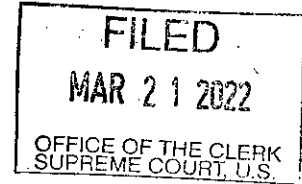


21-7733 ORIGINAL

In The Supreme Court of the United States



United States of America

v.

Rashod Lewis

1:16-CR-311-2

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

Question Presented

- 1) Can a conviction and punishment stand on a non-existent statutory offense, based on it being dismissed?
- 2) Was Petitioner's 18 U.S.C. 924(c)(1)(A)(iii) conviction based on a crime of violence after the government and district court explicitly dismissed the drug trafficking crime, and during sentencing...throughout the entire proceeding, adamantly expressed that their sentence was based on a crime of violence which would affect the vagueness of 924(c) former residual clause resolved through, United States v. Davis 139 S.Ct. 2319, 204 L.Ed.2d. 757 (2019)?

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Parties to Proceeding

United States Government's Attorney
Second Circuit Court of Appeals
United District Court for the Southern District of New York

Table of Authorities

Collier v. United States 2019 U.S. Dist. LEXIS 11742, 2019 JWL
296767 (E.D. NY. 2019)

Miller-El v. Cockrell 537 U.S. 322, 154 L.Ed.2d 931, 123 S.Ct.
1029 (2003)

United States v. Crawley 2021 U.S. APP. LEXIS 18736 (4th Cir. 2021)

United States v. Davis 139 S.Ct. 2319, 204 L.Ed.2d. 757 (2019)

United States v. Lewis 735 Fed. APPX. 28; 2018 U.S. APP LEXIS
24055 (2d Cir. 2015)

United States v. Livorsi 180 F.3d 76, 78 (2d Cir. 1999)

United States v. Ortiz 2021 U.S. Dist. LEXIS 87974 (1st Cir 2021)

United States v. Ritter 700 F.APPX 10, 11(2d Cir. 2017)

United States v. Wells 2020 U.S. Dist. LEXIS 240480 (3rd Cir. 2020)

United States v. Williams 2020 U.S. Dist. LEXIS 161192 (5th Cir.
2020)

Statutes

18 U.S.C. 924(c)(1)(A)(iii)& 2

18 U.S.G. 924(j)& 2

18 U.S.C. 924(c)(3)(B)

18 U.S.C. 1951(b)(1)

21 U.S.C. 841(a)(1)

Fed. R. Crim. P. 11

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit decided on December 29, 2021, as well as all other relevant opinions are found in Appendix A.

Jurisdiction

The Court of Appeals for the Second Circuit denied the C.O.A. on December 29, 2021, in turn, the jurisdiction of this court is invoked pursuant to 18 U.S.C. 1254.

Statutory and Constitutional Provisions Involved

18 U.S.C. 924(c)(3)(B):

Unconstitutional vagueness of 18 U.S.C. 924(c)(3)(B):

Constitutional Provisions for Convictions and Punishment:

Statement of the Case

Petitioner was originally charged with: (Narcotics conspiracy) count one- Distribution and possession with intent to distribute a controlled substance in violation of 21 U.S.C. 841(a)(1); (Robbery conspiracy) count two- Unlawfully and knowingly did combine, conspire and agree together and with each other to commit robbery as defined in 18 U.S.C. 1951(b)(1); (Robbery) count three- Unlawfully and knowingly did commit robbery as defined in 18 U.S.C. 1951(b)(1); (Murder during and in relation to a drug trafficking crime and crime of violence) count four- During and in relation to crimes of violence as charged in counts two and three, and during and in relation to a drug trafficking crime charged in count one, did cause the death of a person through the use of a firearm and aided and abetted the same as defined in 18 U.S.C. 924(j)& 2; (Possession of firearm) count six- During and in relation to a drug trafficking crime charged in count one, did possess, use, and carry firearms and did aid and abet the use, carrying, and possession of firearms, several of which were discharged as defined in 18 U.S.C. 924 (c)(1)(A)(iii)& 2.

On June 8, 2017 Petitioner Pled guilty to count six of the indictment pursuant to a Rule 11 plea agreement, and on October 30, 2017 the district court sentenced Petitioner to 360 months imprisonment, and five years supervised release. Petitioner filed a direct appeal to the Second Circuit Court of Appeals challenging only the condition of supervised release. That appeal was denied on August 23, 2018. United States v. Lewis 735 Fed. APPX 28; 2018 U.S. APP. LEXIS 24055 (2nd Cir. 2018). Petitioner subsequently filed a Petition

Pursuant to 28 U.S.C. 2255 raising a claim that his conviction and sentence for the 924(c)(1)(A)(iii)& 2 offense was in violation of United States v. Davis 139 S.Ct. 2319, 204 L.Ed.2d. 757(2019), which held that section 924(c)(3)(B)--the residual clause, is unconstitutionally vague in describing predicate acts for 924(c) charges. On April 27, 2021, the district court denied the motion pursuant to 28 U.S.C. 2255 as well denied a C.O.A. Petitioner timely filed a motion for Certificate of Appealability to the Second Circuit Court of Appeals which was denied on December 29, 2021.

This case arises out of the government's allegations that Petitioner was involved in a robbery occurring on or about January 21, 2016, in the vicinity of 187th St. and Park Ave., the Bronx, New York targeting a narcotics dealer and others located inside an afterhours club and during which an individual named Nelson Dubon was shot and killed.

The government had originally alleged and listed several underlying offences related to the event. Count one charged Petitioner with a narcotics conspiracy. The government entered into a plea agreement with Petitioner as only for a conviction as to count six of the indictment... the 924(C)(1)(A)(iii)& 2 offense, alleging that it was in the course of the narcotics conspiracy listed as count one. The government stipulated that the conduct underlying the offense charged in count six establishes a more serious offense than the offense of conviction, namely the murder of Nelson Dubon. Nothing in count one or count six refer to the murder of Dubon.

At sentencing the government and district court dismissed all other counts in the indictment--other than count six 924(c) offense.

The statutory provisions for those dismissed offenses are no longer relevant for conviction or sentencing purposes under their statutes. To be sure that this was the intention of the government, they stipulated that at the time of sentencing they will move to dismiss any open counts against Petitioner. Further, that with respect to any and all dismissed charges Petitioner is not a prevailing party within the meaning of the Hyde Amendment, section 617, P.L. 105-119 (Nov. 26, 1997).

As stated, Petitioner's conviction is predicated on a guilty plea and as such he had waived his right to particular appeals as well as collateral proceedings. As such, the courts have held that Fed. R. Crim. P. 11 is designed to assist the district judge in making constitutionally required determinations that a defendant's guilty plea is truly voluntary. *United States v. Maher* 108 F.3d 1513, 1520 (2d Cir. 1997). The Second Circuit has adopted a standard of strict adherence of Rule 11 and examine critically even slight procedural deficiencies to ensure that the defendant's guilty plea was a voluntary and intelligent choice and that none of the defendant's substantial rights has been compromised. *United States v. Livorsi* 180 F.3d 76,78 (2d Cir. 1999); *Collier v. United States* 2019 U.S. Dist. LEXIS 11742, 2019 JWL 296767 (E.D.N.Y. 2019), quoting *United States v. Ritter* 700 F. APPX 10,11 (2d Cir. 2017) (while a voluntary waiver of collateral attack is generally enforceable, a criminal defendant does not waive the right to appeal or collateral attack on the basis that the plea itself, including the waiver, was not intelligent or voluntary).

In Petitioner's case the government did not enforce the appel-

late waiver for this collateral proceeding. Instead, the government on June 2, 2020, per order of the court to respond, wrote in opposition--supporting that Petitioner was charged in count six of the indictment with a violation of 18 U.S.C. 924(c)(1)(A)(iii)& 2, i.e., the discharge of firearms in furtherance of the narcotics conspiracy charged in count one of the indictment.

The question for this court is can a conviction and punishment stand on a non-existent statutory offense based on it being dismissed? During sentencing the government and district court moved and dismissed all underlying statutory offenses originally charged in the indictment...count one, narcotic conspiracy 21 U.S.C. 841(A)(1); count two, robbery conspiracy 18 U.S.C. 1951(b)(1); Count three, robbery 18 U.S.C. 1951(b)(1); and count four, crime of violence or drug trafficking crime causing the death of a person and aid and abet 18 U.S.C. 924(j)& 2.

Also during sentencing the government and district explicitly changed course and stated that the sentence should speak to the significance of Petitioner's acts, and re-classified Petitioner's conviction as a crime of violence; (the government) (I think it's important that Mr. Lewis and any defendant in a violent crime case have that kind of understanding). APP 1, Sen.tr. Pg. 12, Ex-1

The district court's primary reason for the enhanced sentence was based on Petitioner's conviction being re-classified as a crime of violence; (the district court) (Moving to the factors under 3553, I find that the offense is so serious that it's hard to describe. Partaking in the action that killed a man who had a 14-year-old son, who's now lost his father is a scourge on the comm-

unity). APP.1, Sen. Pg. 14, Ex-2.

The predicate crime of violence at issue...per statute, was the shooting of, Nelson Dubon, during the course of a robbery that resulted in his death. (Dubon was not the target of a drug offense). However, count four was dismissed along with counts one, two and three--all underlying offenses. And, as stated above, counts one and six do not refer to the murder of Dubon. Notable, count one narcotics conspiracy only alleged that Petitioner and others known and unknown conspired to distribute and possess with the intent to distribute 280 grams and more of mixtures and substances containing a detectable amount of cocaine base, and one kilogram and more of mixtures and substances containing a detectable amount of heroin.

The government elected to re-classify Petitioner's conviction as a crime of violence which was unopposed by defense counsel. Moreover, the district court clearly adopted the government's re-classification, and specifically issued the enhanced sentence based on the violent nature of the government's re-classified theory for conviction. The district court did not relate this conviction nor its sentence as being predicated on the theory of a narcotics conspiracy, but instead, based the sentence on possession and discharge of a firearm that resulted in the death of a person. (No Degree of Murder).

The Supreme Court decision in United States v. Davis 139 S.Ct. 2319 (2019)

This Supreme Court in Davis found that the definition

of a crime of violence found under the residual clause of 18 U.S.C. 924(c)(3)(B) was unconstitutional, which the term crime of violence means an offense that is a felony and-

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or;

(B) that by its nature, involved a substantial risk that physical force against the property of another may be used in the course of committing the offense.

Petitioner is not convicted of a drug conspiracy, robbery conspiracy, robbery nor the statute for the murder in relation to those offenses--those offenses were dismissed. The statutory crime of conviction is 18 U.S.C. 924(c)(1)(A)(iii)--possession of a firearm in furtherance of a crime of violence or drug trafficking crime. A crime of conviction that not only did the government and district court dismiss the underlying statutory crime related to the offense, but also, re-classified the offense of conviction specifically as a crime of violence during sentencing essentially issuing the additional twenty years based on that theory.

In the plain language of the government and district court to enforce this conviction as a crime of violence theory, without a degree or statutory support for a classified level of violence to accompany the 924(c)(1)(A)(iii) offense...the crime of violence determination can only find support under, 924(c)(3)(B)--an offense that is a felony and that by its nature, involves a substantial risk that physical force may be used in the course of committing the offense... which was found to have been unconstitutional by the

court in United States v. Davis 139 S.Ct. 2319 (2019).

The government's response to this issue is totally contrary to the factual manner of how the sentencing procedures and final analysis was issued...which they still contend that Petitioner is convicted of a narcotic trafficking offense. The government's short evaluation is solely based on maintaining a sentence that is in error which the district court accepted without questioning.

Petitioner then petitioned the Second Circuit Court of Appeals for a C.O.A. demonstrating that jurists of reason could, (A) disagree with a district court's resolution of the federal constitution claim, or (B) the issue presented is adequate to deserve encouragement to proceed further. Miller-El v. Cockrell 537 U.S. 322, 154 L.Ed.2d 931, 123 S.Ct. 1029 (2003). During review whether to issue a C.O.A. one of the three judges on the panel recused herself from participating, stating that the issue would be left to the remaining two judges. The Second Circuit denied a C.O.A.

There is a contrary application among the lower court's concerning the statutory provisions to sustain a defendant's conviction. The Second Circuit and the government support that a defendant can be convicted of an offense without the statutory provision. Other circuits disagree. The First, Third, Fourth, and Fifth Circuits support that an underlying statutory offense has to remain in a 924(c)(1)(A) offense, through a guilty plea, in order to uphold whether it stands as a crime of violence or drug trafficking offense. United States v. Ortiz 2021 U.S. Dist. LEXIS 87974 (1st Cir. 2021); United States v. Wells 2020 U.S. Dist. LEXIS 240480 (3rd Cir. 2020);

United States v. Crawley 2021 U.S. APP. LEXIS (4th Cir 2021);
United States v. Williams 2020 U.S. Dist. LEXIS 161192 (5th Cir.
2020). These circuits all have a statutory offense on which the
924(c) offense is predicated upon. This controversy warrants
this court's guidance.

Reason For Granting The Petition

The courts in the Second Circuit, and the government, contend that a criminal conviction is valid solely upon a Rule 11 plea agreement without a statutory provision to support an underlying criminal offense. Other circuits believe, as do Petitioner, that the underlying criminal offense stands when supported by a statutory provision that identifies its usage in the federal courts. When a statutory offense is dismissed a defendant is no longer held accountable for the statutory provisions... the theory for that particular statute no longer applies to the defendant's conviction.

In this case the government from its inception contended that the result of the 924(c)(1)(A)(iii) offense was more serious than the statutory offense of 21 U.S.C. 841(A)(1)...narcotics conspiracy. They dismissed the offense.

There is ambiguity among the lower courts concerning whether a conviction and punishment can stand on a non-existent statutory offense based on it being dismissed.

Conclusion

Based on the ambiguity among the lower courts this court should exercise its authoritative guidance to resolve it.

Date: 3-21-02

Respectfully Submitted

