

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. DALTON LAQUANE SMITH, Defendant - Appellant.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

2019 U.S. App. LEXIS 14810

No. 18-7409

May 20, 2019, Decided

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**Opinion**

{2019 U.S. App. LEXIS 1}Appeal from the United States District Court for the District of South Carolina, at Columbia. Joseph F. Anderson, Jr., Senior District Judge. (3:13-cr-01038-JFA-1; 3:15-cv-04225-JFA)

Submitted: May 3, 2019 Decided: May 20, 2019

Before KING, AGEE, and FLOYD, Circuit Judges:

Affirmed by unpublished per curiam opinion.

Dalton Laquane Smith, Appellant Pro Se. William Kenneth Witherspoon, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Columbia, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Dalton Laquane Smith appeals the district court's order denying relief on his 28 U.S.C. § 2255 (2012) motion. We have reviewed the record and find no reversible error. Accordingly, although we grant leave to proceed in forma pauperis, we affirm substantially for the reasons stated by the district court. *United States v. Smith*, Nos. 3:13-cr-01038-JFA-1; 3:15-cv-04225-JFA (D.S.C. Oct. 31, 2018). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

**AFFIRMED**

CIRHOT

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Appendix "B"

District Court Order Denying § 2255 Petition  
and Issuing a Certificate of Appealability

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

UNITED STATES OF AMERICA	)	CR No.: 3:13-1038-JFA
	)	
v.	)	ORDER ON §2255 MOTION
	)	
DALTON L. SMITH	)	
	)	

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This matter is before the Court on the defendant's *pro se*<sup>1</sup> motion to vacate or correct his sentence pursuant to 28 U.S.C. § 2255. The defendant relies upon *Johnson v. United States*, 576 U.S. \_\_\_, 135 S.Ct. 2551 (2015)<sup>2</sup> wherein the Supreme Court held that the residual clause of the Armed Career Criminal Act ("ACCA") can no longer support a defendant's classification as an armed career criminal because it is unconstitutionally vague. *Johnson* addressed the residual clause of the "violent crime" definition in the ACCA.

The government has filed a motion for summary judgment<sup>3</sup> contending that the defendant cannot rely on *Johnson* because both his armed career offender status and his career offender guideline status were based upon his prior convictions for drug offenses and not for any violent felonies.

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<sup>1</sup> Because the defendant/petitioner is acting *pro se*, the documents which he has filed in this case are held to a less stringent standard than if they were prepared by a lawyer and therefore, they are construed liberally. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

<sup>2</sup> In *Welch v. United States*, 578 U.S. \_\_\_, 136 S.Ct. 1257 (2016), *Johnson* was held to be retroactive.

<sup>3</sup> Pursuant to *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), the defendant was provided with notice of his right to file any material he wished in opposition to the motion to dismiss and a copy of the applicable Rules. The defendant responded in opposition.

## **I. PROCEDURAL HISTORY**

### **A. Criminal Indictment and Sentencing**

The defendant was charged in a 12-count indictment with various gun and drug offenses. On June 23, 2014, he pled guilty to Count 5 (felon in possession of a firearm and ammunition in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2), and 924(e)); and to Count 6 (possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)).

The government notified the defendant that he would be subject to increased penalties pursuant to 21 U.S.C. § 851 based on six prior felony drug convictions.

The Presentence Report (“PSR”) determined that the defendant was an armed career criminal under 18 U.S.C. § 924(e) and U.S.S.G. § 4B1.4(c)(2); and a career offender based upon a conviction under 18 U.S.C. § 924(c) and U.S.S.G. Section 4B1.1(c)(2). On October 21, 2014, the defendant was determined to be an armed career criminal and a career offender. He was sentenced to 202 months as to Count 5, and 60 months as to Count 6, with the terms to run consecutively.

### **B. Direct Appeal**

The defendant did not file a direct appeal of his sentence. In paragraph 13 of his Plea Agreement, the defendant waived his right to contest either his conviction or sentence in any direct appeal or other post-conviction action, including any proceedings under 28 U.S.C. § 2255. The waiver does not apply to claims of ineffective assistance of counsel or prosecutorial misconduct raised pursuant to § 2255. The government has not raised the

waiver as a defense to this action.

## **II. APPLICABLE LAW**

### **A. 28 U.S.C. § 2255**

Prisoners in federal custody may attack the validity of their sentences pursuant to 28 U.S.C. § 2255. In order to move the court to vacate, set aside, or correct a sentence under § 2255, a defendant/petitioner must prove that one of the following occurred: (1) a sentence was imposed in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose such a sentence; (3) the sentence was in excess of the maximum authorized by law; or (4) the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255(a).

The Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”) provides a one-year statute of limitations period on the filing of a § 2255 action. That limitation period runs 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.

28 U.S.C. § 2255(f).

## B. Summary Judgment

Summary judgment “should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c)(2) (2009). The movant has the burden of proving that summary judgment is appropriate. Once the movant makes the showing, however, the opposing party must respond to the motion with “specific facts showing a genuine issue for trial.” Fed. R. Civ. P. 56(e)(2).

When no genuine issue of any material fact exists, summary judgment is appropriate. *See Shealy v. Winston*, 929 F.2d 1009, 1011 (4th Cir. 1991). In deciding a motion for summary judgment, the facts and inferences to be drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Id.* However, “the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986).

“[O]nce the moving party has met [its] burden, the nonmoving party must come forward with some evidence beyond the mere allegations contained in the pleadings to show that there is a genuine issue for trial.” *Baber v. Hospital Corp. of Am.*, 977 F.2d 872, 874–75 (4th Cir. 1992). The nonmoving party may not rely on beliefs, conjecture, speculation, or conclusory allegations to defeat a motion for summary judgment. *See id.* Rather, the nonmoving party is required to submit evidence of specific facts by way of affidavits, depositions, interrogatories, or admissions to demonstrate the existence of a genuine and

material factual issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

### **III. CLAIMS PRESENTED**

#### **A. The Defendant's § 2255 Motion**

The defendant filed his first § 2255 motion on October 13, 2015. It appears that his motion was timely and not challenged by the government on that basis. He raises one Ground asserting that his sentence was increased under the ACCA's residual clause and in violation of the Due Process Clause. He relies on *Johnson* to support his contention that "the residual clause was used to determine that he had three prior crimes of violence to be sentenced pursuant to the ACCA. . . ."

#### **B. The Government's Motion for Summary Judgment**

The government responded to the defendant's § 2255 petition and moved for summary judgment, correctly pointing out that *Johnson* had no application to the defendant's case, because both the defendant's armed career criminal sentence and his career offender guideline sentence were based upon prior drug convictions, not prior crimes of violence which might be infirm under *Johnson*.

In response to the government's motion, the defendant filed a memorandum which implicitly, though not directly, sought to change the focus of his § 2255 petition so as to attack his prior drug convictions, rather than focus upon any crime of violence on his criminal record. In his response, Smith now asserts that he is actually innocent of the armed career criminal designation and also that his attorneys were ineffective for failing to investigate and determine that at least one of his prior drug convictions did not qualify as a

“serious drug offense.”

On March 6, 2018, the government filed an amended motion for summary judgment, arguing that the PSR correctly determined that Smith’s prior state convictions all qualified as “serious drug offenses” under the ACCA; that Smith was properly determined to be a career offender; and that he failed to prove either prong of the test set out in *Strickland v. Washington*, 466 U.S. 668, 687 (1984) with regard to his allegations of ineffective assistance of counsel.

On June 14, 2018, the defendant filed a response in opposition to the government’s amended motion for summary judgment.

Shortly thereafter, this Court was made aware of the fact that at least two cases from this district were currently pending on appeal which raised the question of whether South Carolina’s drug statutes qualify as “serious drug offenses” under the ACCA or as “controlled offenses” under the Career Offender guideline.

In *United States v. Marshall*, No. 16-4594, 2018 WL 4150855 (4th Cir. Aug. 29, 2018), the Fourth Circuit determined, in an unpublished decision, that South Carolina’s drug statutes on their face make illegal a broader range of conduct than either the ACCA or Career Offender guideline by prohibiting the mere “purchase” of narcotics.<sup>4</sup> The Court further determined that the South Carolina statutes were divisible, thus, triggering a modified categorical approach for purposes of analyzing the convictions. Using this approach, of

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<sup>4</sup> In the second case, *United States v. Rhodes*, 736 F. App’x 375 (4th Cir. 2018), also unpublished, the Fourth Circuit assumed, without deciding, that the South Carolina statutes were divisible thereby requiring the modified categorical approach.

course, requires the Court to delve deeply into the *Shepard*-approved documents involved in the state court convictions.

Rather than dismissing Smith's § 2255 petition because the original petition raised a clearly meritless contention that *Johnson* applied to his sentence, this Court determined that it would be in the interest of justice to take a fresh look at Smith's South Carolina drug convictions in light of *Marshall*.<sup>5</sup> This required the Court to request, and receive, from the United States Probation Office, the *Shepard*-approved documents for Smith's ten South Carolina state drug convictions.<sup>6</sup>

After conducting a careful review of the defendant's South Carolina drug convictions as explained below, the Court has concluded that the defendant is not entitled to relief.

#### **IV. DISCUSSION**

##### **A. The Career Offender Guideline Sentence**

To qualify for sentencing as a career offender, first, the defendant's instant offense

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<sup>5</sup> This Court is aware that, as an unpublished opinion, *Marshall* is not binding precedent. However, the Court will adopt, on its own, the rationale applied by the Fourth Circuit and conclude that the South Carolina statutes are over broad, and yet divisible, thereby calling for a modified categorical approach to the convictions at issue. The Fourth Circuit's analysis in *Marshall* is incorporated herein by reference.

<sup>6</sup> The Court has determined that it has the authority to retrieve the *Shepard*-approved documents from the United States Probation Office ("USPO") and consider them without a new sentencing hearing. Under 28 U.S.C. § 2255(b), a hearing is not required if "the motion and the files and records of the court conclusively show that the petitioner is entitled to no relief." The *Shepard*-approved documents were obtained from the Probation Officer who wrote the PSR in the defendant's criminal case. Probation Officers are judicial employees whose files belong to the court. Therefore, documents used by the USPO to prepare PSRs are "files and records of the case." Additionally, the Court may take judicial notice of "adjudicative facts, such as—in this case—state court records. See Fed. R. Evid. 201, *United States v. Townsend*, 886 F.3d 441, 443–44 (4th Cir. 2018) (taking judicial notice of defendant's amended North Carolina sentencing sheet, submitted for the first time on appeal). For purposes of appeal, these documents have all been filed with the Clerk of Court, and, because they contain some protected information, they are filed under seal.

must be a controlled substance offense or a crime of violence. Here, the defendant pled guilty to Count 5 (felon in possession of a firearm in violation of 18 U.S.C. § 922(g)), and Count 6 (possession and use of a firearm in connection with a drug trafficking crime in violation of 21 U.S.C. § 924(c)). So, the first prong of the career offender qualification is satisfied.

The second career offender inquiry requires the Court to focus on the defendant's prior state convictions to determine if they qualify as either crimes of violence or controlled substance offenses. As noted earlier, the government did not contend that the defendant had any convictions that qualify as crimes of violence. As to the drug-related offenses on his record, these must be examined to determine whether they fall under the definition of "controlled substance offenses" contained in United States Sentencing Guidelines ("U.S.S.G.") § 4B1.2(b):

An offense punishable by imprisonment for more than one year "that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense."

U.S.S.G. § 4B1.2(b).

For career offender purposes, the U.S.S.G. provide an additional requirement: The conviction must be one that also counts toward criminal history, meaning that convictions obtained more than ten years before the instant offense which did not result in actual imprisonment are not counted. U.S.S.G. § 4B1.2, cmt. n. 3.

Here, because none of the defendant's prior controlled substance convictions that are ten years old resulted in actual imprisonment,<sup>7</sup> it follows that these convictions do not qualify as predicate offenses.

This leaves only two prior drug convictions that merit the modified categorical approach inquiry:

1. The November 6, 2006 conviction (03-GS-32-0073) for distribution of cocaine within proximity of a school (PSR ¶68) in violation of S.C. Code Ann. § 44-53-445(A) (2003) ("the proximity statute"). The defendant received a sentence of "four years, suspended, upon time served" and one year probation for this offense.

Section 44-53-445 is unique among South Carolina drug offenses because it has a separate penalty for purchasing controlled substances: "When a violation involves only the purchase of a controlled substance, the person is guilty of a misdemeanor" punishable by up to one year in prison. S.C. Code § 44-53-445(D)(2). Otherwise, the violation is punishable by up to ten years. S.C. Code § 44-53-445(D)(1). So, if a person convicted under § 445 actually received a felony sentence (as defendant Smith did),<sup>8</sup> then the person could not be guilty of purchasing only. A non-purchasing violation of § 445 is punishable by up to ten

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<sup>7</sup> The defendant has a total of nine drug-related convictions on his record. Four convictions are for simple possession (PSR ¶¶ 60, 62, 64, and 75). Two convictions are for distributing controlled substances within the proximity of a school (PSR ¶¶ 65 and 68). Three convictions are for possession with intent to distribute (¶¶ 66, 67, and 74). As a result of these convictions, the defendant has served a total of three days' incarceration. On multiple occasions, the state courts gave him suspended or probationary sentences. In addition, he was allowed to participate in the state drug court program on three occasions.

<sup>8</sup> As noted, the defendant received a sentence of four years, suspended, which is a sentence not available to defendants who violate the misdemeanor portion of § 44-53-445(d)(2).

years, which would qualify as “ten years or more” under the ACCA definition of a “serious drug offense” under 18 U.S.C. § 924(e)(2)(A)(ii).

Thus, the defendant’s 2007 conviction for violation of the felony portion of the proximity statute qualifies as a predicate offense for career offender purposes.

2. The December 14, 2006 conviction (07-GS-40-1298) for possession with intent to distribute cocaine (PSR ¶74). The defendant received a sentence of five years suspended upon eighteen months’ probation.

The *Shepard* documents for this conviction consist of the indictment, which alleges the full text of S.C. Code § 44-53-370 (attached as Exhibit A). The statute and the indictment both include a reference to the “purchase” of cocaine.

However, another *Shepard*-approved document—the standard South Carolina “Sentencing Sheet” (attached as Exhibit B)—provides more information. In the first paragraph, the Deputy Clerk of Court indicated by checking the appropriate boxes and filling in the appropriate blanks, that the defendant had pled guilty to “Possession with Intent to Distribute Cocaine.”

A later entry on the same Sentencing Sheet (at line 5) provides a degree of ambiguity. It reads as follows:

The Charge is <input checked="" type="checkbox"/> As Indicted, <input type="checkbox"/> Lesser Included Offense, <input type="checkbox"/> Defendant Waives Presentment to Grand Jury. _____ (Defendant Initials)
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It could be argued that the reference to “As Indicted” means that the plea was to some undesignated portion of the entire indictment (which would include “purchase[ing].”)

However, when line 5 is looked at in its entirety, the potential ambiguity goes away. The only options the Deputy Clerk has to choose from are “As indicted,” “Lesser Included Offense,” and “Defendant Waives Presentment to the Grand Jury.” The second and third options are clearly not applicable to defendant Smith’s case. In a sense, the Sentencing Sheet is inartfully drafted because it does not provide an option to check the box when a defendant pleads guilty to a specific portion of a statute with multiple prongs. In light of this, this Court is reluctant to read an ambiguity into a document merely because of the format of the document. Given the fact that the Sentencing Sheet specifies that the defendant was convicted for an offense that involved possession of a controlled substance with intent to distribute, this conviction was also considered to be for a controlled substance offense for Career Offender purposes.

In a recent case, Chief Judge Terry Wooten of this Court reached the same conclusion with a similar South Carolina sentencing sheet in *United States v. Marcus Marsh*, 3:17-CR-1197-TLW (D.S.C.).

Because the defendant has two qualifying predicate controlled substance offenses, the Career Offender determination in his sentence must not be disturbed.

#### **B. The Armed Career Criminal Act Sentence**

The Armed Career Criminal Act of 1984 (“ACCA”) provides for a mandatory minimum sentence of 15 years imprisonment for a defendant who violates 18 U.S.C. § 922(g) and has three prior convictions for a “violent felony” or a “serious drug offense.” 18 U.S.C. § 924(e)(1). A “serious drug offense” is defined as . . . “(ii) an offense under

State law involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in § 102 of the Controlled Substances Act set out in 21 U.S.C. § 802), for which a maximum term of imprisonment of ten years or more is prescribed by law.” 18 U.S.C. § 924(e)(2)(A)(ii).

Unlike the Career Offender guideline, however, the ACCA does not require the predicate serious drug offense to be one that counts toward the defendant’s criminal history, thus requiring a fresh look at the defendant’s South Carolina drug convictions to determine if they qualify under the ACCA, even if they did not qualify under the Career Offender guidelines.

1. The August 5, 2000 conviction (00-GS-32-04667) for possession with intent to distribute marijuana in proximity of a school S.C. Code § 44-53-445 (1976) (PSR ¶65). The indictment charges possession with intent to distribute marijuana within proximity of a school park” (and no reference to “purchase[ing]”) and the Sentencing Sheet specifies “PWID marijuana within proximity of a school.” Also, as previously noted, § 445 is unique in that if the sentence imposed was more than one year (as it was here), then the conviction must have been for PWID because the purchasing prong of the statute is carved out for a misdemeanor, punishable by up to one year in prison. Because the defendant’s sentence was ten years, he clearly pled guilty to the greater felony offense of PWID.

2. The November 6, 2002 (03-GS-32-00737) conviction for distribution of cocaine within proximity of a school and the November 6, 2002 conviction for possession with intent to distribute cocaine within proximity of a school (03-GS-32-00738) (both PSR ¶ 68).

Because the offense dates are the same, the Court concludes that these two offenses should be grouped into one. To qualify as a predicate offense, the ACCA requires that the offenses occur on “separate occasions.” In the first case (03-GS-32-0738), the defendant waived indictment, but the Sentencing Sheet indicates he received a four-year sentence, meaning the offense could not have been for the misdemeanor “purchase” prong of S.C. Code § 44-53-445(D)(2).

The same conclusion holds as to the second case (GS 2003-32-738). In that case, the indictment specifies distribution and the Sentencing Sheet specifies “As Indicted.” In addition, the defendant received a non-misdemeanor, four-year sentence for this conviction as well.

3. The December 14, 2006 conviction (07-GS-40-1298) for possession with intent to distribute cocaine (PSR ¶74). This conviction has already been reviewed with regard to the Career Offender enhancement and the same analysis would apply here. Additionally, even though the defendant received a sentence of five years, suspended upon eighteen months’ probation, the potential sentence under the statute of conviction (S.C. Code § 44-53-370) is fifteen years, well beyond the ten-year potential required by the ACCA.

### **C. Defendant’s Remaining Claims**

This Court’s resolution of the Career Offender and the ACCA aspects of the defendant’s sentence renders unnecessary a decision on the other claims he asserted in his response to the government’s original motion for summary judgment.

**V. CONCLUSION**

The Court has carefully reviewed the pleadings, files, and records in this case and has determined that the defendant is not entitled to relief, and that an evidentiary hearing is not necessary. For the foregoing reasons, the government's motion and amended motion for summary judgment (ECF Nos. 76, 92) are granted. The defendant's § 2255 petition is denied, and the defendant's sentence remains undisturbed.

The Court has reviewed this petition in accordance with Rule 11 of the Rules Governing Section 2255 Proceedings. In order for the Court to issue a certificate of appealability, Rule 11 requires that Petitioner satisfy the requirements of 28 U.S.C. § 2253(c)(2). The Court concludes that he has made the required showing. Accordingly, the Court will issue a certificate of appealability as to the issues raised in this petition.

IT IS SO ORDERED.

October 31, 2018  
Columbia, South Carolina

*Joseph F. Anderson, Jr.*  
Joseph F. Anderson, Jr.  
United States District Judge