 2551 (2015), cannot affect Burke's conviction. As a result, the district court did not err in denying Burke's § 2255 petition. I would not opine further on Burke's *Johnson* claim, as it is unnecessary to resolve this appeal.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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November 27, 2018

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 16-16198-AA
Case Style: Kenneth Burke, Jr. v. USA
District Court Docket No: 8:16-cv-01641-EAK-MAP
Secondary Case Number: 8:11-cr-00181-EAK-MAP-1

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir. R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1.

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call T. L. Searcy, AA at (404) 335-6180.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Djuanna Clark
Phone #: 404-335-6161

OPIN-1 Ntc of Issuance of Opinion