

No. _____

In the
SUPREME COURT OF THE UNITED STATES

Paul DiBiase,

Petitioner,

-against-

United States of America,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Petitioner was sentenced as an Armed Career Criminal (ACC) over his protests that he did not have three prior violent felony convictions as required for such a sentence. He had pleaded guilty to being in possession of a weapon as an armed career criminal and waived his appeal rights as part of his plea agreement. Is he precluded from establishing in a post-conviction proceeding that the predicate convictions on which the armed career criminal designation was based were not violent felony offenses because he does not seek to vacate his guilty plea?

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Opinion Below And Jurisdiction

Petitioner Paul DiBiase seeks review of a decision of the Second Circuit entered March 7, 2023, affirming in a summary order the order denying petitioner's motion to set aside his sentence pursuant to 28 U.S.C. §2255 . The official citation for the Second Circuit opinion is ____ F.4th ____ (2d Cir. 2023). It can be found at 2023 WL 2376223. A copy of the decision is appended as Appendix A.¹ Jurisdiction is in this Court pursuant to 28 U.S.C. § 1254(1).

Statement of the Case

Paul DiBiase pleaded guilty to being a felon in possession of a weapon under a count that asserted that he had previously been convicted of three violent felony offenses. The plea agreement also alleged the prior offenses and included the standard waiver of appellate and post-conviction rights should the sentence be within or below the sentencing range agreed upon. (Pet. App. A at 3).

Prior to sentence DiBiase objected to being sentenced as an Armed Career Criminal (ACC), pointing out that at least one of the prior offenses was not a

¹ Citations to "Pet. App." refer to the appendices submitted with this petition. Citations to App.Br., Govt.Br., and Reply Br. refer to the appellant's and government's briefs filed on the appeal from the order below. Citations to "A" and "SA" refer to the appendix and special appendix filed on the appeal from the order below. Citations to documents filed on the direct appeal to the Second Circuit from the judgment of conviction (United States v. DiBiase, Docket No. 15-751) are denoted "D.E. ____."

violent felony. When the court directed defense counsel to investigate the question, the prosecutor advised that he would consider defendant to have breached the plea agreement if he pursued the claim. After consulting with his attorney, DiBiase withdrew his objection. He was sentenced as provided in the plea agreement. (Pet. App. A at 3)

DiBiase's counseled brief filed on the judgment appeal argued, among other things, that there was a question whether one of the predicate convictions was a violent felony and that there was no adequate factual basis for the armed career criminal aspect of the plea (App. No. 15-751, D.E. #40, pages 24-25). DiBiase's *pro se* supplemental brief argued that the predicate offenses were not violent felonies under the laws of the states in which he had been convicted (*id.*, D.E. #56, pages 39, *et seq.* The opinion affirming the conviction did not mention the arguments concerning the armed career criminal designation. United States v. DiBiase, 649 Fed.Appx. 77, 77-79 (2d. Cir. 2016) (summary order).

Less than a month after the conviction was affirmed, DiBiase moved to vacate his sentence pursuant to 28 U.S.C. §2255, claiming his sentence as an armed career criminal violated due process because he had not been previously convicted of three violent felonies (A at 168). He also accused his trial and appellate attorneys of ineffective assistance of counsel for not preventing the ACC

designation (A at 169) and argued that his ACC sentence was a miscarriage of justice and violated due process because there was no evidence that the predicate convictions were violent felonies (A at 186).

Both DiBiase *pro se* and subsequently assigned CJA counsel filed extensive memoranda of law analyzing the prior convictions, explaining why almost all of them were not violent felony offenses (*e.g.*, A at 209-19, 306-13, 370-78), and specifying how defense counsel were ineffective (*e.g.*, A at 226-36, 383-92).

District Court denied the §2255 motion, finding that the appeal waiver was enforceable and precluded the attack on the sentence (Pet. App. B. at 7). As to the ineffective assistance of counsel claim, which was not precluded by the appeal waiver, District Court found that counsel had acted reasonably. He reasoned that a challenge to the attorneys' failures to investigate whether the predicates were violent felonies would not have been successful, since DiBiase had failed to show that the case for a finding that the predicates were not violent felonies was so "obvious" that his counsel was "obligated to conduct the analysis." (Pet. App. B, at 9-11).

On the appeal from the denial of the motion to vacate sentence, DiBiase argued that (1) it would be a manifest injustice and a deprivation of his fundamental rights if the sentence were to stand even though all the evidence

showed that DiBiase had not committed the requisite three prior violent felony offenses (App.Br. at 16), and (2) the determination that he was an armed career criminal was the result of the ineffectiveness of his attorneys (*id.* at 26).

The Second Circuit found that DiBiase’s fundamental rights claim “falters” because he did not seek vacatur of his guilty plea under Count Two and the ACC allegations in that count were “part and parcel” of that count, to which he pleaded guilty (Pet. App. A at 7). His challenge to being sentenced as an armed career criminal without seeking vacatur of the plea did not “match” his argument (Pet. App. A at 7). The Court declined to opine whether “the appeal waiver would have effect in the context of a challenge to DiBiase’s *conviction* on Count 2” (Pet. App. A at 7, n.2 [*italics in original*]).

Apparently the Second Circuit deemed the 2255 petition to be only an attack on the plea since it then noted that his rejection of an opportunity to withdraw his plea “undermine[d]” his claim (Pet. App. A at 8).

The Second Circuit concluded that “insofar as DiBiase argues he was improperly sentenced as an armed career criminal,” the sentence was not reached in a manner that the plea agreement did not anticipate, citing United States v. Riggi, 649 F.3d 143, 148 (2d Cir. 2011) (Pet. App. A at 9).

The Second Circuit rejected arguments based on ineffective assistance of counsel because DiBiase did not seek to withdraw from the plea agreement (Pet. App. A at 10). It also concluded that there was no reasonable probability that DiBiase would have gone to trial had he received effective legal advice and in any case counsel's failure to challenge the armed career criminal finding at sentence was not relevant to the quality of his representation earlier (Pet. App. A at 10-11).

The Second Circuit did not mention the merits of DiBiase's claim that his prior felonies were not violent felonies. However, the government, in its opposition, did not dispute that the predicate burglary convictions did not qualify as violent felony offenses: It conceded that the New Jersey and Texas burglary convictions were not for a generic burglary (Govt.Br. at 44-45), mentioned a Connecticut burglary conviction only in a footnote and did not rely on it (*id.* at 43-44, n. 10) and did not contest the claim that the Florida burglary conviction was also not for a generic burglary. These concessions left only one violent felony offense, a Connecticut robbery (*id.* at 41-43), not enough as the basis for an armed career criminal determination.

Reasons for Granting Petition

Petitioner has found no appellate cases analyzing the relationship between the armed career criminal designation and the plea or sentence. This case presents an opportunity for this Court to provide the necessary guidance.

The Second Circuit denied relief to petitioner because it held that his attack on the ACC determination could be effective only if construed as an attack on the plea. In its words, the ACC allegations were “part and parcel” of the count to which he pleaded. Therefore, the only relief to which he was entitled was vacatur of the plea, relief which petitioner rejected. The implication was that by not seeking to vacate the plea, DiBiase remained bound by the appeal waiver. The Second Circuit was wrong.

The ACC determination was not a part of the plea. The only crime to which DiBiase pleaded guilty was being a felon in possession of a weapon. The nature of the prior felony convictions was irrelevant to his guilt of that charge. Indeed, having been previously convicted of three violent felonies is not an element of any crime on the books. It is merely a circumstance that, if established, has an effect on the sentence. See, Almendarez v. Torres, 523 U.S. 224, 243 (1998) (referring to

Congress’s “long tradition” of treating recidivism as a sentencing factor rather than an element of the crime).

Because it is not “part and parcel” of a guilty plea, the armed career criminal status must be determined post-plea. The district court has an affirmative burden at sentence to make this determination prior to imposing an enhanced sentence, Shepard v. United States, 544 U.S. 13, 15 (2005) (discussing the responsibility of the district court to determine at sentence whether the ACC enhancement should apply); Taylor v. United States, 495 U.S. 575, 579 (1990) (same); United States v. Dantzler, 771 F.3d 137, 139 (2d Cir. 2014) (same); United States v. Santiago, 668 F.3d 151, 154 (2d Cir. 2001) (same). And the government has the burden of proof on that question. Pereida v. Wilkinson, 141 S.Ct. 754, 765 (2021); Dantzler, 771 F.3d at 145. See, also, United States v. Rosa, 507 F.3d 142, 151 (2d Cir. 2007), on the government is obligated to prove, by a preponderance, that a defendant is subject to sentence as an armed career criminal.

Here, even though DiBiase raised a question concerning whether he had three prior convictions for violent felony offenses, neither the court nor the government fulfilled its responsibility to establish, as a factual matter, at sentence, that DiBiase’s prior convictions were for violent felony offenses.

The Fifth Circuit recognized this distinction in an analogous case. In

United States v. White, 258 F.3d 374 (5th Cir. 2001), the defendant pleaded guilty to possessing a weapon after having been convicted of two domestic violence misdemeanors (the latter condition being one of the elements of the crime). The plea agreement included a waiver of the right to appeal. White claimed on appeal that because neither of his predicate domestic violence misdemeanors had an element of force as required, he had pleaded to an offense that did not exist and the appeal waiver was inapplicable. The Fifth Circuit agreed, holding the waiver inapplicable since a defendant cannot waive “his substantive right to be free of prosecution under an indictment that fails to charge an offense.” 258 F.3d at 380. Similarly DiBiase’s appeal waiver did not preclude him from arguing that the enhanced sentence should not be imposed. He pleaded guilty to a status that simply did not exist in his case – he was not an armed career criminal since the prerequisites for such a status did not exist.

DiBiase’s argument in the court below repeatedly characterized the ACC determination as something separate from the plea but rather a status that affected his sentencing: See, Appellant’s Brief below (App.Br. at 2: the questions presented contain the word “status” three times; App.Br. at 14: “[a]ppellant’s status as an Armed Career Criminal”; App.Br. at 15: a violation of due process to impose an enhanced sentence “because of a status based on a factor that has been

held unconstitutional”; App.Br. at 16: “[appellant’s] status as an Armed Career Criminal”; App.Br. at 22: reference to appellant’s right “not to be deemed an armed career criminal”; App.Br. at 23: appellant was imprisoned “for an act the law does not make illegal and a status that does not apply”; App.Br. at 25: DiBiase is “serving a sentence for a status he should not hold”; App.Br. at 26: the appeal waiver “should not bar his attack on his status”; Reply Br. at 3: reference to DiBiase being “designat[ed] ... as an armed career criminal ,, a status he did not hold.”

The Second Circuit ignored DiBiase’s claim and found, contrary to Almendarez, that the ACC allegation was “part and parcel of the plea.” As a consequence it found DiBiase’s claim could only be vindicated as an attack on the plea and ruled, in effect, that he forfeited his claim by not seeking vacatur of the plea. To the contrary, where the government failed to fulfill its obligation to prove the existence of three prior violent felony offenses, and the court failed to fulfill its obligation to make the finding prior to imposing sentence, the only proper remedy is to leave the plea intact and remand for a hearing on whether DiBiase is an armed career criminal.

This result flows logically from the authority discussed above. Counsel could find no case specifically so holding. This Court should grant the petition for

certiorari to provide guidance to the lower courts concerning the correct relationship between a plea and the armed career criminal determination.

Conclusion

For the reasons above, DiBiase respectfully requests that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

A handwritten signature in black ink, reading "Malvina Nathanson". The signature is fluid and cursive, with the first name "Malvina" being more prominent than the last name "Nathanson".

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