

APPENDIX A

Barnett v. United States

United States Court of Appeals for the Sixth Circuit

December 12, 2019, Filed

Nos. 17-5977, 17-5978

Reporter

2019 U.S. App. LEXIS 36861 *

YERVIN KEITH BARNETT, Petitioner-Appellee, v. UNITED STATES OF AMERICA, Respondent-Appellant.UNITED STATES OF AMERICA, Plaintiff-Appellant v. YERVIN KEITH BARNETT, Defendant-Appellee.

[United States v. Barnett, 398 F.3d 516, 2005 U.S. App. LEXIS 2644 \(6th Cir.\) \(6th Cir. Tenn., Feb. 16, 2005\)](#)

Case Summary

Notice: NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

Overview

HOLDINGS: [1]-The court reversed the district court's order granting petitioner relief under [28 U.S.C.S. § 2255](#) from his enhanced sentence under the Armed Career Criminal Act (ACCA), [18 U.S.C.S. § 924\(e\)](#), because United States v. Nance was once against the law of the Sixth Circuit, and the court could not overrule Nance's holding that a Tennessee conviction for aggravated burglary was a violent felony for purposes of the ACCA; [2]-Petitioner's argument - that the "remaining in" variants of Tennessee's burglary statutes were broader than generic burglary because they did not contain an element of criminal intent at the time of entry - was also foreclosed by binding precedent.

Prior History: [*1] ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE.

Outcome

Judgment reversed and remanded, motion denied.

Criminal Law &
Procedure > ... > Sentencing
Guidelines > Adjustments &
Enhancements > Armed Career
Criminals

Criminal Law &
Procedure > ... > Burglary & Criminal
Trespass > Burglary > Elements

LexisNexis® Headnotes

Criminal Law &
Procedure > ... > Burglary & Criminal
Trespass > Burglary > Elements

Governments > Legislation > Overbreadth

HN1 [down] Burglary, Elements

Tennessee's aggravated burglary statute is not rendered overly broad by its coverage of mobile structures "designed or adapted for overnight use."

Criminal Law &
Procedure > ... > Appeals > Standards of
Review > De Novo Review

HN2 [down] Standards of Review, De Novo Review

An appellate court reviews a district court's legal rulings on a 28 U.S.C.S. § 2255 motion de novo.

HN3 [down] Adjustments & Enhancements, Armed Career Criminals

A defendant qualifies as an armed career criminal if he has three or more prior convictions for a serious drug offense or a violent felony, which is defined as one that has as an element the use, attempted use, or threatened use of physical force against the person of another (the use of force clause) or that is burglary, arson, or extortion, or involves use of explosives (the enumerated offense clause). 18 U.S.C.S. § 924(e)(2)(B). For a state burglary offense to qualify as a violent felony under the enumerated offense clause, its elements must be the same as, or narrower than, those of generic burglary, i.e., an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.

Criminal Law &
Procedure > ... > Sentencing
Guidelines > Adjustments &
Enhancements > Armed Career
Criminals

Governments > Courts > Judicial
Precedent

Criminal Law &

Procedure > ... > Burglary & Criminal Trespass > Burglary > Elements

HN4 [down] **Adjustments & Enhancements, Armed Career Criminals**

United States v. Nance, in which the U.S. Court of Appeals for the Sixth Circuit held that the Tennessee's aggravated burglary statute comported with the definition of generic burglary, is once again the law of the Sixth Circuit. A panel of the court cannot overrule Nance's holding that a Tennessee conviction for aggravated burglary is a violent felony for purposes of the Armed Career Criminal Act. That can only be done by an inconsistent decision of the Supreme Court or a decision of the en banc court.

Criminal Law &
Procedure > ... > Sentencing Guidelines > Adjustments & Enhancements > Armed Career Criminals

Governments > Courts > Judicial Precedent

Criminal Law &
Procedure > ... > Burglary & Criminal Trespass > Burglary > Elements

HN5 [down] **Adjustments & Enhancements, Armed Career Criminals**

The argument—that the "remaining in" variants of Tennessee's burglary statutes are broader than generic burglary for purposes of the Armed Career Criminal Act because they do not contain an element of criminal

intent at the time of entry—is foreclosed by binding U.S. Court of Appeals for the Sixth Circuit precedent.

Counsel: For Yervin Keith Barnett, Petitioner - Appellee (17-5977): Needum L. Germany III, Assistant Federal Public Defender, Federal Public Defender, Memphis, TN.

For United States of America, Respondent - Appellant (17-5977): Naya Bedini, Office of the U.S. Attorney, Memphis, TN.

For United States of America, Plaintiff - Appellant (17-5978): Naya Bedini, Office of the U.S. Attorney, Memphis, TN.

For Yervin Keith Barnett, Defendant - Appellee (17-5978): Needum L. Germany III, Assistant Federal Public Defender, Federal Public Defender, Memphis, TN.

Judges: Before: BOGGS, WHITE, and MURPHY, Circuit Judges.

Opinion

ORDER

The United States appeals a district court order granting relief under [28 U.S.C. § 2255](#)

to Yervin Keith Barnett from his enhanced sentence under the [Armed Career Criminal Act \("ACCA"\)](#), [18 U.S.C. § 924\(e\)](#) (No. 17-5977), and the amended judgment entered in the criminal case (No. 17-5978). The cases have been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See Fed. R. App. P. 34(a)*.

In 2003, a jury convicted Barnett of being a felon in possession of a firearm, in violation of [18 U.S.C. § 922\(g\)](#). The district court sentenced him [*2] under the ACCA to 265 months of imprisonment based on five convictions in Tennessee for aggravated burglary and one conviction for attempt to commit a felony. We affirmed Barnett's conviction but remanded for resentencing in light of [United States v. Booker](#), [543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 \(2005\)](#). [United States v. Barnett](#), [398 F.3d 516 \(6th Cir. 2005\)](#). On remand, the district court sentenced Barnett to 235 months of imprisonment. We affirmed. [United States v. Barnett](#), [184 F. App'x 531 \(6th Cir. 2006\)](#).

In 2010, Barnett filed his first [§ 2255](#) motion, which the district court denied. This court denied Barnett a certificate of appealability. [Barnett v. United States](#), No. 11-6098 (6th Cir. Mar. 26, 2012) (order). We also denied Barnett's first motion requesting authorization to file a second or successive [§ 2255](#) motion. [In re Barnett](#), No. 12-6039 (6th Cir. Mar. 20, 2013) (order).

In 2017, we granted Barnett permission to file a second or successive [§ 2255](#) motion challenging his armed career criminal

designation based on [Johnson v. United States](#), [135 S. Ct. 2551, 192 L. Ed. 2d 569 \(2015\)](#), on the ground that his prior Tennessee aggravated burglary convictions no longer qualified as violent felonies for purposes of the ACCA. [In re Barnett](#), No. 15-6378 (6th Cir. July 27, 2017) (order).

Thereafter, Barnett filed his second [§ 2255](#) motion, noting that this court's en banc decision in [United States v. Stitt](#), [860 F.3d 854, 858 \(6th Cir. 2017\)](#) ("*Stitt I*"), had overruled prior circuit precedent and held that a conviction [*3] under Tennessee's aggravated burglary statute did not qualify as an ACCA predicate because the statute swept more broadly than generic burglary by including habitable vehicles and movable enclosures. The district court granted Barnett's [§ 2255](#) motion based on *Stitt I*. The district court then vacated Barnett's sentence and resentenced him to time served.

The government appealed, and briefing was held in abeyance pending the Supreme Court's decision on the government's petition for a writ of certiorari in *Stitt I*. The Supreme Court eventually granted the petition and reversed this court's decision, holding that [HNI](#) [↑] Tennessee's aggravated burglary statute was not rendered overly broad by its coverage of mobile structures "designed or adapted for overnight use." [United States v. Stitt](#), [139 S. Ct. 399, 407, 202 L. Ed. 2d 364 \(2018\)](#) ("*Stitt II*"). The government argues that, in light of the Supreme Court's decision in *Stitt II*, Barnett is no longer entitled to relief from his ACCA sentence, so the district court's judgment should be reversed and the

case remanded for reinstatement of his original sentence. Barnett contends that his aggravated burglary convictions still should not count as ACCA predicates because a defendant can be convicted of Tennessee aggravated burglary [*4] based on "attempted burglary." He argues that the "entry" element of Tennessee's burglary statutes has been defined by the Tennessee courts more broadly than the entry element of generic burglary. In addition, Barnett argues that Tennessee's aggravated burglary statute is overly broad because it does not require the perpetrator to have the intent to commit a crime at the time of entry. He contends that the government has failed to meet its burden of establishing that he committed generic burglary. Finally, he moves to file a supplemental brief.

HN2[⁵] We review a district court's legal rulings on a § 2255 motion de novo. *See Davis v. United States*, 900 F.3d 733, 735 (6th Cir. 2018), cert. denied, 139 S. Ct. 1374, 203 L. Ed. 2d 612 (2019).

The parties dispute whether Barnett qualifies as an armed career criminal based on his prior Tennessee convictions for aggravated burglary. **HN3**[⁶] A defendant qualifies as an armed career criminal if he has three or more prior convictions for a serious drug offense or a violent felony, which is defined as one that "has as an element the use, attempted use, or threatened use of physical force against the person of another" (the use of force clause) or that "is burglary, arson, or extortion, [or] involves use of explosives" (the enumerated offense clause). 18 U.S.C. § 924(e)(2)(B); *see Johnson*, 135 S. Ct. at 2563

(invalidating [*5] this provision's third clause, known as the residual clause, as unconstitutionally vague). For a state burglary offense to qualify as a violent felony under the enumerated offense clause, its elements must be the same as, or narrower than, those of generic burglary, i.e., "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." Taylor v. United States, 495 U.S. 575, 598, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990); *see Mathis v. United States*, 136 S. Ct. 2243, 2248, 195 L. Ed. 2d 604 (2016).

Barnett argues that his aggravated burglary conviction should not count as an ACCA predicate because the Tennessee courts define the entry element of the state's burglary statutes more broadly than generic burglary by including intrusions by instrument that are the functional equivalent of attempted burglary. However, we recently concluded that **HN4**[⁷] United States v. Nance, 481 F.3d 882, 888 (6th Cir. 2007), in which we held that the Tennessee's aggravated burglary statute comported with the definition of generic burglary, "is once again the law of this circuit." Brumbach v. United States, 929 F.3d 791, 794 (6th Cir. 2019). Accordingly, even if there were merit to Barnett's argument, a panel of this court cannot overrule *Nance*'s holding that a Tennessee conviction for aggravated burglary is a violent felony for purposes of the ACCA. *See id.* (declining to consider the same argument in light of *Nance*). That "can [*6] only be done by an 'inconsistent decision' of the Supreme Court or, like we did briefly

with *Stitt I*, a decision of the en banc court." *Id.* (citing *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985)).

HN5[] Barnett's second argument—that the "remaining in" variants of Tennessee's burglary statutes are broader than generic burglary because they do not contain an element of criminal intent at the time of entry—is also foreclosed by binding precedent. *See United States v. Ferguson*, 868 F.3d 514, 515 (6th Cir. 2017) (citing *United States v. Priddy*, 808 F.3d 676, 684-85 (6th Cir. 2015)); *see also Quarles v. United States*, 139 S. Ct. 1872, 1880, 204 L. Ed. 2d 200 (2019).

Accordingly, we **REVERSE** the district court's grant of § 2255 relief and **REMAND** with instructions to reinstate the original sentence. Burnett's motion to file a supplemental brief is **DENIED**.

Session v. United States

United States Court of Appeals for the Sixth Circuit

January 30, 2020, Decided

17-5955/6323) 17-5957)

Reporter

2020 U.S. App. LEXIS 3067 *

VERLON SESSION, Petitioner-Appellee, v.
UNITED STATES OF AMERICA,
Respondent-Appellant. UNITED STATES
OF AMERICA, Plaintiff-Appellant, v.
VERLON SESSION, Defendant-Appellee.

Notice: Decision text below is the first available text from the court; it has not been editorially reviewed by LexisNexis. Publisher's editorial review, including Headnotes, Case Summary, *Shepard's* analysis or any amendments will be added in accordance with LexisNexis editorial guidelines.

Before: SILER, ROGERS, and LARSEN,
Circuit Judges.

In these consolidated cases, the government appeals a district court order granting relief under [28 U.S.C. § 2255](#) to Verlon Sesson from his sentence enhancement under the Armed Career

Criminal Act ("ACCA") (No. **17-5955**), the amended judgment entered in the criminal case (No.

17-5957), and the subsequent judgment entered by the district court in the [§ 2255](#) proceeding (No.

Nos. **17-5955/5957/6323**

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17-6323). The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See Fed. R. App. P.* 34(a).

In 2013, Sesson pleaded guilty to being a felon in possession of a firearm, in violation of [18 U.S.C. § 922\(g\)](#). The presentence report designated Sesson an armed career criminal based on three prior "violent felon[ies]," [18 U.S.C. § 924\(e\)\(1\)](#): a

Opinion

[*1] ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
TENNESSEE

ORDER

conviction for Tennessee first-degree burglary, a conviction for Tennessee aggravated burglary, and a conviction for Tennessee robbery.

The district court adopted the presentence report's ACCA designation and sentenced Sesson to

180 months of imprisonment, to be followed by two years of supervised [*2] release. We affirmed.

United States v. Sesson, 574 F. App'x 607 (6th Cir. 2014) (per curiam).

In 2016, Sesson filed a [§ 2255](#) motion, challenging his ACCA designation under *Johnson v. United States*, 135 S. Ct. 2551 (2015), on the ground that his Tennessee aggravated burglary conviction no longer qualified as a violent felony for purposes of the ACCA. While that [§ 2255](#) motion was pending, we overruled circuit precedent, *see United States v. Nance*, 481 F.3d 882 (6th Cir. 2007), and held that a conviction under Tennessee's aggravated burglary statute did not qualify as an ACCA predicate because the statute swept more broadly than "generic" burglary by including habitable vehicles and movable enclosures. *United States v. Stitt*, 860 F.3d 854, 858

(6th Cir. 2017) (en banc) ("*Stitt I*"), *rev'd*, *United States v. Stitt*, 139 S. Ct. 399 (2018) ("*Stitt II*"). Based on our decision in *Stitt I*, the district court granted Sesson's [§ 2255](#) motion and resentenced him to time served and the same two-year period of supervised release.

After the district court entered its order and

judgments, the Supreme Court reversed our *Stitt I* decision in *Stitt II*. On appeal, the government argues that Sesson is no longer entitled to relief from his ACCA designation in light of *Stitt II*. In response, Sesson argues that this court lacks jurisdiction over No. 17-6323 because the government's notice of appeal was untimely. On the merits of the government's appeals, Sesson does not dispute [*3] that he is no longer entitled to relief under *Stitt I*, but argues that his Tennessee convictions for simple and aggravated burglary do not qualify as ACCA predicate offenses on alternative grounds. Sesson has also filed a motion for leave to file a supplemental brief challenging his [§ 922\(g\)](#) conviction under *Rehaif v. United States*, 139 S. Ct. 2191 (2019).

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As a threshold matter, Sesson's jurisdictional arguments lack merit. Sesson first argues that we lack jurisdiction over Case No. **17-5955** because the government appealed the order granting Sesson's [§ 2255](#) motion rather than the civil judgment. He also argues that there is no jurisdiction over Case No. 17-6323, as the government appealed the civil [§ 2255](#) judgment out of time. We need not address these arguments, however, as the government has timely appealed

Sesson's amended criminal judgment (Case No. 17-5957), which serves as the final judgment in an appeal under [§ 2255](#). *See Andrews v. United States*, 373 U.S. 334

(1963); *United States v. Hadden*, 475 F.3d 652, 663 (4th Cir. 2007). Accordingly, the government's appeal is properly before the court.

"Whether an ACCA predicate crime qualifies as a violent felony . . . is a legal question that we review *de novo*." See *Davis v. United States*, 900 F.3d 733, 735 (6th Cir. 2018), cert. denied, 139 S. Ct. 1374 (2019).

A defendant qualifies as an armed career criminal if he has three or more prior convictions for, as relevant [*4] here, a "violent felony." *18 U.S.C. § 924(e)(1)*. A burglary is a "violent felony" under ACCA. *18 U.S.C. § 924(e)(2)(B)*. For a state burglary offense to qualify as burglary under ACCA, the state offense's elements must be the same as, or narrower than, those of "generic" burglary, that is, "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor v. United States*, 495 U.S. 575, 598 (1990); see *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016).

Tennessee law defines aggravated burglary as "burglary of a habitation." Tenn. Code Ann.

§ 39-14-403(a). Burglary, in turn, is defined as "enter[ing]" or "remain[ing] . . . in" a building or vehicle without the owner's consent and "with the intent to commit a felony." Tenn. Code Ann.

§ 39-14-402(a). Session first argues that his Tennessee convictions for simple and aggravated burglary no longer qualify as ACCA predicate offenses because the

Tennessee courts define the "entry" element of the state's burglary statutes more broadly than generic burglary. But, prior to

Stitt I, we had held that Tennessee's aggravated burglary statute comported with the definition of generic burglary. *Nance, 481 F.3d at 888*. As we recently held, *Nance* "is once again the law of this circuit." *Brumbach v. United States*, 929 F.3d 791, 794 (6th Cir. 2019). Accordingly, even if

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there were merit to Session's argument, a panel of this [*5] court cannot overrule *Nance*'s holding that a Tennessee conviction for aggravated burglary is a violent felony for purposes of the ACCA. *See id.* Rather, that "can only be done by an 'inconsistent decision' of the Supreme Court or, as we did briefly with *Stitt I*, a decision of the en banc court." *Id. at 795* (quoting *Salmi v. Sec'y of Health*

& *Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985)).

Session also argues that the "remaining in" variants of Tennessee's burglary statutes are broader than generic burglary. But that argument, too, is foreclosed by binding precedent. See *United States v. Ferguson*, 868 F.3d 514, 515 (6th Cir. 2017) (citing *United States v. Priddy*, 808 F.3d 676, 684-85 (6th Cir. 2015)); see also *Quarles v. United States*, 139 S. Ct. 1872, 1880 (2019).

For these reasons, we **REVERSE** the district court's grant of § 2255 relief and **REMAND** with instructions to reinstate the original sentence. The motion for leave to file a supplemental brief is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

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