

CLD-129

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **22-1021**

UNITED STATES OF AMERICA

VS.

ANDRE THOMPSON,
Appellant

(E.D. Pa. Cr. No. 2-09-cr-00143-001)

Present: AMBRO, SHWARTZ and BIBAS, Circuit Judges

Submitted are:

- (1) Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1); and
- (2) Petitioner's "Motion to Have the District Court's Judgment Vacated and Remanded"

in the above-captioned case.

Respectfully,

Clerk

ORDER

The foregoing request for a certificate of appealability is denied. We may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). That standard is satisfied if the petitioner demonstrates that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Buck v. Davis, 137 S. Ct. 759, 773 (2017) (citation omitted). Jurists of reason would not debate the District Court's decision to deny Appellant's second or successive motion to vacate under 28 U.S.C.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

CRIMINAL ACTION NO. 09-143-1

v.

ANDRE THOMPSON

CIVIL ACTION NO. 20-4014

ORDER

AND NOW, this 10th day of December, 2021, upon consideration of Defendant Andre Thompson's pro se Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 (Docket No. 114) and all documents filed in connection therewith, **IT IS HEREBY ORDERED** that the Motion is **DENIED**.¹ As Mr. Thompson has failed to make a substantial showing of the

¹ On September 29, 2009, Mr. Thompson pled guilty to one count of conspiracy to commit armed bank robbery in violation of 18 U.S.C. § 371 (Count I), one count of armed bank robbery in violation of 18 U.S.C. § 2113(d) (Count II), and one count of using and carrying a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1) (Count III). These charges arose from Mr. Thompson's participation in a conspiracy to commit armed robbery of the Third Federal Bank, 905 North Second Street, Philadelphia, Pennsylvania, on January 17, 2009 with Roshine Matthews. On July 11, 2011, Mr. Thompson was sentenced to terms of imprisonment of 77 months and 3 of years supervised release as to each of Counts I and II, to be served concurrently; 200 months of imprisonment as to Count III, to be served consecutively to his terms of imprisonment as to Counts I and II; five years of supervised release as to Count III, to be served concurrently with his terms of supervised released imposed with respect to Counts I and II; restitution in the amount of \$46,244; and a \$300 special assessment.

The instant Motion primarily concerns Mr. Thompson's conviction as to Count III. Section 924(c)(1)(A) provides that "any person who, during and in relation to any crime of violence . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm," shall be sentenced to a term of imprisonment "in addition to the punishment provided for such crime of violence . . ." 18 U.S.C. 924(c)(1)(A). Section 924(c)(3) defines "crime of violence" as "an offense that is a felony" and either "(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another," (the "elements clause") or "(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense" (the "residual clause"). 18 U.S.C. § 924(c)(3). In Johnson v. United States, 576 U.S. 591 (2015), the Supreme Court held that the definition of a "violent felony" in the residual clause of the Armed Career Criminal Act was unconstitutionally vague. Id. at 597, 606. In United States v. Davis, 139 S. Ct. 2319 (2019), the Supreme Court held that the definition

Appendix A

of "crime of violence" in 18 U.S.C. § 924(c)(3)(B) is likewise unconstitutionally vague. Id. at 2336.

Mr. Thompson asks that we vacate all of his Counts of conviction in light of the Supreme Court's decisions in Johnson v. United States and Davis. He makes four arguments in support of his Motion: (1) his conviction for violation of 18 U.S.C. § 924(c) should be vacated because the residual clause of that section is unconstitutionally vague; (2) his convictions as to all three counts should be vacated because he did not enter into his guilty plea voluntarily, knowingly and intelligently since he was unaware that § 924(c) was unconstitutionally vague; (3) his convictions as to all three counts should be vacated because the Court committed a structural error by accepting his guilty plea to an indictment which included a charge of violating an unconstitutionally vague law; and (4) his conviction for violation of 18 U.S.C. § 924(c) should be vacated because 18 U.S.C. §§ 371 and 2113(d) are not crimes of violence under the elements clause. Count III of Indictment No. 09-143 charges that Mr. Thompson and Mr. Matthews:

knowingly used and carried . . . a firearm, that is, a semi-automatic pistol, during and in relation to a crime of violence for which they may be prosecuted in a court of the United States, that is, conspiracy to commit armed bank robbery and armed bank robbery, as charged in Counts One and Two of this indictment, in violation of Title 18, United States Code, Sections 371 and 2113(d).

(Docket No. 13 at 5.) Thus, both the conspiracy offense (Count I) and the armed bank robbery offense (Count II) were predicate offenses for Mr. Thompson's § 924(c)(1) charge. Mr. Thompson maintains that these offenses are not considered crimes of violence for the purposes of 18 U.S.C. § 924(c) because the Supreme Court found the residual clause to be unconstitutionally vague in Davis and because these offenses do not qualify as crimes of violence under the elements clause.

The Government admits that Mr. Thompson's conviction for conspiracy is not a predicate crime of violence under § 924(c)(3)(A) because a conspiracy may not necessarily involve actual force. (See Gov't Resp. (Docket No. 114) at 4.) However, the Government maintains that Mr. Thompson's conviction for armed bank robbery remains a predicate crime of violence under § 924(c)(3)(A) notwithstanding Davis because the United States Court of Appeals for the Third Circuit has determined, in a precedential decision, that armed bank robbery in violation of 18 U.S.C. § 2113(d) qualifies as a crime of violence under the elements clause, § 924(c)(1)(A). See United States v. Johnson, 899 F.3d 191, 202-04 (3d Cir. 2018). See also United States v. Wilson, 960 F.3d 136, 151 (3d Cir. 2020), cert. denied, 141 S. Ct. 1091 (2021) ("We have recently held that armed bank robbery is categorically a crime of violence under § 924(c)(3)'s elements clause." (citing United States v. Johnson, 899 F.3d at 204)). "As a consequence, in the Third Circuit, it is settled law that armed bank robbery in violation of 18 U.S.C. § 2113(d) constitutes a 'crime of violence' under the elements clause of § 924(c)." Bledsoe v. United States, Crim. A. No. 07-0165, 2020 WL 3638116, at *9 (E.D. Pa. July 6, 2020) (discussing United States v. Johnson, 899 F.3d 191).

Mr. Thompson acknowledges that the Third Circuit held in United States v. Johnson that armed bank robbery qualifies as a crime of violence under the elements clause of § 924(c). However, he argues, quite eloquently, that United States v. Johnson was wrongly decided. We

denial of a constitutional right, there is no basis for the issuance of a certificate of appealability.²

The Clerk is directed to CLOSE Civil Action No. 20-4014.

BY THE COURT:

/s/ John R. Padova

John R. Padova, J.

cannot, however, consider this argument since we are required to follow precedential decisions of the Third Circuit. As the Third Circuit has explained:

[t]his court is strict in its adherence to the precedent of its earlier opinions. Our own Internal Operating Procedures are explicit and provide, “It is the tradition of this court that reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel. Court in banc consideration is required to overrule a published opinion of this court.” If the judges of this court are bound by earlier panels, *a fortiori* district court judges are similarly bound. Recognition of the hierarchical nature of the federal judiciary requires no less.

Poulis v. State Farm Fire & Cas. Co., 747 F.2d 863, 867 (3d Cir. 1984) (quoting Internal Operating Procedures of the Court of Appeals for the Third Circuit, Chapter 8.C.); see also A.A. ex rel. E.A. v. Exeter Twp. Sch. Dist., 485 F. Supp. 2d 587, 591 (E.D. Pa. 2007) (“It is axiomatic that a district court is bound to apply its appellate court’s precedent.” (citing Poulis, 747 F.2d at 867)). Consequently, we conclude that Mr. Thompson’s conviction for armed bank robbery in violation of 18 U.S.C. § 2113(d) qualifies as a predicate crime of violence in accordance with the elements clause, § 924(c)(3)(A), and that Mr. Thompson’s conviction for using and carrying a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1) does not violate the Constitution. We therefore deny Mr. Thompson’s Motion in its entirety.

² Title 28, United States Code § 2253 provides that a defendant may not appeal an order denying a § 2255 Motion unless a certificate of appealability has been issued. 28 U.S.C. § 2253(c)(1)(B). Section 2253 further provides that “[a] certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Thus, the defendant must show ““that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.”” Mathias v. Superintendent Frackville SCI, 876 F.3d 462, 474 (3d Cir. 2017) (alteration in original) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)). “In the Court’s view, it is not the case that reasonable jurists could disagree that the new rule announced by the Supreme Court in Davis does not invalidate [Mr. Thompson’s] conviction[] under § 924(c).” Bledsoe, 2020 WL 3638116, at *14. Moreover, “[i]t is clear [his] conviction[] under that statute would, in all certainty, have been the same even omitting the now invalid conspiracy-based theory of § 924(c) liability.” Id. Accordingly, we conclude that there is no basis for the issuance of a certificate of appealability.

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No. 22-1021

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(E.D. Pa. Cr. No. 2-09-cr-00143-001)

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, McKEE, AMBRO, JORDAN, HARDIMAN,
GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY,
and PHIPPS, Circuit Judges

The petition for rehearing filed by Appellant in the above-entitled case having
been submitted to the judges who participated in the decision of this Court and to all the
other available circuit judges of the circuit in regular active service, and no judge who
concurred in the decision having asked for rehearing, and a majority of the judges of the
circuit in regular service not having voted for rehearing, the petition for rehearing by the
panel and the Court en banc, is denied.

5

Appendix B

BY THE COURT,

s/Patty Shwartz
Circuit Judge

Dated: June 3, 2022
JK/cc: Andre Thompson
Robert A. Zauzmer, Esq.