

FILED: March 16, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7559
(5:12-cr-00336-BO-1)
(5:16-cv-00338-BO)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

XAVIER DESHAWN LYMAS

Defendant - Appellant

JUDGMENT

In accordance with the decision of this court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNPUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 19-7559

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

XAVIER DESHAWN LYMAS,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Terrence W. Boyle, Chief District Judge. (5:12-cr-00336-BO-1; 5:16-cv-00338-BO)

Submitted: March 10, 2020

Decided: March 16, 2020

Before NIEMEYER and AGEE, Circuit Judges, and SHEDD, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Xavier Deshawn Lymas, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Xavier Deshawn Lymas seeks to appeal the district court's order denying relief on his 28 U.S.C. § 2255 (2018) motion. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(B) (2018). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2018). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *See Buck v. Davis*, 137 S. Ct. 759, 773-74 (2017). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the motion states a debatable claim of the denial of a constitutional right. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We have independently reviewed the record and conclude that Lymas has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. 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.

DISMISSED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:12-CR-336-1-BO
No. 5:16-CV-338-BO

XAVIER DESHAWN LYMAS,)
Petitioner,)
)
v.)
)
UNITED STATES OF AMERICA,)
Respondent.)

ORDER

This cause comes before the Court on petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. [DE 221]. The stay previously entered in this matter has been lifted, and petitioner and respondent have been permitted to file supplemental briefing. For the reasons that follow, petitioner's § 2255 motion is DENIED.

BACKGROUND

Petitioner, Lymas, is currently serving a sentence of 123 months' imprisonment after pleading guilty to counts one and three of an eight-count indictment charging Lymas and others with robbery and firearm offenses. Lymas pleaded guilty to conspiracy to rob businesses engaged in interstate commerce (count one), 18 U.S.C. § 1951(b); and using and carrying a firearm during and in relation to a crime of violence and aiding and abetting (count three), 18 U.S.C. §§ 924(c)(1)(A) and 2. Lymas was sentenced to sixty-three months' imprisonment on count one and sixty months' imprisonment on count three, to be served consecutively. [DE 197].

Lymas filed a motion pursuant to 28 U.S.C. § 2255 arguing that his 18 U.S.C. § 924(c) conviction is unconstitutional in light of the Supreme Court's holding in *Johnson v. United States*, 135 S. Ct. 2551 (2015). In *Johnson*, the Supreme Court held that the residual clause of the Armed Career Criminal Act's definition of a crime of violence is unconstitutionally vague. *Id.* at 2563; 18 U.S.C. § 924(e)(2).

§ 924(c)(3) is now invalid, *Davis*, 139 S. Ct. at 2336, Hobbs Act robbery remains a crime of 18 U.S.C. § 924(c)(3)(A)-(B). Although, like the ACCA's residual clause, the residual clause of § 924(c)(3) is now invalid, *Davis*, 139 S. Ct. at 2336, Hobbs Act robbery remains a crime of [the residual clause].

person or property of another may be used in the course of committing the offense (B) that by its nature, involves a substantial risk that physical force against the person or property of another [the force clause], or (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another [the force clause], or

Section 924(c) defines a crime of violence as a felony offense that

robbery (Hobbs Act robbery) charge in count two. [DE 1].

Lyman's conviction under 18 U.S.C. § 924(c) in count three is his interference with commerce by of any such crime, possesses a firearm . . .” 18 U.S.C. § 924(c)(1)(A). The predicate offense for may be prosecuted in a court of the United States, uses or carries a firearm or who, in furtherance during and in relation to any crime of violence or drug trafficking crime . . . for which the person Pursuant to 18 U.S.C. § 924(c), a defendant shall be subject to a consecutive sentence if the

sentence authorized by law, or that it is otherwise subject to collateral attack. 28 U.S.C. § 2255(a). was without jurisdiction to impose the sentence, that the sentence was in excess of the maximum sentence was imposed in violation of the Constitution or laws of the United States, that the court A motion under 28 U.S.C. § 2255 will be granted where the petitioner has shown that his

DISCUSSION

additional briefing. In this posture, the § 2255 motion is ripe for adjudication. Circuit's mandate in *Simms*, this Court *sua sponte* lifted the stay in this matter and ordered v. *Davis*, 139 S. Ct. 2319 (2019). Following the Supreme Court's decision in *Davis* and the Fourth 24, 2019, the mandate in *Simms* was stayed to await the Supreme Court's decision in United States v. *Simms*, 914 F.3d 229 (4th Cir. 2019). Although *Simms* was decided on January decisions by the Fourth Circuit in United States v. *Walker*, 934 F.3d 375 (4th Cir. 2019), and Upon a motion by the government, the case was stayed on March 3, 2017, to await

violence under the force clause of § 924(c)(3)(A). *United States v. Mathis*, 932 F.3d 242, 266 (4th Cir. 2019). That the Hobbs Act robbery charge in count two supporting Lymas' § 924(c) conviction was dismissed is of no import. *See United States v. Carter*, 300 F.3d 415, 425 (4th Cir. 2002); *United States v. Link*, 214 F. Supp. 3d 506, 518 (E.D. Va. 2016). Accordingly, Lymas' § 924(c) conviction stands as he has a proper crime of violence predicate to support the conviction.

Certificate of Appealability

A certificate of appealability shall not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner satisfies this standard by demonstrating that reasonable jurists would find that an assessment of the constitutional claims is debatable and that any dispositive procedural ruling dismissing such claims is likewise debatable. *Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Rose v. Lee*, 252 F.3d 676, 683 (4th Cir. 2001). As reasonable jurists would not find this Court's denial of petitioner's § 2255 motion debatable, a certificate of appealability is DENIED.

CONCLUSION

Accordingly, for the foregoing reasons, petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 [DE 221] is DENIED. A certificate of appealability is DENIED.

SO ORDERED, this 25 day of September, 2019.


TERRENCE W. BOYLE
CHIEF UNITED STATES DISTRICT JUDGE