

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

July 22, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

TIMOTHY EDWARD HOLZ,

Defendant - Appellant.

No. 17-6118
(D.C. Nos. 5:16-CV-00613-C &
5:01-CR-00211-C-1)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before MATHESON, McHUGH, and CARSON, Circuit Judges.

Timothy Edward Holz appeals the district court's order denying his 28 U.S.C. § 2255 motion for sentencing relief. Our jurisdiction arises under 28 U.S.C. §§ 1291 and 2253(a). We affirm.

BACKGROUND

In 2002, Holz pled guilty to one count of armed bank robbery in violation of 18 U.S.C. §§ 2113(a) and (d). The district court sentenced him as a career offender under

* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G).* The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

U.S. Sentencing Guidelines Manual (USSG) § 4B1.1 (U.S. Sentencing Comm'n 2002)¹

to 210 months' imprisonment, which was within the applicable 188-235 month range of the then-mandatory sentencing guidelines. He did not appeal.

On June 26, 2015, the Supreme Court held that the residual clause of 18 U.S.C. § 924(e)(2)(B)(ii), which defines "violent felony" under the Armed Career Criminal Act, is unconstitutionally vague. *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015). The Supreme Court later held that *Johnson* applied retroactively on collateral review. *See Welch v. United States*, 136 S. Ct. 1257, 1268 (2016).

Within one year of *Johnson*, Holz filed a § 2255 motion, arguing that *Johnson*'s reasoning should also apply to the residual clause found in USSG § 4B1.2(a)'s crime-of-violence definition. *Johnson*, Holz argued, called into question the district

¹ Designation as a "career offender" requires, among other things, that the offense of conviction is a crime of violence or controlled substance offense and that the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. USSG § 4B1.1(a) (2002). The term "crime of violence" is defined as

- (a) . . . any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
 - (1) **has as an element the use, attempted use, or threatened use of physical force against the person of another, or**
 - (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*

Id. § 4B1.2(a) (2002) (emphases added). The portion in bold is known as "the elements clause." The italicized portion is known as "the residual clause." Holz's career-offender designation was based on two prior convictions for drug offenses and the instant conviction for armed robbery.

court's basis for sentencing him as a career offender. While the motion was pending, the Supreme Court held that *Johnson* does not impact sentences enhanced under the now-advisory guidelines. *Beckles v. United States*, 137 S. Ct. 886, 890, 895 (2017)

The district court avoided the *Johnson* issue altogether, however, by finding that Holz's armed-robbery conviction qualified as a crime of violence under the elements clause of USSG § 4B1.2(a). The district court denied Holz's § 2255 motion, but it issued a certificate of appealability.

DISCUSSION

We review de novo a district court's denial of a § 2255 *Johnson* claim where, as here, the district court did so without an evidentiary hearing. *United States v. Copeland*, 921 F.3d 1233, 1242 (10th Cir. 2019). Our review leads to an affirmance on two grounds.

First, as Holz acknowledges, our body of jurisprudence contains a "plethora of decisions" holding that armed bank robbery is categorically a crime of violence under USSG § 4B1.2(a)'s elements clause. Reply Br. at 5; see, e.g., *United States v. McCranie*, 889 F.3d 677, 677 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 1260 (2019). Thus, the district court correctly designated Holz as a career offender -- notwithstanding any constitutional uncertainty in the residual clause of the mandatory guidelines.

Second, even if we disagreed with the district court's rationale, Holz is still not

entitled to relief because his *Johnson* claim is untimely.² Section 2255 prescribes a one-year limitations period. 28 U.S.C. § 2255(f). The limitations period for Holz's motion ran from the later of either "the date on which [his] judgment of conviction bec[ame] final" or "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." 28 U.S.C. § 2255(f). As Holz concedes, we held in *United States v. Greer*, 881 F.3d 1241 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 374 (2018), that *Johnson* does not include a "right not to be sentenced under the residual clause of § 4B1.2(a)(2) of the mandatory Guidelines." *Id.* at 1247. And this court recently validated *Greer*, reiterating that "*Johnson* did not create a new rule of constitutional law applicable to the mandatory Guidelines." *United States v. Pullen*, 913 F.3d 1270, 1285 (10th Cir. 2019), *petition for cert. filed* (U.S. July 15, 2019) (No. 19-5219). Consequently, the one-year limitations period applicable to Holz's § 2255 motion cannot be based on the date *Johnson* was decided. Instead, it must be based upon "the date on which [his] judgment of conviction bec[ame] final." Holz's motion, which was filed more than a decade after his conviction became final, is therefore time barred.

² We may affirm on any ground adequately supported by the record. *United States v. Greer*, 881 F.3d 1241, 1244 (10th Cir. 2018) (internal quotation marks omitted), *cert. denied*, 139 S. Ct. 374 (2018).

AFFIRMED.

Entered for the Court

Joel M. Carson, III
Circuit Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

ORDER

Defendant, a prisoner appearing through appointed counsel, has filed a request for Certificate of Appealability (“COA”) to appeal this Court’s denial of his 28 U.S.C. § 2255 Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Dkt. No. 154). Although the time for response has passed, Plaintiff has neither responded nor sought additional time to respond.

Defendant is entitled to a COA only upon making a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(2). Defendant can make such a showing by demonstrating that the issues he seeks to raise are deserving of further proceedings, debatable among jurists of reason, or subject to different resolution on appeal. See Slack v. McDaniel, 529 U.S. 473, 483 (2000) (“[W]e give the language found in § 2253(c) the meaning ascribed it in Barefoot v. Estelle, 463 U.S. 880, 893 (1983)], with due note for the substitution of the word ‘constitutional.’””).

APPENDIX B

Here, Defendant has satisfies this standard. Whether Defendant's conviction for armed robbery is a crime of violence as defined by USSG § 4B1.2(a) is debatable among jurists of reason.

Accordingly, Defendant's request for a Certificate of Appealability (Dkt. No. 112) is GRANTED.

IT IS SO ORDERED this 11th day of May, 2017.


ROBIN J. CAUTHRON
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
vs.)
TIMOTHY EDWARD HOLZ,)
Plaintiff)
Defendant)
No. CR-01-211-C
CIV-16-613-C

JUDGMENT

Upon consideration of Defendant's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence, and the Court's accompanying Memorandum Opinion and Order,

IT IS ORDERED, ADJUDGED, AND DECREED that the Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence be and the same are hereby denied.

DATED this 13th day of April, 2017.

Robin J. Cauthron
ROBIN J. CAUTHRON
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
vs.)
Plaintiff,)
vs.) No. CR-01-211-C
TIMOTHY EDWARD HOLZ,) CIV-16-613-C
Defendant.)

MEMORANDUM OPINION AND ORDER

Defendant filed a pro se Motion pursuant to 28 U.S.C. § 2255 seeking relief from his sentence of imprisonment. The Court appointed counsel to assist Defendant and counsel filed a supplement to Defendant's Motion. Plaintiff has not responded to Defendant's Motion but instead has filed a Motion to Enforce the terms of the plea agreement, which included a waiver of collateral attack. Defendant has responded to that Motion.

Prior to sentencing, the Court determined Defendant was a career offender as defined by USSG §§ 4B1.1 and 4B1.2. Defendant pled guilty to armed bank robbery in violation of 18 U.S.C. § 2113(a) and (d). As predicate offenses, Defendant had two prior felony drug convictions which qualified under the controlled substance offenses of USSG § 4B1.2(b). Relying on those two prior convictions and the guilty plea to violation of § 2113(a) and (d), the Court sentenced Defendant as a career offender under the Sentencing Guidelines.

APPENDIX D

Relying on Johnson v. United States, ___ U.S. ___, 135 S.Ct. 2551 (2015), and United States v. Madrid, 805 F.3d 1204, 1210-11 (10th Cir. 2015), Defendant argues that his sentence was determined on a now-invalid basis. In Johnson, the Supreme Court held the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924, was unconstitutionally vague. In Madrid, the Tenth Circuit applied that reasoning in holding the residual clause of § 4B1.1 to be unconstitutionally vague.

In Beckles v. United States, ___ U.S. ___, 137 S.Ct. 886 (2017), the Supreme Court overruled Madrid and held “the advisory Sentencing Guidelines are not subject to a vagueness challenge under the Due Process Clause and that § 4B1.2(a)’s residual clause is not void for vagueness.” Id. at 895. Defendant argues that because he was sentenced at a time when the Guidelines were mandatory rather than advisory, Beckles is not dispositive of his § 2255 Motion. The Court finds Defendant’s claims fail on the merits and therefore resolution of the applicability of Beckles is unnecessary.

Initially, the Court must determine the impact, if any, of Defendant’s waiver of collateral attack. In its Motion, Plaintiff argues that Defendant, as part of his Plea Agreement, agreed to a waiver of collateral attack and that waiver is applicable to the claims presented herein. Plaintiff acknowledges that the waiver included an exception to “challenges based on changes in the law reflected in Tenth Circuit or Supreme Court cases decided after the date of this agreement that are held by the Tenth Circuit or Supreme Court to have retroactive effect.” (Dkt. No. 30, Att. 1, Plea Agree., p. 9.) Plaintiff argues this exception does not apply because neither of the requisite Courts have made the basis for

Defendant's challenge retroactive. In his response, Defendant argues, relying primarily on case law applying Johnson and the Armed Career Criminal Act rather than the Sentencing Guidelines, that the changes in the law apply retroactively. However, Defendant does not direct the Court to any case holding that any determination on the validity of the Sentencing Guidelines enhancement is to be given retroactive effect. In light of the Supreme Court's recent decision in Beckles, it is unclear whether any of the cases relied upon by Defendant would remain applicable to his claims and would give retroactive effect to a challenge to the Sentencing Guideline. However, because Defendant's claims fail on the merits, it is unnecessary to resolve this issue.

Defendant argues that his conviction for armed bank robbery is not a crime of violence as defined by § 4B1.2(a). Thus, he asserts, it cannot serve as a predicate offense for enhancing his sentence.* The Fourth Circuit has held that:

Bank robbery under § 2113(a), "by force and violence," requires the use of physical force. Bank robbery under § 2113(a), "by intimidation," requires the threatened use of physical force. Either of those alternatives includes an element that is "the use, attempted use, or threatened use of physical force," and thus bank robbery under § 2113(a) constitutes a crime of violence under the force clause of § 924(c)(3).

United States v. McNeal, 818 F.3d 141, 153 (4th Cir. 2016), cert. denied, ____ U.S. ___, 137 S.Ct. 164 (2016). The Tenth Circuit reached the same conclusion in United States v.

* Defendant does not argue that his prior drug convictions cannot serve as predicate offenses.

McGuire, No. 16-3282, 2017 WL 429251, at *2 (10th Cir. Feb. 1, 2017). Thus, USSG § 4B1.2(a)(1) applies to Defendant's conviction without reliance on the residual clause.

Because Defendant was also convicted of violating 2113(d), the conviction included an additional element of force. Section 2113(d) states:

Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.

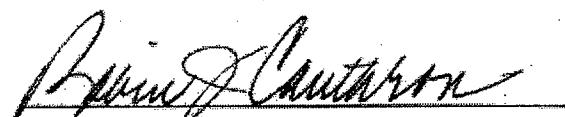
The Tenth Circuit has recognized that violation of this paragraph establishes the use or threatened use of violent force. See United States v. Silva, 608 F.3d 663, 670 (10th Cir. 2010) ("Threatening or engaging in menacing conduct toward a victim, with a weapon capable of producing death or great bodily harm, threatens the use of '*violent force*' . . ."). Defendant's violation of this additional paragraph bolsters the validity of application of the sentencing enhancement under the elements portion of § 4B1.2(a).

Defendant argues that because the gun he used was a toy gun his conviction under this statute cannot constitute a crime of violence. The Court is precluded from examining the facts underlying Defendant's conviction in this matter. Shepard v. United States, 544 U.S. 13, 26 (2005). Rather, the Court's inquiry is limited to "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." Id. Even were the Court to give credence to Defendant's argument, that fact would only affect his conviction for violating

§ 2113(d). Because his conviction for violating § 2113(a) is a crime of violence under § 4B1.2(a), Defendant would still be subject to the career offender enhancement.

For the reasons set forth herein, Defendant's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Dkt. No. 56) is DENIED. Defendant's pro se Motion (Dkt. No. 102) is stricken as moot. The United States' Motion to Enforce the Collateral Attack Waiver or, Alternatively, Motion to Dismiss (Dkt. No. 89) is STRICKEN as Moot. A judgment shall enter accordingly.

IT IS SO ORDERED this 13th day of April, 2017.



ROBIN J. CAUTHRON
United States District Judge