

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Submitted November 24, 2020

Decided December 4, 2020

Before

FRANK H. EASTERBROOK, *Circuit Judge*

MICHAEL S. KANNE, *Circuit Judge*

No. 20-1738

THEODORE HOWARD,
Petitioner-Appellant,

Appeal from the United States District
Court for the Northern District of Illinois,
Eastern Division.

v.

No. 1:19-cv-04006

UNITED STATES OF AMERICA,
Respondent-Appellee.

Ronald A. Guzmán,
Judge.

ORDER

Theodore Howard has filed a notice of appeal from the denial of his motion under 28 U.S.C. § 2255 and an application for a certificate of appealability. We have reviewed the final order of the district court and the record on appeal and find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). It is not necessary either to issue a certificate of appealability or to wait for the decision in *Borden v. United States*, 140 S. Ct. 1262 (Mar. 2, 2020) (granting petition for writ of certiorari), because the classification of 18 U.S.C. § 1992(a)(6) under the residual clause is not a constitutional question, and it takes at least one substantial constitutional issue to support a certificate of appealability.

Accordingly, Howard's request for a certificate of appealability and his motion to proceed in forma pauperis are denied.

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SUPREME COURT, U.S.

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

THEODORE HOWARD,

Defendant.

No. 19 C 4006

Judge Ronald A. Guzmán

ORDER

Theodore Howard's motion to have his sentence vacated, set aside, or corrected pursuant to 28 U.S.C. § 2255 [1] is denied. Civil case terminated.

STATEMENT

Theodore Howard was convicted of offenses arising from his hiring a man named Telly Virgin to shoot at a Metra commuter train, on two different occasions, in an unavailing attempt to kill Andrea Brown, who is Howard's former common-law wife and a Metra engineer. Specifically, Howard was convicted of (1) interfering with the engineer of a passenger train with the intent to endanger the safety of any person or with a reckless disregard for human life, in violation of 18 U.S.C. § 1992(a)(6) and (10), (b)(1) and (2) (Counts One and Four); (2) committing and attempting to commit an act, namely, the use of a firearm, with the intent to cause serious bodily injury to a train-company employee, in violation of 18 U.S.C. § 1992(a)(7) and (10), (b)(1) and (2) (Counts Two and Five); and (3) knowingly using and carrying a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A) and (2) (Counts Three and Six).

Howard was sentenced to life imprisonment on each of Counts One, Two, Four, and Five; a consecutive term of 10 years' imprisonment on Count Three; and a consecutive term of 25 years' imprisonment on Count Six, for a total term of imprisonment of life plus 35 years. Howard appealed his convictions, which were affirmed. He did not obtain relief on his first post-conviction petition under 28 U.S.C. § 2255.

In May 2019, the Court of Appeals granted Howard leave to file a successive § 2255 motion to challenge his § 924(c) convictions on vagueness grounds, under *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), in which the Supreme Court held unconstitutionally vague the "residual clause" in 18 U.S.C. § 16(b), which mirrors § 924(c)(3)(B)'s definition of a "crime of violence." Subsequently, the Supreme Court held in *United States v. Davis*, 139 S. Ct. 2319 (2019), that the "residual clause" in § 924(c)(3)(B) is unconstitutionally vague. The issue before the Court, therefore, is whether there is a predicate categorical crime of violence to support Howard's § 924(c) convictions that satisfies

§ 924(c)(3)'s surviving "elements clause," which defines a crime of violence as a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). Each of Howard's § 924(c) convictions is predicated on two offenses: a violation of 18 U.S.C. § 1992(a)(6) and (10), and a violation of 18 U.S.C. § 1992(a)(7) and (10). At Howard's trial, the jury was instructed that either offense could serve as a basis for a § 924(c) conviction, and it was not required to specify which of the predicates on which it relied.

Section 1992(a)(6) requires proof that the defendant, knowingly and without lawful authority or permission, interfered with, disabled, or incapacitated any dispatcher, driver, captain, locomotive engineer, railroad conductor, or other person while the person was employed in dispatching, operating, controlling, or maintaining railroad on-track equipment or a mass-transportation vehicle, with the intent to endanger the safety of any person, or with a reckless disregard for the safety of human life. In light of the Supreme Court's decision in *Voisine v. United States*, 136 S. Ct. 2272 (2016), the Court agrees with the government that this offense categorically qualifies as a crime of violence even though it includes interference through a reckless act. In *Voisine*, the Supreme Court considered whether "misdemeanor assault convictions for reckless (as contrasted to knowing or intentional) conduct," *id.* at 2276, qualify as misdemeanor crimes of domestic violence under 18 U.S.C. § 922(g)(9), which have as an element the "use or attempted use of physical force," 18 U.S.C. § 921(a)(33)(A)(ii). The Court answered this question in the affirmative, reasoning that the word "use" "is indifferent as to whether the actor has the mental state of intention, knowledge, or recklessness with respect to the harmful consequences of his volitional conduct," and it "does not exclude . . . an act of force carried out in conscious disregard of its substantial risk of causing harm." *Id.* at 2279. "The Supreme Court also clarified [in *Voisine*] that the categorical inquiry of whether a statute has the use of physical force as an element focuses on whether the force contemplated by the predicate statute is volitional or instead involuntary, and that it makes no difference whether the person applying the force had the specific intention of causing harm or instead merely acted recklessly." *United States v. Pam*, 867 F.3d 1191, 1208 (10th Cir. 2017) (citation and internal punctuation omitted). Section 1992(a)(6) requires that the defendant have interfered with, disabled, or incapacitated a railroad employee—conduct that involves the use of physical force—with the intent to endanger any person's safety or with a reckless disregard for human life. Applying the reasoning of *Voisine*, this provision is a predicate offense that satisfies § 924(c)(3)'s elements clause.

The other possible predicate offense, 18 U.S.C. § 1992(a)(7), requires proof that the defendant, knowingly and without lawful authority or permission, committed an act, including the use of a dangerous weapon, with the intent to cause death or serious bodily injury to any person who is on property that is described in § 1992(a)(4), which includes various forms of mass-transportation

equipment. Using the modified categorical approach¹ to determine what Howard was “really convicted of,” *Haynes v. United States*, 936 F.3d 683, 687 (7th Cir. 2019) (internal punctuation omitted), the Court examines the third superseding indictment, which charged Howard in Counts Two and Five with knowingly and without lawful authority committing and attempting to commit an act, *namely, the use of a firearm*, with the intent to cause serious bodily injury to another person,” namely, a Metra employee, while such person was inside a passenger train located on track used in the operation of a mass-transportation vehicle, namely, a Metra passenger train, which conduct affected a mass-transportation provider, namely, Metra. (Case No. 07 CR 674, ECF No. 95, Third Superseding Indictment (emphasis added).) The jury instructions tracked this language. (Case No. 07 CR 674, ECF No. 135.) The use of a firearm with such intent has as an element the use of physical force, *see generally United States v. Curtis*, 645 F.3d 937, 940-42 (7th Cir. 2011), and thus is a predicate offense that satisfies § 924(c)(3)’s elements clause.

Even if violations of § 1992(a)(6) do not categorically qualify as crimes of violence for purposes of § 924(c), Howard’s § 924(c) convictions remain valid because a § 1992(a)(7) offense clearly qualifies as a crime of violence, and, as the government explains in its brief, no rational juror could have found that Howard violated § 924(c) as charged in Counts Three and Six without finding that he violated § 1992(a)(7). When a jury is instructed on alternative theories of guilt, one of which is legally invalid, and the jury returns a general verdict, there is plain error, but “even a jury-instruction error of constitutional dimension is subject to the familiar requirement that the error have harmed the defendant.” *United States v. Cardena*, 842 F.3d 959, 998 (7th Cir. 2016). “[T]o constitute reversible error, the plain error must have affected the defendant’s substantial rights such that there is a reasonable probability that but for the error the outcome of the trial would have been different.” *Id.* The burden is on Howard to show prejudice. *See id.*

Howard cannot satisfy this burden. The evidence in this case was as follows. After Brown broke up with Howard and asked him to move out of their house, Howard reacted poorly. A physical altercation ensued, and Brown subsequently obtained protective orders and restrictions on Howard’s visitation rights with their child. Howard then began a string of activities aimed at harming Brown: (1) he hired a man named Ron Windom to go to Brown’s home and throw a caustic liquid on Brown, which burned her face and melted her clothes and carpet; (2) he threatened to shoot

¹An “indivisible” statute sets forth a single set of elements to define a single crime, whereas a “divisible” statute lists elements in the alternative and thereby defines multiple crimes. *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). The text of 18 U.S.C. § 1992, which is titled “Terrorist attacks and other violence against railroad carriers and against mass transportation systems on land, on water, or through the air,” shows that it is divisible, or that it is at least divisible as between subsections (a)(6) and (a)(7). The statute does not contain any particular generic offense that can be committed in alternative ways. Rather, it defines several instances of distinct conduct—various separate ways to commit violence against transportation systems—each of which constitutes an offense and requires a distinct mental state. Accordingly, the Court can use the “modified categorical” approach to determine what crime, with what elements, Howard was convicted of, consulting a limited class of documents that includes the indictment and jury instructions. *See id.* at 2249.

Brown unless she dropped the charges against him; (3) he obtained a gun, made plans to kill Brown, and hired Virgin to shoot at Metra trains that Howard believed Brown to be operating, and the men conducted two such attempts to kill Brown, during which Howard transported Virgin (or arranged for Virgin's transportation) to Metra stations, gave Virgin the gun, and Virgin then shot at Metra trains; (4) after the car that Howard used in the train shootings was impounded, Howard asked Virgin to go into the car to retrieve the gun that was used, Virgin accessed the car and removed the gun, and Howard put the gun in his new car; (5) Howard complained to Virgin that he had hired another person to shoot Brown, and that person had merely shot at her truck; and (6) Brown had reported this shooting to the police after discovering a bullet hole in her truck in a movie-theater parking lot. Given this record, the jury could not have rationally found that Howard used the firearm as alleged in Counts 3 and 6 with the intent to endanger any person's safety or with a reckless disregard for the safety of human life, as required for a § 1992(a)(6) conviction, and not also have found that he acted with intent to cause serious bodily injury to another person, as required for a § 1992(a)(7) conviction.² Accordingly, Howard cannot show that he was prejudiced by any error in the jury instructions, nor could he given the facts of this case. *See United States v. Francies*, No. 16 C 5531, 2019 WL 4120444, at *7 (N.D. Ill. Aug. 28, 2019) (denying § 2255 relief under *Davis*, assuming for the sake of argument that one of the alternative bases for defendants' § 924(c) convictions did not qualify as a crime of violence and finding that any error in the alternative jury instruction was harmless in light of the evidence at trial).

For the reasons stated above, Howard's § 2255 motion is denied. Under Rule 11(a) of the Rules Governing Section 2255 Proceedings, the Court must issue or deny a certificate of appealability when it enters a final order adverse to the petitioner. A certificate of appealability may issue only if a petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). Under this standard, a petitioner must demonstrate that reasonable jurists would find the court's assessment of the constitutional claims "debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Howard has failed to make such a showing; therefore, the Court denies a certificate of appealability.

²Howard points out, correctly, that "use" of a firearm means more than mere possession; it requires "active employment" of the firearm. *See Bailey v. United States*, 516 U.S. 137, 150 (1995). But the Court rejects Howard's contention that the evidence was insufficient to show that he used a firearm. "Active employment" includes conduct that is broader than firing a gun. *Id.* (stating that the "active-employment understanding of 'use'" includes, among other things, brandishing, displaying, and bartering a firearm). There is no possibility that Howard was convicted for merely possessing a gun; the evidence was that he delivered a gun to Virgin with the direction to shoot at Brown's train.

DATE: December 11, 2019

A handwritten signature in black ink, reading "Ronald A. Guzmán". The signature is written in a cursive style with a horizontal line underneath it.

Ronald A. Guzmán
United States District Judge