United States Court of Appeals
For the Eighth Circuit

No. 18-3757

Daniel L. Lopez

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from United States District Court
for the Southern District of Iowa - Davenport

Submitted: December 9, 2019
Filed: March 30, 2020
[Unpublished]

Before SMITH, Chief Judge, LOKEN and GRASZ, Circuit Judges.

PER CURIAM.

Daniel Lopez pleaded guilty to drug and firearm offenses in 1997 and was sentenced as a career offender to 360 months in prison. See USSG § 4B1.1. Lopez appealed and we affirmed. United States v. Lopez, No. 97-2439, 1998 WL 279357 (8th Cir. June 2, 1998). In June 2016, he moved to correct his sentence under 28 U.S.C. § 2255 based on Johnson v. United States, 135 S. Ct. 2551 (2015). Lopez

appeals the district court's[1] denial of the motion as untimely, an issue we review *de novo*. E.J.R.E. v. United States, 453 F.3d 1094, 1097 (8th Cir. 2006).

A § 2255 motion is timely if brought within one year of the date on which the judgment of conviction becomes final. § 2255(f)(1). But if the movant asserts a right "newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review," the one-year period runs from "the date on which the right asserted was initially recognized by the Supreme Court." § 2255(f)(3).

In Johnson, the Supreme Court invalidated the residual clause of the Armed Career Criminal Act as unconstitutionally vague. 135 S. Ct. at 2556-57, 2563. Lopez filed his § 2255 motion within one year of Johnson. The Court made Johnson retroactive to cases on collateral review in Welch v. United States, 136 S. Ct. 1257, 1265, 1268 (2016). But in Beckles v. United States, 137 S. Ct. 886, 892, 895 (2017), the Court held that the parallel residual clause in the career offender provisions of the advisory guidelines was not unconstitutionally vague. In a concurring opinion, Justice Sotomayor said it should be considered an open question whether the career offender residual clause in the *mandatory* guidelines is susceptible to a vagueness challenge under Johnson. Id. at 903 n.4 (Sotomayor, J., concurring in the judgment). Lopez was sentenced before the Sentencing Guidelines were made advisory in United States v. Booker, 543 U.S. 220, 246 (2005). Based on this distinction, he argues that he is entitled to relief because Johnson effectively invalidated the career offender provision under which he was sentenced, and therefore his motion to correct his sentence was timely-filed under § 2255(f)(3).

This argument is foreclosed by our recent decision in Russo v. United States, 902 F.3d 880 (8th Cir. 2018), cert. denied, 139 S. Ct. 1297 (2019). In Russo, we held

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[1]The Honorable Charles R. Wolle, United States District Judge for the Southern District of Iowa.

that the right Lopez asserts -- "a right under the Due Process Clause to be sentenced without reference to the residual clause of § 4B1.2(a)(2) under the mandatory guidelines" -- is "not dictated by Johnson." Id. at 882-83. As Johnson left open and debatable whether its vagueness analysis applies to the career offender provisions of the mandatory guidelines, Lopez is not asserting a right newly recognized and made retroactive by the Supreme Court and therefore cannot benefit from the limitations period in § 2255(f)(3). We have since affirmed denials of other § 2255 motions as untimely under Russo. See Peden v. United States, 914 F.3d 1151 (8th Cir. 2019); Mora-Higuera v. United States, 914 F.3d 1152 (8th Cir. 2019).

Lopez argues that Russo was wrongly decided and urges us to follow contrary decisions of the Seventh Circuit. See D'Antoni v. United States, 916 F.3d 658 (7th Cir. 2019); Cross v. United States, 892 F.3d 288 (7th Cir. 2018). Russo expressly acknowledged the Seventh Circuit's contrary view and explained why its reasoning was not persuasive. Russo, 902 F.3d at 883-84. Even if we disagreed with Russo, we are not free to avoid its clear holding. "It is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel." Owsley v. Luebbers, 281 F.3d 687, 690 (8th Cir. 2002), cert. denied, 534 U.S. 1121 (2002). Lopez may of course argue that Russo was wrongly decided in a petition for rehearing en banc to our court, or in a petition to the Supreme Court for a writ of certiorari to resolve a conflict in the circuits. See United States v. London, 937 F.3d 502, 508 (5th Cir. 2019), cert. denied, --- S. Ct. --- (2020) (collecting cases).

The judgment of the district court is affirmed.

APPENDIX B - Court of Appeals Order Denying Rehearing

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-3757

Daniel L. Lopez

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the Southern District of Iowa - Davenport
(4:16-cv-00371-CRW)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Kelly did not participate in the consideration or decision of this matter.

May 11, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

DANIEL LENE LOPEZ, Movant, v. UNITED STATES OF AMERICA, Respondent.	No. 4:16-cv-00371-CRW Crim. No. 4:96-cr-00121-CRW **ORDER**

Daniel Lene Lopez filed this Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255, challenging his sentence in *United States v. Lopez*, 4:96-cr-000121-CRW (S.D. Iowa) ("Crim. Case"). Lopez asserts he is entitled to relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015). The issues have been briefed by the parties, and the matter is now ready for ruling.

I. STANDARD OF REVIEW

A federal inmate may file a motion under 28 U.S.C. § 2255 for release "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, ..." 28 U.S.C. § 2255(a).

A movant "is entitled to an evidentiary hearing on a section 2255 motion unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." *Voytik v. United States*, 778 F.2d 1306, 1308 (8th Cir. 1985) (citing 28 U.S.C. § 2255); *see also Franco v. United States*, 762 F.3d 761, 763 (8th Cir. 2014) ("No hearing is required,

however, where the claim is inadequate on its face or if the record affirmatively refutes the factual assertions upon which it is based.") (quoting *Anjulo-Lopez v. United States*, 541 F.3d 814, 817 (8th Cir. 2008)). Here, the files and records conclusively show Lopez is not entitled to § 2255 relief, and no hearing is needed.

II. PROCEDURAL BACKGROUND

Lopez pleaded guilty to conspiring to distribute methamphetamine, amphetamine, and marijuana; possessing methamphetamine and amphetamine; and to using and carrying a firearm during and in relation to a drug-trafficking crime. *United States v. Lopez*, No. 97-2439, 1998 U.S. App. LEXIS 11678, at *2 (8th Cir. 1998) (per curiam). The Court sentenced Lopez to 360 months in prison, which was based, in part, on his designation as a career offender under USSG § 4B1.1. *Id.*

III. DISCUSSION OF CLAIM

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court excised that part of the Sentencing Guidelines which made the Guidelines mandatory and imposed binding requirements on all sentences. *Id.* at 245 ("finding the provision of the federal sentencing statute that makes the Guidelines mandatory, incompatible with today's constitutional holding.").

Lopez was sentenced in 1997, a time when the Sentencing Guidelines were considered mandatory. As stated above, the Court also found Lopez had been convicted of previous crimes of violence which triggered the career offender status under USSG § 4B1.1. *Lopez*, 1998 U.S. App. LEXIS 11678, at *2. The language in the Sentencing Guidelines used to define a "crime of violence" was identical to the language used in the Armed Career Criminal Act of 1984 (ACCA) to define a "violent felony." *Beckles v. United States*, 137 S. Ct. 886, 890 (2017).

In *Johnson v. United States*, 135 S. Ct. 2551 (2015), the Supreme Court held the ACCA language for "violent felony" was unconstitutionally vague. *Id.* at 2558 ("By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates.").

The rule recognized in *Johnson* was made retroactive to cases on collateral review in *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016). Even though the language used in the Guidelines and the language of the ACCA was identical, the Supreme Court held no vagueness challenge to the Guidelines could be made because of the discretionary nature of the Guidelines themselves. *Beckles*, 137 S. Ct. at 892 (holding Guidelines are not subject to vagueness challenge under Due Process Clause because "they merely guide the exercise of a court's discretion in choosing an appropriate sentence within the statutory range."). Justice Sotomayor noted in her concurrence in *Beckles*, that it remains open "whether defendants sentenced to terms of imprisonment before our decision in [*Booker*], that is, during the period in which the Guidelines *did* 'fix the permissible range of sentences' may mount vagueness attacks on their sentences." *Beckles*, 137 S. Ct. at 903, n.4 (Sotomayor, J., concurring) (emphasis original) (internal citations omitted).

Lopez raises this specific claim in his pending § 2555 motion. The identical issue was also raised and decided in *Russo v. United States*, 902 F.3d 880 (8th Cir. 2018), reh'g and reh'g en banc denied, 2018 U.S. App. LEXIS 32031.

In order to be considered timely, such a claim must have been filed within one year of "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." 28 U.S.C. § 2255(f)(3). The *Russo* Court reasoned *Johnson* did not explicitly recognize that its holding applied to the mandatory pre-*Booker* Guideline, but rather, "[i]t is reasonably debatable whether *Johnson*'s holding regarding the ACCA extends to the former mandatory guidelines." *Russo*, 902 F.3d at 883. Because the Supreme Court did not specifically recognize the right asserted by Russo, Russo "cannot benefit from the limitations period in § 2255(f)(3)." *Id.* The Court of Appeals then affirmed the district court's decision to dismiss Russo's § 2255 motion as untimely. *Id.*

For the reasons given in *Russo*, the claim raised here by Lopez is untimely.[1]

IV. CONCLUSION

The § 2255 is denied, and the case is dismissed.[2]

Pursuant to Rule 11(a) of the Rules Governing Section 2255 Proceedings in the United States Courts, the Court must issue or deny a Certificate of Appealability when it enters a final order adverse to the movant. District Courts have the authority to issue certificates of

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[1] As the § 2255 motion was considered untimely, the Court of Appeals did "not resolve the merits of Russo's constitutional claim that a sentence based on a residual clause in the mandatory guidelines violates the Due Process Clause." *Russo*, 902 F.3d at 884. The Supreme Court also has denied a petition for writ of certiorari on an identical issue. *See Brown v. United States*, 139 S. Ct. 14, 586 U.S. __ (2018) (Sotomayor, J., dissenting from denial of certiorari).

[2] The Government also asserts relief to Lopez should be denied because he filed a § 2255 motion on July 9, 2001. Gov't. Brief 1, ECF No. 8. The Government contends, therefore, this § 2255 should be considered a successive petition and barred until Lopez obtains permission from the Court of Appeals as required by 28 U.S.C. § 2255(h). *Id.* at 2.

On May 24, 1999, the Court denied Lopez additional time to file a § 2255 motion. The docket sheet, however, does not reflect that Lopez ever filed a § 2255 motion in this district court previous to the current motion, either in his criminal case or as a separate civil case. For this reason, the Court does not address this argument.

appealability under 28 U.S.C. § 2253(c) and Fed. R. App. P. 22(b). A certificate of appealability may issue only if a movant "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A substantial showing is a showing "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotation marks and citations omitted).

Although the above result is required in this Circuit, reasonable jurists have debated where the petition should be resolved in a different manner. *See Cross v. United States*, 892 F.3d 288, 293-94 (7th Cir. 2018) (finding *Johnson* claim timely as it applies to pre-*Booker* sentence because movant not required to "ultimately prove that the right applies to his situation; he need only claim the benefit of a right that the Supreme Court has recently recognized."). The Court finds Lopez has made a substantial showing of the denial of a constitutional right for any of his claims, and **grants a Certificate of Appealability on the issue raised in this case**.

IT IS SO ORDERED.

Dated this 7th day of December, 2018.

Charles R Wolle

CHARLES R. WOLLE, JUDGE
U.S. DISTRICT COURT