Appendix

FILED

AUG 22 2019

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES DOUGLAS PRIDGEN, Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee.	No. 18-55308 D.C. No. 2:17-cv-03016-SVW Central District of California, Los Angeles ORDER

Before: SCHROEDER and PAEZ, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 10) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV-17-3016-SVW/CR-98-43-SVW	Date	March 7, 2018
Title	*United States v. Pridgen*		

JS-6

Present: The Honorable	STEPHEN V. WILSON, U.S. DISTRICT JUDGE

Paul M. Cruz	N/A
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
N/A	N/A

Proceedings: IN CHAMBERS ORDER DENYING AMENDED MOTION TO VACATE, SET ASIDE,OR CORRECT SENTENCE UNDER 28 U.S.C. § 2255 [18]

Pridgen's § 2255 motion brings two broad claims. The first is a *Napue* claim relating to the government's presentation of false testimony at his trial. The second is a *Johnson* claim, involving his convictions for armed bank robbery and carjacking. The *Johnson* claims, however, are foreclosed by two recent Ninth Circuit decisions, *United States v. Watson*, 881 F.3d 782 (9th Cir. 2018) and *United States v. Gutierrez*, 876 F.3d 1254 (9th Cir. 2017).

I. Factual Background and Procedural History

A. Procedural History

After a four-day trial in 1998, a jury convicted petitioner of the five counts listed in the Third Superseding Indictment. (CV Dkt. No. 18-1 at 2.) Pridgen appealed on grounds unrelated to the current motion, and on July 10, 2002, the Ninth Circuit affirmed the convictions, but reversed and remanded with respect to restitution. *United States v. Pridgen*, 41 F. App'x 103, 107 (9th Cir. 2002).

On December 24, 2007, petitioner filed a motion to vacate or set aside his convictions under 28 U.S.C. § 2255 ("§ 2255"), which was denied on May 29, 2008. (Criminal ("CR") Dkt. Nos. 252, 263.) On or near June 27, 2016, petitioner filed an application for leave to file a second or successive motion under § 2255. (CV Dkt. No. 1.) On April 20, 2017, the Ninth Circuit granted petitioner's application because it made "a prima facie showing for relief under *Johnson v. United States* []." (CV Dkt. No. 2.)

Initials of Preparer PMC

B. DOJ Letter

On approximately September 21, 2015, Department of Justice Special Counsel Norman Wong noted in a letter to the government (the "Letter") that "testimony regarding microscopic hair comparison analysis containing erroneous statements was used" in Pridgen's trial, and that such testimony "exceeded the limits of science." (CV Dkt. No. 16-4 at 99-100.)

On approximately October 27, 2015, the government disclosed the Letter to Pridgen's counsel, and Pridgen received the information regarding Mr. Hopkins' testimony. Then, on June 8, 2017, the Court expanded appointment of counsel to include Pridgen's claims relating to this false testimony. (CV Dkt. No. 8.) On October 2, 2017, now with the aid of counsel, Pridgen filed the instant motion. (CV Dkt. No. 18.)

II. *Napue* Claim

If the government presented false testimony at a defendant's trial, the defendant can obtain reversal of his conviction under *Napue*. A claim under *Napue v. Illinois*, 360 U.S. 264 (1959), will succeed when "(1) the testimony (or evidence) was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) the false testimony was material." *Hayes v. Brown*, 399 F.3d 972, 984 (9th Cir. 2005) (en banc) (internal quotation marks and alteration omitted). Here, the government concedes the first two elements. Opp. at 5.[1] The only contested issue is materiality.

[1] It is not clear to the Court that the testimony at issue is "actually false" for purposes of *Napue*. Generally, something closer to perjury is required for the *Napue* falsity standard to be met. "When a witness's testimony may be misleading or incomplete, but not actually false, most courts do not find the prosecutor's silence a due process violation." § 5:21.False testimony—What constitutes false testimony?, Prosecutorial Misconduct § 5:21 (2d ed.) *See, e.g., U.S. v. Houston*, 648 F.3d 806 (9th Cir. 2011) (witness' lack of clarity and omissions not "false" under *Napue*); *U.S. v. Bailey*, 123 F.3d 1381, 1385–1386 (11th Cir. 1997) (memory lapse, unintentional error, or oversight not considered perjury); *U.S. v. Payne*, 940 F.2d 286, 291 (8th Cir. 1991) (fact that testimony is challenged by another witness or inconsistent with prior statements not perjury). *But see U.S. v. Freeman*, 650 F.3d 673, 679-680 (7th Cir. 2011) (defendant's due process rights not limited "to situations where it can be conclusively established that the government witness was lying," but also includes "half-truths" and "vague statements that could be true in a limited literal sense but give a false impression to the jury"). Here, there is no contention that Hopkins perjured himself, and as discussed later, he was forthright in stating the limitations of his forensic tools. The Court notes that nowhere in the DOJ letter is there any implication that Hopkins manipulated the results of the analysis or acted in bad faith in any way. Rather, the inaccuracy at issue is that Hopkins overstated the accuracy of the hair analysis during trial testimony in a way that may have been misleading to the jury. However, because both sides stipulated to the falsity prong, the Court will not analyze this issue

Under the *Napue* materiality standard, a conviction must be set aside if "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Jackson v. Brown*, 513 F.3d 1057, 1076 (9th Cir. 2008). This is a more lenient standard than "sufficiency of the evidence," which applies on direct review. However, the use of false testimony does not lead to an automatic inference of a due process violation—if the unchallenged evidence presented at trial was so "overwhelming" that the petitioner "cannot demonstrate that the alleged errors had a substantial and injurious effect or influence in determining the jury's verdict" then there is no *Napue* violation. *Id.* at 1079. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Hall v. Director of Corrections*, 343 F.3d 976, 983-84 (9th Cir.2003).

Besides examining the unchallenged evidence, the Court should also analyze the challenged evidence and its context in the trial. If the testimony in question was substantially undermined at trial, this can lead to a conclusion that it was not material. *See Gentry v. Sinclair*, 705 F.3d 884, 903 (9th Cir. 2013) (holding that witness's false testimony was not material "because his credibility had been substantially called into question during the course of his testimony at trial.")

Here, the testimony in question is that of a forensic hair specialist, Christopher Hopkins, who worked as an FBI lab examiner at the time of the trial. He testified that hair found on one of the masks used in the bank robbery of which Pridgen was convicted was consistent with Pridgen's hair, based on his analysis. However, in 2015, the DOJ issued the aforementioned letter stating that the forensic analysis utilized by Hopkins did not support the statements he made, and that his testimony was therefore unsupported by scientific evidence and false.

Pridgen contends that his conviction for bank robbery must be vacated under *Napue*. The government believes that in light of the amount of other evidence presented of Pridgen's guilt, the *Napue* materiality standard is not met here, and the conviction should stand.

To evaluate this claim, this Court must examine both the precise content of Hopkins' testimony (and how effectively it was undermined during cross-examination) and the extent of the other evidence the government presented regarding Pridgen's presence in the bank during the robbery.

---

further.

Initials of Preparer : PMC

A. The Testimony of Christopher Hopkins

At trial, Hopkins testified that hair found on one of the two ski masks used by the bank robbers "was consistent with having originated from" Pridgen. (Reporter's Transcript of Proceedings from 4/29/1998 ("RT 2") at 211.) He further testified that the "microscopic" characteristics of the hair made him believe that it was not present on the mask for an extended period of time. (*Id.*) Hopkins also testified under cross-examination, however, that he was aware at the time he made the report that "hair comparisons did not constitute a basis for absolute personal identification." (*Id.* at 213.) He additionally clarified that the "limits of the examination of hairs does [*sic*] not allow a hair examiner, such as myself, to say, to the exclusion of everyone else, that the hair personally and positively came from a certain person." (*Id.*) Qualifications to that effect were also present in the written report he originally prepared. (*Id.*) Through cross-examination, defense counsel therefore made it apparent to the jury that Hopkins' testimony was marked by some level of uncertainty. This was a point defense counsel also emphasized during closing arguments, where counsel stated that Hopkins "said that this testing is not sufficient for absolute identification." (RT 4 at 53.)

Thus, although hair analysis was subsequently disavowed by the DOJ, the jury was already made aware at trial that such analysis could not definitively place Pridgen at the scene of the crime. Thus it is very likely that this particular testimony was not material to the jury's determination of guilt. *See Gray v. Michael*, 2016 WL 6403509, at *9 (D. Md. Oct. 28, 2016) (hair analysis testimony not material because forensic analyst "included cautionary statements" and "readily admitted on cross-examination that the hair analysis he performed was not an exact science."), *appeal dismissed sub nom. Gray v. Stouffer*, 681 F. App'x 299 (4th Cir. 2017), cert. denied, *2017 WL 2483481* (U.S. Oct. 2, 2017). Although not binding on this Court, the previous case is highly similar. There, as here, defense counsel effectively cross-examined the expert witness and elicited a statement that the hair analysis was not definitively accurate. The actual testimony Hopkins presented at trial therefore does not support Pridgen's *Napue* claim, in light of defense counsel's effective cross-examination.

B. Other evidence of Pridgen's Involvement in the Robbery

The government also presented significant additional evidence that Pridgen was at the scene of the crime and also had substantial involvement in the robbery generally. The evidence placing Pridgen directly at the scene of the crime is as follows:

- Deborah Hobson, an FBI forensic specialist, testified that DNA recovered from one of the ski masks used during the robbery matched DNA extracted from Pridgen's saliva. (RT 3 at 114.) Although the DNA of more than one person was found on the mask, Hobson testified that this was very common when analyzing pieces of clothing, and that Pridgen was the major contributor of DNA by a ratio of 9:1. (RT 3 at 113-15.)
- Lori Massengale, the acting branch manager of the Credit Union, and John A. Marcrum, a Credit Union customer, both testified that one of the two robbers: (1) had a handgun; (2) wore a black jacket that had the word "Security" on the back; and (3) was African-American based on their view of his face through the holes in his mask. (RT 2 at 23, 48.) The getaway driver for the robbery and petitioner's former co-defendant, Darrell Lane McClain, confirmed that: (1) petitioner had brandished a handgun in a carjacking prior to the robbery, and had still possessed the gun immediately after the robbery had taken place (RT 3 at 43, 60); and (2) petitioner had put on a black jacket — with the word "Security" written on the back — prior to and in preparation for the robbery. (RT 3 at 54.)
- Two witnesses heard one robber call the other "Jim." (RT 2 at 43; RT 4 at 44.) Both McClain testified that Pridgen's nickname was "Jim." (RT 2 at 105.)

Besides the above, the government also presented extensive evidence that showed Pridgen was significantly involved in the planning and aftermath of the robbery (even if it did not tend to directly show his presence at the scene of the crime). Specifically, that evidence was as follows:

- According to McClain's testimony: 1) Pridgen told him he wanted to rob the bank with McClain's help; 2) Pridgen subsequently drew a diagram of the bank that was robbed with his other co-defendant; 3) Pridgen scouted out the bank with McClain and the third co-defendant; and 4) that Pridgen, some days before the robbery, stole a 1985 Honda Prelude by pulling a gun on its owner. (RT 3 at 33, 35, 37, 43-6.)
- McClain also testified that: 1) a couple of days after this carjacking, petitioner went to Wal-Mart to buy black, burgundy, and turquoise sports beanies, so that petitioner could "cut them and use them for masks"; 2) McClain witnessed Pridgen and his co-robber depart the bank immediately after the robbery in a Honda Prelude; and 3) Pridgen later returned with the Prelude, left it in the alley and got into McClain's car carrying a handgun and a gym bag. (RT 3 at 50-61.)

- McClain stated that Pridgen emanated a strong chemical smell and that he saw red stains on his (Pridgen's) clothing. (RT 3 at 61-2.) Another witness had earlier testified that the robber with the handgun and black "Security" jacket had taken money containing a red dye pack and tear gas that was set to release within ten seconds of exiting the Credit Union. (RT 2 at 20, 23.)
- Gary Dean Broadwater, a customer of the Credit Union who was withdrawing money during the robbery, testified that he saw an African-American man drive a grey Honda Prelude that had smoke billowing out of the windows away from the bank moments after the robbery. (RT 2 at 55-57.)
- According to McClain's mother, Victoria Peggy McCreery, McClain and Pridgen came to her home at some point after the robbery. (RT 2 at 106.) Ms. McCreery testified that McClain and Pridgen, who had a bag with him, went to another room in the home, and that she smelled a "burning and stinking" smell from somewhere in the house. (RT 2 at 107-08.) She went to her daughter's bedroom, and saw red-stained money in the same bag that Pridgen had brought in. (RT 2 at 108-09.) Pridgen then requested that Ms. McCreery take him to a Motel 6 in Palmdale, which Ms. McCreery did. (RT 2 at 111.)
- Pamla Yater, who lived with Melissa Mendoza (Pridgen's girlfriend) during the time of the robbery, testified that on the same evening of the robbery, Mendoza showed her a bag full of money that had been stained with red ink. (RT 2 at 150-51.) Ms. Yater further testified that Pridgen came over to her house the next day and took the bag with him. (RT 2 at 151.)

The question is if, in light of the above evidence, Hopkins' testimony could have affected the judgment of the jury. Pridgen asserts that much of the above testimony is lacking in value because it comes from McClain. (Pet. at 8-9, 17-18.) He attacks the probative value of McClain's testimony by pointing out that he was a cooperating witness who had "a stake" in the outcome of the trial. (*Id.* at 8.) However, Pridgen himself acknowledges that the jury heard from McClain that he expected to receive a lower sentence in exchange for his testimony. (*Id.*) The jury was thus aware of McClain's potential credibility issues. Furthermore, as detailed above, McClain's testimony was corroborated by that of several other witnesses who did not have the same credibility problems. Additionally, the testimony of the DNA expert suffers from none of the defects of eyewitness testimony. In light of this evidence, Hopkins' testimony does not meet the *Napue* standard. The large amount of unchallenged physical and corroborating testimony means that the trial resulted in a "verdict worthy of confidence." *Hall*, 343 F. 3d at 983-4.

The two cases that Pridgen cites that involve forensic hair testimony are distinguishable and serve to bolster this conclusion. In *Matta-Ballesteros v. United States,* 2:16-cv-02596-JAK, Dkt. No. 37 (C.D. Cal. May 22, 2017), the Court found a *Napue* violation because the flawed hair analysis provided the *only* link between the defendant and the scene of the crime (the kidnapping of a federal agent). The court there specifically noted that no testimony placed the defendant at the actual scene of the crime. *Id*. at 23. The testimony by witnesses in that case only established that the defendant was involved with co-conspirators who would later carry out the kidnapping. *Id*. Furthermore, there was no other physical evidence. That is a direct contrast to this case, where McClain's testimony places Pridgen at the bank at the time of the robbery. In addition, Hobson's DNA testimony provided, physical evidence that Pridgen directly participated in the robbery. The evidence here is therefore much stronger that in *Matta-Ballesteros*.

Similarly in *Verdugo-Urquidez v. United States,* 2:15-cv-09274-JAK, Dkt. No. 37 (C.D. Cal. May 22, 2017), a case involving a co-defendant of Matta-Ballesteros', the Court found a *Napue* violation because the hair evidence was the "strongest" the government had. Again, witness testimony only linked the defendant to other conspirators, rather than directly placing him at the scene of the crime. Contrastingly here, there was substantial evidence, including physical evidence, placing Pridgen at the scene of the crime.

The evidence, outside the hair analysis, that the government presented at trial is so "overwhelming" that Pridgen "cannot demonstrate that the alleged errors had a substantial and injurious effect or influence in determining the jury's verdict." *Jackson*, 513 F.3d at 1076. *See also Gentry v. Sinclair*, 705 F.3d 884, 903–04 (9th Cir. 2013) (finding that a witness's false testimony could not have affected the jury's verdict because: (1) "the DNA, eyewitness, and other circumstantial evidence were more than sufficient for a jury to convict"; and (2) defense counsel questioned that witness "extensively" on cross-examination); *Sivak v. Hardison*, 658 F.3d 898, 914 (9th Cir. 2011) (finding no prejudice based on alleged *Napue* violations because "[t]here was simply too much evidence placing [defendant] at the scene of the crime"). Accordingly, Pridgen's *Napue* claim does not succeed, as Hopkins' testimony was not material to the jury's verdict.

III. *Johnson* Claims

Pridgen next challenges his convictions under 18 U.S.C. § 924(c). The two charges at issue with

respect to the *Johnson* claims in the instant motion are Counts Two and Five of the Third Superseding Indictment. Count Two charged that Pridgen had "used, carried, and brandished a firearm, namely a handgun, during and in relation to a crime of violence, namely carjacking, in violation of 18 U.S.C. § 2119." (*See* Ex. B: Third Superseding Indictment (CR 75.) Count Five charged that Pridgen and his co-defendants, "aiding and abetting each other knowingly used and carried firearms, namely a shotgun and a semi-automatic handgun, during and in relation to a crime of violence," namely armed bank robbery under 18 U.S.C. § 2113(a), (d). (*Id.*)

Section 924(c) provides for a series of graduated, mandatory consecutive sentences for using or carrying a firearm during and in relation to a "crime of violence." 18 U.S.C. § 924(c)(1)(A), (B). The term "crime of violence" is defined in § 924(c)(3) as "an offense that is a felony and--"

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

(B) 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. 18 U.S.C. § 924(c)(3)

Subsection (A) is known as the "force (or elements) clause" and subsection (B) is known as the "residual clause."

Pridgen's claim here is that *Johnson v. United States*, 135 S. Ct. 2551 (2015) and *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015) require his convictions to be vacated. Those cases invalidated as unconstitutionally vague the so-called residual clauses of Armed Career Criminal Act (ACCA) and 8 U.S.C. § 1101(a)(43)(F) of the Immigration and Nationality Act (INA), respectively. The wording of the residual clause in the latter statute is identical to the wording in the residual clause of § 924(c). Pridgen claims that carjacking and armed bank robbery do not fit under the force clause. And because similarly worded residual clauses have been struck down, Pridgen believes his convictions on these counts cannot stand under either the force clause or the residual clause. These claims are foreclosed by recent Ninth Circuit decisions, however. There is no need to consider the vagueness argument in relation to the residual clause because the Ninth Circuit held that both armed bank robbery and carjacking are crimes of violence under the force clause.

A. Armed Bank Robbery

In *United States v. Watson*, 881 F.3d 782 (9th Cir. 2018), the Ninth Circuit held that armed bank robbery, in violation of 18 U.S.C. § 2113(a), (d) is a crime of violence upon which 18 U.S.C. § 924(c) can be predicated. The Ninth Circuit explained that: (1) "[B]ank robbery qualifies as a crime of violence because even its least violent form 'requires at least an implicit threat to use the type of violent physical force necessary to meet the Johnson standard.'"; (2) bank robbery meets the mens rea requirement for a crime of violence, as "[t]he offense must at least involve the knowing use of intimidation, which necessarily entails the knowing use, attempted use, or threatened use of violent physical force"; (3) because 18 U.S.C. § 2113(a) "contains at least two separate offenses, bank robbery and bank extortion," the former may be a crime of violence even if the latter is not; and (4) "[b]ecause bank robbery 'by force and violence, or by intimidation' is a crime of violence, armed bank robbery is as well. *Id*.

Moreover, the Court reached those conclusion under the force clause, not the residual clause. Thus, even if the holdings of *Johnson* and *Dimaya* were extended to § 924(c), it would not matter because those decisions dealt only with the residual clause. As such, there is no basis to vacate Pridgen's conviction under Count Five of the indictment.

B. Carjacking

In *United States v. Gutierrez*, 876 F.3d 1254 (9th Cir. 2017), the Ninth Circuit held that federal carjacking, in violation of 18 U.S.C. § 2119 is a crime of violence under the force clause of §924(c). Specifically, the Ninth Circuit held that: "[t]o be guilty of carjacking 'by intimidation,' the defendant must take a motor vehicle through conduct that would put an ordinary, reasonable person in fear of bodily harm, which necessarily entails the threatened use of violent physical force. It is particularly clear that "intimidation" in the federal carjacking statute requires a contemporaneous threat to use force that satisfies Johnson because the statute requires that the defendant act with 'the intent to cause death or serious bodily harm.' [] As a result, the federal offense of carjacking is categorically a crime of violence under § 924(c)." *Id*. at 1257. Again, the grounding of the holding in the force clause means that *Johnson* and *Dimaya* are not implicated and that carjacking is a valid predicate act for a conviction under § 924(c). Accordingly, there is no basis for vacating Pridgen's conviction under Count Two of the indictment.

IV. Conclusion

Pridgen's § 2255 motion should be denied on both the *Napue* and *Johnson* claims.

Initials of Preparer PMC