

FILED

United States Court of Appeals
Tenth Circuit

July 7, 2017

Elisabeth A. Shumaker
Clerk of Court

PUBLISH

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

No. 16-6024

BRITT JARRIEL HAMMONS,

Defendant - Appellant.

**Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. Nos. 5:15-CV-00912-F and 5:04-CR-00172-F-1)**

Kyle Wackenheim, Assistant Federal Public Defender (Julia C. Summers, with him on the briefs), Office of the Federal Public Defender, Oklahoma City, Oklahoma, for Defendant-Appellant.

Timothy W. Ogilvie, Assistant United States Attorney (Mark A. Yancy, Acting United States Attorney, with him on the brief), Office of the United States Attorney, Oklahoma City, Oklahoma, for Plaintiff-Appellee.

Before **BRISCOE**, **EBEL**, and **MURPHY**, Circuit Judges.

EBEL, Circuit Judge.

This case presents the question whether Oklahoma’s drive-by shooting statute, Okla. Stat. tit. 21, § 652(B), qualifies as a violent felony under the federal Armed Career Criminal Act (ACCA). We hold that it does. Accordingly, we AFFIRM.

I. BACKGROUND

In 2004, Britt Hammons pleaded guilty in federal court to possessing a firearm as a felon. His criminal history included three prior convictions under Oklahoma’s drive-by shooting statute, Okla. Stat. tit. 21, § 652(B) (1992). It is undisputed that, at the time of sentencing, Hammons qualified for the ACCA’s fifteen-year mandatory minimum sentence because his prior convictions would have met the definition of “violent felony” under the ACCA’s residual clause.¹ See 18 U.S.C. § 924(e)(2)(B)(ii) (residual clause). The district court thus imposed the ACCA enhancement, but the Supreme Court struck down the residual clause in Johnson v. United States, 135 S. Ct. 2551 (2015). Now that the residual clause cannot be relied upon for the enhancement, Hammons seeks to vacate his sentence under 28 U.S.C. § 2255.²

On collateral review, the district court concluded that Hammons nevertheless qualified for the enhancement because his state-law convictions were violent felonies under the *elements* clause of the ACCA. Under that clause, a violent felony

¹ The sentencing record does not establish which clause of the ACCA was relied upon in the original sentence, nor does that make a difference in our analysis.

² The ruling in Johnson applies retroactively to cases on collateral review. Welch v. United States, 136 S. Ct. 1257, 1265 (2016).

includes any felony statute that “has as an element the use . . . of physical force against the person of another[.]” 18 U.S.C. § 924(e)(2)(B)(i). Finding that Oklahoma’s drive-by shooting statute contained such an element, the district court upheld the sentence.

II. DISCUSSION

The Oklahoma drive-by shooting statute in effect at the time of Hammons’ convictions provided:

Every person who *uses any vehicle to facilitate the intentional discharge of any kind of firearm, crossbow or other weapon in conscious disregard for the safety of any other person or persons* shall upon conviction be punished

Okla. Stat. tit. 21, § 652(B) (1992) (emphasis added). The question is whether § 652(B) satisfies the requirement in 18 U.S.C. § 924(e)(2)(B)(i) that the crime of conviction “has as an element the use . . . of physical force against the person of another[.]”

This case calls for the application of the categorical approach, which examines the *elements* of the predicate state conviction in the abstract, rather than the precise *conduct* giving rise to that conviction. E.g., Descamps v. United States, 133 S. Ct. 2276, 2283 (2013). In doing so, we look to the least of the acts criminalized by the Oklahoma statute. Moncrieffe v. Holder, 133 S. Ct. 1678, 1684 (2013). In other words, if § 652(B) realistically reaches any conduct that does not involve the use of

physical force against another person, then a conviction under § 652(B) does not qualify as a violent felony under the ACCA's elements clause. Id.

Hammons makes three arguments for why § 652(B) does not trigger the ACCA enhancement under the elements clause: (1) the statute permits conviction for merely operating a vehicle without the defendant actually discharging a weapon; (2) the statute requires proof of recklessness, which is not enough to qualify as a violent felony; and (3) the statute permits conviction based on the discharge of a weapon that does not involve force. We reject each contention in turn.

A. Section 652(B) Does Not Require the Offender To Discharge the Weapon Himself

Section 652(B), by its plain terms, does not require the offender to discharge the weapon himself—he need only operate the vehicle while someone else in the car discharges the weapon. Okla. Stat. tit. 21, § 652(B). The statute thus does not require the defendant personally to have employed any physical force against another, so according to Hammons, a conviction under § 652(B) would not necessarily involve the offender's personal use of physical force. But the elements clause does not require the offender himself to have employed the requisite physical force; instead it requires only that the predicate statute contain “as an element the use . . . of physical force.” 18 U.S.C. § 924(e)(2)(B)(i). Section 652(B) explicitly contains as an element “the intentional discharge” of a weapon, even if the trigger is pulled by someone other than the offender, e.g., a passenger in the car rather than the

driver. Because the predicate statute includes such an element, Hammons’ argument fails.

B. The Mental State Required to Violate § 652(B)

The mental state required to commit a predicate offense bears on our determination of whether that offense qualifies as a violent felony under the ACCA. See Voisine v. United States, 136 S. Ct. 2272, 2278-80 (2016); Leocal v. Ashcroft, 543 U.S. 1, 9 (2004). Hammons cites United States v. Zuniga-Soto, 527 F.3d 1110, 1124 (10th Cir. 2008), for the proposition that a reckless mental state does not meet the use-of-force requirement under a similarly phrased provision in the U.S. Sentencing Guidelines. Relying on that case, Hammons points out that § 652(B) requires only recklessness because an offender need only act “in conscious disregard” for the safety of others—so Hammons argues it does not qualify as a violent felony under the ACCA’s elements clause.

But Hammons discounts an important element of the Oklahoma law. Section 652(B) requires that the offender use a vehicle “*to facilitate* the intentional discharge” of a weapon. Okla. Stat. tit. 21, § 652(B) (1992) (emphasis added). The phrase “to facilitate” indicates that the offender must have the specific intent to accomplish the intentional discharge of a weapon. See Burleson v. Saffle, 46 P.3d 150, 152 (Okla. Crim. App. 2002) (interpreting § 652(B) to require “the specific intent to discharge a weapon”). And it is already established that purposefully discharging a firearm in the direction of others satisfies the elements clause of the ACCA. United States v. Hernandez, 568 F.3d 827, 830 (10th Cir. 2009). Thus,

§ 652(B) contains as an element the intentional—not merely reckless—use of physical force against the person of another.³

The Supreme Court’s recent decision in United States v. Voisine confirms the point. 136 S. Ct. 2272 (2016). In interpreting the word “use . . . of physical force” in 18 U.S.C. § 921(a)(33)(A)(ii), Voisine reasoned that because reckless conduct involves a “*deliberate* decision to endanger another,” a predicate statute requiring only a reckless mental state would categorically involve the use of physical force. Id. at 2279 (emphasis added). The Court clarified that the categorical inquiry focuses on whether the force contemplated by the predicate statute is “volitional” or instead “involuntary”—it makes no difference whether the person applying the force had the specific intention of causing harm or instead merely acted recklessly. Id.; see also United States v. Mendez-Henriquez, 847 F.3d 214, 222 (5th Cir. 2017) (interpreting Voisine to establish a dividing line between “volitional acts [and] involuntary motion[,], not recklessness [and] intention”).⁴ We have already observed that Oklahoma’s § 652(B) requires the deliberate use of physical force—the facilitation of

³ There is no question that the physical force contemplated by Oklahoma’s drive-by shooting statute is employed “against the person of another.” 18 U.S.C. § 924(e)(2)(B)(i). The Oklahoma Court of Criminal Appeals—the court of last resort for state criminal cases—has held that § 652(B) is “indisputably a crime against the person.” Burleson, 46 P.3d at 152.

⁴ We do not here decide whether Voisine abrogated our earlier precedent in Zuniga-Soto, 527 F.3d at 1124, which held that “recklessness falls into the category of accidental conduct” that “fail[s] to satisfy the use of physical force requirement” in a similarly worded federal sentencing guideline. We leave for another day a final determination on that question.

the intentional discharge of a weapon. See Burleson, 46 P.3d at 152. Accordingly, we conclude that § 652(B) necessarily involves “the use . . . of physical force against the person of another.”

C. Section 652(B)’s Inclusion of “Other Weapon”

Section 652(B) criminalizes the use of a vehicle to aid “the intentional discharge of any kind of firearm, crossbow or *other weapon* in conscious disregard for the safety of another person” (emphasis added). Hammons contends that this inclusion of “other weapon” defeats a categorical match because it permits a conviction even when the weapon does not involve or require the application of physical force against another person. A predicate statute will qualify as a violent felony under the ACCA’s elements clause only if—when looking to the least of the acts criminalized—the statute *necessarily* involves the use, attempted use, or threatened use of “physical force” against another person. See Moncrieffe v. Holder, 133 S. Ct. 1678, 1684 (2013). Hammons imagines some kind of weapon, such as an instrument that deploys hazardous chemicals, that could trigger a conviction under Oklahoma’s § 652(B) but would not involve “the use . . . of physical force against the person of another.” 18 U.S.C. § 924(e)(2)(B)(i).

We disagree for several reasons. First, § 652(B) requires that the “other weapon” be “*discharge[d]*”—which is a quintessentially physical action. Okla. Stat. tit. 21, § 652(B) (1992) (emphasis added). The term “physical force” in the elements clause refers to the “mechanism by which the force is imparted,” rather than the

physical effect on the victim. See United States v. Rodriguez-Enriquez, 518 F.3d 1191, 1194 (10th Cir. 2008) (exposing a victim to hazardous chemicals or poison is not “physical force” without using some actual kinetic force to cause the harm). Section 652(B)’s requirement that the “other weapon” be “discharge[d]” indicates that—whatever the weapon is—it must be used in a manner that involves the application of physical force.⁵

Second, the highest criminal court in Oklahoma observed that, in enacting § 652(B), “the Legislature intended to punish willful *use of force or violence* against another” Burleson, 46 P.3d at 153 (emphasis added). Third, the highest criminal court in Oklahoma has defined a “weapon” generally as “anything used or designed to be used in *destroying, defeating, or injuring* an enemy—an instrument of offensive or defensive combat.” Beeler v. State, 334 P.2d 799, 806 (Okla. Ct. Crim. App. 1959) (emphasis added). These considerations confirm that § 652(B)’s reference to “other weapon” contemplates the use of an instrument that necessarily involves the use of physical force.

⁵ There may be some question whether Rodriguez-Enriquez remains good law in light of subsequent Supreme Court decisions addressing the degree of physical force required under similar statutes. See Johnson v. United States, 559 U.S. 133, 140 (2010) (interpreting 18 U.S.C. § 924(e)(2)(B)(i)); United States v. Castleman, 134 S. Ct. 1405, 1414-15 (2014) (interpreting 18 U.S.C. § 921(a)(33)(A)(ii)). Hammons does not challenge the continued validity of Rodriguez-Enriquez in this case, so we offer no comment on that question. We simply note that Rodriguez-Enriquez furnishes only one of several grounds to reject Hammons’ argument regarding the inclusion of “other weapon” in Oklahoma’s drive-by shooting statute.

Finally, Hammons’ invitation that we deny a categorical match based on the possibility that an offender could commit chemical warfare from the backseat of a car requires us to stretch our “legal imagination” beyond what is “realistically probab[le].” Moncrieffe, 133 S. Ct. at 1685. The Supreme Court in Moncrieffe cautioned us not to engage in such speculative adventures, so we decline to do so here. Id.

III. CONCLUSION

A conviction under Oklahoma’s drive-by shooting statute, Okla. Stat. tit. 21, § 652(B), categorically qualifies as a violent felony under the elements clause of the ACCA. We therefore AFFIRM.

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

August 15, 2017

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

No. 16-6024

BRITT JARRIEL HAMMONS,

Defendant - Appellant.

ORDER

Before **BRISCOE**, **EBEL**, and **MURPHY**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court



ELISABETH A. SHUMAKER, Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	Case Nos. CR-04-172-F
	)	CIV-15-912-F
BRITT JARRIEL HAMMONS,	)	
	)	
Defendant.	)	

ORDER

Before the court is defendant, Britt Jarriel Hammons’ “Motion to Correct Sentence by a Person in Federal Custody 28 USCS Section 2255.” Doc. no. 48. The motion was filed *pro se*. Plaintiff, United States of America, has responded and defendant, through appointed counsel, has replied. Upon due consideration of the parties’ submissions, the court makes its determination.

I.

Defendant, Britt Jarriel Hammons (“Hammons”), pled guilty to one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). On April 28, 2005, Hammons was sentenced by the court to a term of 180 months imprisonment, pursuant to the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e), to be served consecutively to prison terms imposed for violations of state law.¹ Hammons’ sentence of 180 months imprisonment was the statutory minimum under the ACCA. Hammons timely appealed his sentence to the Tenth Circuit,

¹ In applying the ACCA, the court relied upon Hammons’ prior Oklahoma County convictions in Case No. CF-1992-7615 of three counts of Using a Vehicle to Facilitate the Intentional Discharge of a Firearm and one count of Attempting to Facilitate Discharge of Firearm.

arguing that the court (1) erred in sentencing him under the ACCA where the indictment, the plea petition, and plea proceedings did not mention the ACCA; (2) erred in treating his prior felony convictions for using, and attempting to use, a vehicle to facilitate the discharge of a firearm as separate offenses for purposes of applying the ACCA; and (3) abused its discretion in refusing to run his federal sentence concurrent with the state sentences. On November 1, 2005, the Tenth Circuit issued an order and judgment affirming Hammons' sentence. Thereafter, Hammons filed a petition for writ of certiorari. The Supreme Court denied the petition on March 6, 2006.

II.

Hammons seeks to vacate his sentence under § 2255 based upon the Supreme Court's recent decision in Johnson v. United States, 135 S.Ct. 2551 (2015). Hammons argues that Johnson, which struck the residual clause of 18 U.S.C. § 924(e)(2)(B)(ii) as unconstitutionally vague, applies retroactively on collateral review and because his prior convictions of state law do not qualify as violent felonies under the force clause of 18 U.S.C. § 924(e)(2)(B)(i), his sentence must be corrected.

Plaintiff, United States of America ("United States"), agrees with defendant that Johnson applies retroactively to ACCA cases on collateral review. However, the United States argues defendant's prior convictions qualify as violent felonies under the force clause of § 924(e)(2)(B)(i). In so arguing, the United States points out that while the criminal statute at issue, 21 O.S. § 652(B), does not include the word "force," the statute, in order to be violated, requires that the offender necessarily have used, attempted to use or threatened to use physical force against the person of another. Thus, the United States maintains that Hammons' convictions are violent

felonies under the force clause of § 924(e)(2)(B)(i) and Hammons is not entitled to vacation of his sentence under § 2255.

In reply, Hammons argues that his convictions do not fall within the force clause of § 924(e)(2)(B)(i). Hammons points out that the court must employ the categorical approach in determining whether his prior convictions qualify as violent felonies under the force clause, and consequently, the court must look only to the statutory definition of the crimes and not to the facts underlying his offenses. Hammons contends that his convictions do not qualify as violent felonies under the ACCA because the statutory definition of the crimes does not require the use, attempted use, or threatened use of physical force. Hammons asserts that physical force has been defined to mean violent force, that is, force which is capable of causing physical pain or injury to another person. Hammons asserts that an individual can be convicted under the criminal statute at issue, § 652(B), without employing the use of force. According to Hammons, an individual can be convicted under the statute by merely driving the vehicle in which a firearm or other weapon was intentionally discharged by another person. Hammons additionally maintains that his convictions under the subject statute did not require intentional conduct which is necessary for a violent felony under the ACCA. Further, Hammons asserts that the subject statute's term "other weapon" encompasses weapons which do not necessarily require the use of violent physical force.

III.

Initially, in light of the parties' agreement that Johnson applies retroactively on collateral review, the court assumes, without deciding, that the decision applies retroactively and defendant's motion is timely. The court therefore proceeds to decide whether Hammons is entitled to relief under § 2255 based upon the Johnson decision

which struck the residual clause of 18 U.S.C. § 924(e)(2)(B)(ii) as unconstitutionally vague.

The ACCA provides enhanced punishment for persons with three previous convictions for a “violent felony.” 18 U.S.C. § 924(e). After Johnson, a “violent felony” under the ACCA includes any crime punishable by imprisonment for more than one year that “has as an element the use, attempted use, or threatened use of physical force against the person of another, ” *see* 18 U.S.C. § 924(e)(2)(B)(i) [the force clause], or is “burglary, arson, or extortion, or involves the use of explosives,” *see*, 18 U.S.C. § 924(e)(2)(B)(ii) [the enumerated crimes clause].

The criminal statute in effect at the time of Hammons’ convictions provided:

Every person who uses any vehicle to facilitate the intentional discharge of any kind of firearm, crossbow or other weapon in conscious disregard for the safety of any other person or persons shall upon conviction be punished by imprisonment in the State Penitentiary for a term of not less than two (2) years nor more than twenty (20) years.

21 O.S. 1992 Supp. § 652(B). The government does not argue that Hammons’ convictions under the drive-by shooting statute fall within the enumerated crimes clause of § 924(e)(2)(B)(ii). Thus, the question is whether his convictions fall within the force clause of § 924(e)(2)(B)(i). If not, Hammons is entitled to relief under § 2255 as the residual clause of § 924(e)(2)(B)(ii) was stricken in Johnson.

To determine whether the convictions under the drive-by shooting statute falls within the force clause of § 924(e)(2)(B)(i), the court, as propounded by Hammons, uses the “categorical approach.” Descamps v. United States, 133 S.Ct. 2276, 2280 (2013). Under that approach, the court looks only to the elements of the crime, not the particular facts of the case. *Id.* at 2283. Thus, the court considers whether the

elements of the offense are of the type that would justify its inclusion within the force clause, without inquiring in to the specific conduct of the offender. United States v. Hernandez, 568 F.3d 827, 828 (10th Cir. 2009).

Upon review, the court concludes that the convictions for drive-by shooting satisfy the statutory definition of violent felony under the force clause. In Burleson v. Saffle, 46 P.3d 150 (Okla. Crim. App. 2002), the Oklahoma Court of Criminal Appeals determined that “the drive-by shooting statutes require the specific intent to discharge a weapon in conscious disregard for the safety of another person or persons.” *Id.* at 153. It also determined that drive-by shooting is a “crime against the person.” *Id.* at 152. Further, it determined that “the Legislature intended to punish willful use of force or violence against another whether or not a defendant has the specific intent to injure or kill.” *Id.* at 153.

This court is bound by the Oklahoma Court of Criminal Appeals’ interpretation of the state law. Johnson v. United States, 130 S.Ct. 1265, 1269 (2010). The court concludes that as interpreted by the Oklahoma Court of Criminal Appeals, a violation of the drive-by shooting statute, § 652(B), necessarily requires the use, attempted use or threatened use of physical force against the person of another. The statute requires an intentional discharge of a weapon. See, United States v. Hernandez, 568 F.3d at 830 (knowingly discharging a firearm at or in the direction of one or more individuals involves the use, attempted or threatened use of physical force against the person of another). Although the statute does not necessarily require the offender to be the individual who discharges the weapon, there can be no conviction unless a weapon is intentionally discharged and in conscious disregard for the safety of a person or

persons. There also must be the use of a vehicle to facilitate the intentional discharge of a weapon.²

Despite Hammons' argument to the contrary, his convictions require a showing of intentional conduct. While the offense has a recklessness component (discharge of firearm in the conscious disregard for the safety of any other person or persons), it also has an intentional component, the intentional discharge of a firearm. In addition, the language of the statute, "uses . . . vehicle to facilitate," which indicates intentional conduct on the part of the driver of the vehicle. Nguyen v. Ashcroft, 366 F.3d 386, 388 (5th Cir. 2004).

Finally, the court rejects Hammons' argument that the use of the phrase "other weapon" in the statute does not require the use, attempted use or threatened use of violent physical force. As noted by Hammons, Black's Law Dictionary defines "weapon" as "[a]n instrument used or designed to be used to injure or kill someone." (10th ed. 2014). However, in Bond v. United States, 134 S.Ct. 2077 (2014), the Supreme Court also explained that the "use of something as a 'weapon' typically connotes '[a]n instrument of offensive or defensive combat,' Webster's Third New

² OUJI-CR-4-5 states:

No person may be convicted of use of a vehicle to facilitate the discharge of a firearm/crossbow/weapon unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, use of any vehicle;

Second, to facilitate the intentional discharge;

Third, of any firearm/crossbow/weapon;

Fourth, in the conscious disregard for the safety of any other person or persons.

International Dictionary 2589 (2002) or ‘[a]n instrument of attack or defense in combat, as a gun, missile, or sword,’ American Heritage Dictionary 2022 (3d ed 1992).” In the court’s view, intentional discharge of “other weapon,” for purposes of 652(B) would constitute an instrument of attack or defense in combat and would fall within the Supreme Court’s definition of “physical force,” defined as meaning “*violent* force—“that is, force capable of causing physical pain or injury to another person.” *Id.* at 2091 (quoting Johnson v. United States, 559 U.S. 133 (2010)) (emphasis in original). The court therefore concludes that the inclusion of “other weapon” in § 652(B) also requires the use, attempted use, or threatened use of physical force.

In sum, the court finds that Hammons’ convictions under § 652(B) qualify as violent felonies under § 924(e)(2)(B)(i). Consequently, the court finds that Hammons is not entitled to relief under § 2255.

IV.

The district court is required to issue or deny a certificate of appealability when it enters a final order adverse to the applicant in § 2255 proceedings. Rule 11(a), Rules Governing Section 2255 Proceedings for the United States District Courts.

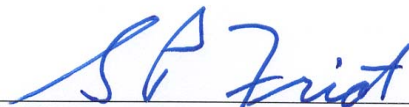
A certificate of appealability may issue only if Hammons makes a “substantial showing of the denial of a constitutional right” 28 U.S.C. § 2253(c)(2). Hammons can satisfy that standard by demonstrating that the issues raised are debatable among jurists, that a court could resolve the issues differently, or that the questions deserve further proceedings. Slack v. McDaniel, 529 U.S. 473, 484 (2000) (citing Barefoot v. Estelle, 463 U.S. 880, 893 (1983)).

After considering the record in this case, the court concludes that Hammons has failed to make the required showing. The court therefore concludes that a certificate of appealability should be denied.

V.

Based upon the foregoing, defendant, Britt Jarriel Hammons' "Motion to Correct Sentence by a Person in Federal Custody 28 USCS Section 2255," (doc. no. 48) is **DENIED**. A certificate of appealability is also **DENIED**. Judgment shall issue forthwith.

DATED January 15, 2016.



STEPHEN P. FRIOT
UNITED STATES DISTRICT JUDGE

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