Appendix

18-1619
United States v. Jones

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 16th day of September, two thousand nineteen.

PRESENT:
ROBERT A. KATZMANN,
Chief Judge,
JOHN M. WALKER, JR.,
MICHAEL H. PARK,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v. No. 18-1619

COREY JONES,

Defendant-Appellant.

For Defendant-Appellant: MATTHEW B. LARSEN, Federal Public Defender's Office, New York, NY.

For Appellee: AMY BUSA, Margaret Lee (on the brief) Assistant United States Attorneys, *for* Richard P. Donoghue, United States Attorney for the Eastern District of New York, Brooklyn, NY.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Garaufis, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Corey Jones appeals from a sentence entered in the United States District Court for the Eastern District of New York (Garaufis, *J.*) following a jury trial conviction for assaulting a federal officer in violation of 18 U.S.C. § 111. The district court sentenced him as a career offender principally to 180 months of imprisonment, a significant departure from Jones's Guidelines range of 210 months to 240 months.

The convoluted procedural history of this case is covered in detail in *United States v. Jones*, 878 F.3d 10 (2d Cir. 2017), in which we affirmed Jones's sentence on two bases: first, in light of *Beckles v. United States*, 137 S. Ct. 886 (2017), we held that "first-degree robbery as defined in New York is categorically a crime of violence under the residual clause," *Jones*, 878 F.3d at 14, and, second, we found that Jones's sentence was substantively reasonable, *id.* at 19-20. Nevertheless, we remanded the case "for further consideration as may be just under the circumstances." *Id.* at 20; *see id.* (Calabresi, *J.*, joined by Hall, *J.*, concurring) ("[The] result, while mandated by the law, seems to me to be highly unjust, and little short of absurd."); 28 U.S.C. § 2106 (An appellate court "may remand the cause" to "require such further proceedings to be had as may be just under the circumstances."). It was implicit in the mandate that the case would be remanded to the same district judge. *Cf. United States v. Robin*, 553 F.2d 8, 9 n.1 (2d Cir. 1977) ("Throughout the Second Circuit resentencing, in the absence of directions to the contrary by this court, is usually conducted upon remand by the same judge.").

On May 25, 2018, following submissions from Jones and the government "as to how the [district] court should proceed in this case," Appellant's App'x at 85, the district court denied

Jones's application for a resentencing hearing and reaffirmed his sentence. *Id.* at 97. The district court, "taking into account all of the evidence adduced at [Jones's] trial, the contents of the Presentence Report, [Jones's] criminal history, [Jones's] lack of remorse . . . , and the submissions of counsel," concluded "that the sentence that was imposed on [Jones] was the appropriate sentence." *Id.* at 96-97. Having already held that Jones's sentence is "mandated by the law," *Jones*, 878 F.3d at 20 (Calabresi, *J.*, concurring), we once again, affirm.

We did not remand this case for resentencing. *Compare id.* (majority opinion) ("[W]e AFFIRM the sentence imposed by the district court and REMAND for further consideration as may be just under the circumstances."), *with United States v. Malki*, 609 F.3d 503, 512 (2d Cir. 2010) ("The case is remanded for resentencing . . . ."). Thus, this Circuit's precedents concerning mandates where "we *overturn* a sentence" are inapposite. *United States v. Malki*, 718 F.3d 178, 182 (2d Cir. 2013) (emphasis added). "To determine whether an issue remains open for reconsideration on remand, the trial court should look to both the specific dictates of the remand order as well as the broader spirit of the mandate." *United States v. Ben Zvi*, 242 F.3d 89, 95 (2d Cir. 2001) (internal quotation marks omitted).

Given the lack of "specific dictates of the remand order" in this case, we must examine "the broader spirit of the mandate." *Id.* We did not vacate Jones's conviction. Nor did we—or could we—identify any sentencing error. Rather, we remanded pursuant to 28 U.S.C. § 2106, which "permits affirmances and remands for further proceedings in the interest of justice," and which the concurrence noted "may permit the district court to reconsider the sentence imposed." *Jones, 878* F.3d at 24 n.6 (Calabresi, *J.*, concurring).[1] The spirit of the mandate *permitted* the district court to "reconsider" Jones's sentence.

[1] The concurrence pointed to *United States v. Algahaim*, 842 F.3d 796 (2d Cir. 2016), as an example of a case where we affirmed a sentence but remanded for further consideration of that sentence. Upon remand, following written submissions by the parties, the district court (McAvoy,

Jones argues that the district court did not comply with our mandate to "further consider[]," *id.* at 20 (majority opinion), the case in the interests of justice. He argues that the district court did not comply with the "spirit of the mandate" because it denied Jones's application for a resentencing hearing without briefing on the issue. He asks us to remand the case to a different district judge. We decline to do so.

Contrary to Jones's assertion, the district court did not "do nothing" on remand. Appellant's Br. at 20. The district court ordered Jones and the government to submit respective "proposals regarding how the [district] court should proceed" in light of our remand. Appellant's App'x at 96. In his proposal, Jones made substantive arguments to the district court regarding resentencing. Similarly, the government's proposal made substantive points. Granted, Jones's proposal was a preview of arguments he planned to "set out in detail" in a later submission and was not intended as a final submission to support a motion for resentencing. Appellant's App'x 87 n.1. Nevertheless, the district court accepted and "consider[ed]," *Jones*, 878 F.3d at 20, the parties' submissions. Indeed, in reaffirming Jones's sentence, the district court expressly stated it had taken the "submissions of counsel" into account, Appellant's App'x at 97, and we have no reason to doubt that it did.

Accordingly, for the foregoing reasons, the judgment of the district court is **AFFIRMED**.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK

J.) reaffirmed its original sentence. *United States v. Murshed et al.*, No. 13-CR-489 (N.D.N.Y. Apr. 26, 2017), ECF No. 205. No appeal followed.

D/F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

UNITED STATES OF AMERICA,

-against-

ORDER

13-CR-438 (NGG)

COREY JONES,

Defendant.
----------X

NICHOLAS G. GARAUFIS, United States District Judge.

Before the court is Defendant Corey Jones's application to have the Government produce Defendant in this district. (Def. Letter to Produce Def. (Dkt. 58).) The application is DENIED WITHOUT PREJUDICE. Defense counsel may consult with his client either by telephone or by visiting the facility in which he is designated.

Additionally, the court ORDERS the parties to submit proposals, by no later than April 26, 2018, as to how the court should proceed in this case, taking into account the Second Circuit's affirmance of the judgment of this court and its direction that the court give "further consideration as may be just under the circumstances." (Mandate (Dkt. 56).) See also United States v. Jones, 878 F.3d 10, 24 (2d Cir. 2017) (Calabresi, J., concurring) ("I believe our affirmance is correct, and that we can do no other. I hope, however, that somewhere, somehow, there exists a means of determining what would, in fact, be an appropriate sentence for Jones.").

SO ORDERED.

s/Nicholas G. Garaufis

Dated: Brooklyn, New York
March 27, 2018

NICHOLAS G. GARAUFIS
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

UNITED STATES OF AMERICA,

-against-

COREY JONES,

Defendant.
----------X

ORDER

13-CR-438 (NGG)

NICHOLAS G. GARAUFIS, United States District Judge.

Before the court is Defendant Corey Jones's application to have the court order submissions from the parties and schedule a hearing to decide whether to resentence Defendant. (Def. Letter (Dkt. 61).) The application is DENIED.

In June 2013, Defendant was living in a halfway house, where he was completing a 92-month federal sentence for unlawful gun possession. See United States v. Jones, 878 F.3d 10, 13 (2d Cir. 2017) ("Jones II"). He threatened a staff member and was remanded to the custody of the Bureau of Prisons. Id. When deputy U.S. Marshals arrived to take him into custody, Defendant became aggressive and, while physically resisting arrest, bit one of the Marshals. Id. He was subsequently charged with, and convicted by a jury of, assaulting a federal officer in violation of 18 U.S.C. §§ 111(a)(1) and (b). Id.

This court sentenced Defendant on April 24, 2015. (Apr. 24, 2015, Min. Entry (Dkt. 52).) The U.S. Sentencing Guidelines provided then, as now, that a defendant was subject to a significant sentencing enhancement as a "career offender" if "(1) [he] was at least eighteen years old at the time [he] committed the instant offense of conviction; (2) the instant offense of conviction [was] a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant ha[d] at least two prior felony convictions of either a crime of violence or a controlled substance offense." U.S.S.G. § 4B1.1(a) (2014). At the time, the Guidelines defined

"crime of violence" to mean "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." U.S.S.G. § 4B1.2(a) (2014) (emphasis added). For ease of reference, the court refers to the first clause as the "Guidelines force clause" and the emphasized portion of the second clause as the "Guidelines residual clause."

Defendant argued that he did not qualify for a career-offender enhancement under the Guidelines because, first, his offense of conviction did not require the use of "violent" physical force, see Johnson v. United States, 559 U.S. 133, 139-43 (2010) ("Curtis Johnson") (interpreting analogous language in the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(i)); and second, under New York law, his prior conviction for first-degree robbery qualified as a "youthful offender adjudication," not a felony conviction. (Def. Sentencing Mem. (Dkt. 46); Def. Sentencing Reply (Dkt. 48).) Defendant did not argue, however, that New York first-degree robbery was categorically not a "crime of violence" under the Guidelines. The court rejected Defendant's contentions, found that he qualified as a career offender under the Guidelines, and thus calculated his applicable Guidelines sentencing range as 210 to 240 months' imprisonment. (Mem. & Order (Dkt. 50).) The court ultimately imposed a below-Guidelines sentence of 180 months' imprisonment and three years of supervised release. (J. (Dkt. 53).)

Shortly thereafter, the Supreme Court invalidated the ACCA's residual clause—which, for purposes of that statute, defined "violent felony" to mean a felony that "otherwise involves conduct that presents a serious risk of physical injury to another," 18 U.S.C. § 924(e)(2)(B)(ii)—

as unconstitutionally vague. Johnson v. United States, 135 S. Ct. 2551 (2015) ("Samuel Johnson").

On appeal, Defendant challenged his sentence on two grounds. First, Defendant argued that he should not have received a career-offender enhancement because his prior New York first-degree robbery conviction was not a "crime of violence" under the Guidelines. Br. for Appellant, Jones II, 878 F.3d 10 (2d Cir. 2017) (No. 15-1518), 2015 WL 6575789. In his view, New York first-degree robbery does not categorically require "violent" force, so it could not be a crime of violence under the Guidelines force clause. Id. at *17-24. Nor could it constitute a crime of violence under the Guidelines residual clause, which, he argued—and the Government conceded—was void in light of the Supreme Court's invalidation of the ACCA's residual clause in Samuel Johnson. Id. at *24. Second, Defendant also argued that his sentence was substantively unreasonable. Id. at *29-45. Meanwhile, the U.S. Sentencing Commission deleted the residual clause from Guideline § 4B1.2, effective August 1, 2016. U.S. Sentencing Comm'n, Amendments to the Sentencing Guidelines 4-5 (Jan. 21, 2016), https://www.ussc.gov/sites/default/files/pdf/amendment-process/official-textamendments/20160121_Amendments_0.pdf.

After oral argument in Defendant's appeal, on July 21, 2016, the Second Circuit issued an opinion holding that New York first-degree robbery was not a categorical crime of violence under the Guidelines force clause, and it remanded the case for further proceedings. United States v. Jones, 830 F.3d 142 (2d Cir. 2016) ("Jones I"), vacated, 878 F.3d 10 (2d Cir. 2017). The Second Circuit explained that, without the residual clause, there was no basis for the career-offender designation. Id. On September 13, 2016, the Government filed a petition for rehearing, and on October 3, 2016, the Second Circuit vacated its prior opinion and held the appeal in

abeyance "pending the Supreme Court's disposition in Beckles v. United States, No. 15-8544." Order, Jones II, 878 F.3d 10 (No. 15-1518), ECF No. 110. On March 6, 2017, the Supreme Court decided Beckles v. United States, 137 S. Ct. 886 (2017), holding that the residual clause of the Career Offender Guideline was not unconstitutionally void for vagueness. Thereafter, the Second Circuit affirmed Defendant's sentence, holding that (1) because the residual clause of the Career Offender Guideline was not void for vagueness, New York first-degree robbery qualified as a crime of violence under the residual clause, see Jones II, 878 F.3d 10, 14 (2d Cir. 2017); and (2) Defendant's sentence was substantively reasonable, see id. at 19-20.

Despite affirming Defendant's sentence, however, the Second Circuit remanded the matter to this court for "further consideration as may be just under the circumstances." (Mandate (Dkt. 56).) See also Jones II, 878 F.3d at 24 (Calabresi, J., concurring) ("I believe our affirmance is correct, and that we can do no other. I hope, however, that somewhere, somehow, there exists a means of determining what would, in fact, be an appropriate sentence for Jones."). Out of respect for the concerns articulated in the concurrence, the court has now revisited the matter.

On March 27, 2018, the court ordered the parties to submit proposals regarding how the court should proceed, taking into account the Second Circuit's affirmance of Defendant's sentence and its remand for further consideration. (March 27, 2018, Order (Dkt. 59).) On April 26, 2018, the Government and Defendant submitted their respective proposals. (Gov't Letter (Dkt. 60); Def. Letter.)

In his concurrence, Judge Calabresi stated that he wished to ask the district court: "[W]hat is the sentence that you deem appropriate in this case?" Jones II, 878 F.3d at 24 (Calabresi, J., concurring). Respectfully, and upon further reflection—taking into account all of

the evidence adduced at the trial, the contents of the Presentence Report, Defendant's criminal history, Defendant's lack of remorse (as evidenced by his documented conduct at the time of sentencing, Tr. of Sentencing Hr'g at 42:9-20, Jones II, 878 F.3d 10 (No. 15-1518), ECF No. 25), and the submissions of counsel—this court concludes that the sentence that was imposed on Defendant was the appropriate sentence.

Thus, the court will not resentence Defendant. Accordingly, the court need not order additional submissions from the parties or conduct further proceedings in this matter.

SO ORDERED.

/s Nicholas G. Garaufis
NICHOLAS G. GARAUFIS
United States District Judge

Dated: Brooklyn, New York
May 25, 2018

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 19th day of December, two thousand nineteen.

United States of America,

Appellee,

v.

Corey Jones,

Defendant - Appellant.

ORDER

Docket No: 18-1619

Appellant, Corey Jones, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk