

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

No: 17-1564

Jay D. Lamont

Movant - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:16-cv-00635-GAF)

JUDGMENT

Before COLLOTON, MURPHY and KELLY, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

September 18, 2017

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appendix A

**UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

JAY D. LAMONT,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.

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Case No. 16-00635-CV-W-GAF

Crim. No. 05-00177-01-CR-W-GAF

**ORDER DENYING MOVANT'S MOTION UNDER 28 U.S.C. § 2255, DENYING A
CERTIFICATE OF APPEALABILITY, AND DISMISSING CASE**

Movant, who is incarcerated at the FCI Forrest City Low in Forrest City, Arkansas, pursuant to a conviction and sentence entered in the above-cited criminal case, has filed a *pro se* motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. Respondent has filed suggestions in opposition to Movant's motion. Doc. 12. Movant has filed a reply thereto. Doc. 18. Because this Court finds that the motion, files, and record conclusively show that Movant is not entitled to relief,¹ Movant's motion is denied, a certificate of appealability is denied, and this case is dismissed.

Background

On May 10, 2005, an indictment was issued charging Movant with one count of being a felon in possession of a firearm after "having been convicted of crimes punishable by imprisonment for terms exceeding one year; and having been convicted of three violent felonies as defined in 18 U.S.C. § 924(e), committed on occasions different from one another," in violation of

¹ "A Section 2255 movant is entitled to an evidentiary hearing . . . unless the motion, files, and record conclusively show he is not entitled to relief." *Roundtree v. United States*, 751 F.3d 923, 925 (8th Cir. 2014) (citation and internal quotation omitted).

Appendix B

18 U.S.C. §§ 922(g)(1) and 924(e). Crim. Doc. 1, p. 1.² The charge carried a statutory range of imprisonment of not less than 15 years and up to life imprisonment. *Id.*

On October 6, 2005, Movant appeared before this Court and pleaded guilty pursuant to a written plea agreement. Crim. Docs. 23, 24. Prior to sentencing, a Presentence Investigation Report (PSR) was issued,³ wherein it was determined that Movant previously had been convicted of the following felonies:

1. Robbery with a firearm in Ottawa County District Court, Miami, Oklahoma, Case No. CRF-84-55;
2. Robbery with a firearm in Ottawa County District Court, Miami, Oklahoma, Case No. CRF-84-56;
3. Robbery in the first degree and Armed Criminal Action, Newton County Circuit Court, Neosho, Missouri, Case No. CR484-208FX;
4. Two counts of Robbery with a firearm in Mayes County District Court, Mayes County, Oklahoma, Case No. CRF-84-40;
5. Robbery in the first degree, Jasper County Circuit Court, Joplin, Missouri, Case No. CR584-201F;
6. Robbery in the first degree, Jasper County Circuit Court, Joplin, Missouri, Case No. CR584-202F; and
7. Two counts of Robbery in the first degree, McDonald County Circuit Court, McDonald County, Missouri, Case No. CR284-112FX.

² "Crim. Doc." refers to the docket number entries in Movant's criminal case, Case No 05-00177-01-CR-W-GAF. "Doc." refers to the docket number entries in Movant's civil case, Case No 16-00635-CV-W-GAF. Page number citations refer to the page numbers assigned by the CM/ECF electronic docketing system.

³ A hardcopy of the PSR was part of the record at sentencing. Crim. Doc. 25. For the convenience of the parties and any reviewing court, a sealed copy of the PSR will also be entered electronically into the record contemporaneously with this Order.

PSR, pp. 7-10. The PSR found that Movant's felony robbery convictions qualified as violent felonies for purposes of designating Movant as an armed career criminal. *Id.* at 7. As a result, the statutory range of punishment was determined to be not less than 15 years and not more than life imprisonment. *Id.* at 15. Movant did not object to the PSR. PSR Addendum; Crim. Doc. 25, p. 1.

On March 1, 2006, Movant appeared before this Court for sentencing, whereupon this Court sentenced Movant to the statutory minimum sentence of 180 months' imprisonment. Crim. Docs. 25, 26. Movant did not appeal this Court's sentence.

On June 13, 2016, Movant filed the present § 2255 motion, wherein he argues that he is entitled to relief under *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015). Doc. 1; Doc. 5, p. 4.⁴ Although counsel was originally appointed to represent Movant, counsel was permitted to withdraw after reviewing Movant's case and finding that he is not eligible for relief under *Johnson*. Docs. 8, 9, 10. *I DISMISSED COUNSEL F.P.D. LAINE CARDARELLA*

Standard

Title 28 U.S.C. § 2255 provides that an individual in federal custody may file a motion to vacate, set aside, or correct his or her sentence. A motion under this statute "is not a substitute for a direct appeal and is not the proper way to complain about simple trial errors." *Anderson v. United States*, 25 F.3d 704, 706 (8th Cir. 1994) (internal citations omitted). Instead, § 2255 provides a statutory avenue through which to address constitutional or jurisdictional errors and errors of law that "constitute[] a fundamental defect which inherently results in a complete miscarriage of justice." *Sun Bear v. United States*, 644 F.3d 700, 704 (8th Cir. 2011) (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)).

Discussion

In Movant's § 2255 motion, Movant raises one ground for relief, wherein he argues that his

⁴ At this Court's direction, Movant refiled his motion on court-approved forms on June 27, 2016. Doc. 5.

sentence is invalid pursuant to *Johnson*. Doc. 5, p. 4. In response, the Government argues that *Johnson* does not apply to Movant's case, because Movant's prior felony convictions qualify as violent felonies under the "force clause"⁵ of the Armed Career Criminal Act (ACCA). Doc. 12.

At issue in *Johnson* was whether the residual clause of the ACCA, 18 U.S.C. § 924(e)(2)(B)(ii), was unconstitutionally vague. The ACCA requires the enhanced statutory range of punishment for anyone convicted of violating § 922(g) if the person has three previous convictions that qualify as either a "violent felony" or as a "serious drug offense." 18 U.S.C. § 924(e)(1). A "violent felony" is defined under the ACCA as a crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another" (the "force clause"); "is burglary, arson, or extortion, [or] involves use of explosives" (the "enumerated offenses clause"); or "otherwise involves conduct that presents a serious potential risk of physical injury to another" (the "residual clause"). *Id.* § 924(e)(2)(B)(i), (ii).

The *Johnson* Court held that a sentence imposed under the residual clause of the ACCA violates the Constitution's guarantee of due process because it is unconstitutionally vague. *Johnson*, 135 S. Ct. at 2563. The *Johnson* Court stated specifically that its decision "does not call into question application of the Act to the four enumerated offenses or the remainder of the Act's definition of a violent felony." *Id.* The rule articulated in *Johnson* applies retroactively to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257 (2016).

Movant is not entitled to relief. Movant was not sentenced under the residual clause of the ACCA. Instead, at least three of Movant's prior convictions qualify as violent felonies under the force clause of the ACCA. Movant has five prior violent felony convictions for robbery in the first degree in violation of Mo. Rev. Stat. § 569.020 and four prior violent felony convictions of robbery with a firearm under Okla. Stat. tit. 21, § 801. As to Movant's prior convictions in Missouri under § 569.020, in *Bevly v. United States*, No. 4:16CV00965 ERW, 2016 WL 6893815, at *3 (E.D.

⁵ The "force clause" is also referred to as the "elements clause."

Mo. Nov. 23, 2016), the district court explained the following:

At first glance, Missouri's statute for Robbery in the First Degree appears to fit squarely in the elements clause of the ACCA. The statute uses the term "forcibly steals" and its definition is almost identical to the language contained in the elements clause of the ACCA. However, Robbery in the Second Degree also contains the phrase "forcibly steals" and the Eighth Circuit has recently determined Missouri's second-degree robbery statute does not necessarily require the use of violent force as one of its elements and it is not a violent felony. *See Bell*, No. 15-3506, slip op. at 7. Therefore, the Court must analyze the listed elements of Robbery in the First Degree that differentiate it from Robbery in the Second Degree to determine if Robbery in the First Degree is a violent felony.

The listed elements make clear Robbery in the First Degree is a violent felony. A person may commit Robbery in the First Degree when a person forcibly steals property and either causes serious physical injury, is armed with a deadly weapon, uses or threatens to use a dangerous instrument, or displays or threatens to use what appears to be a deadly weapon or dangerous instrument. This language satisfies the requirement of the use or threatened use of physical force or force capable of causing physical pain or injury to another. The use of violence is what differentiates Robbery in the First Degree and Robbery in the Second Degree. Therefore, the Court finds Missouri's statute for Robbery in the First Degree qualifies as a violent felony under the ACCA. *See also United States v. Sprouls*, 389 Fed. Appx. 826, 828 (10th Cir. 2010) ("There is no question that Missouri . . . first-degree robbery [is a] violent felon[y].").

Bevly, 2016 WL 6893815, at *3. The Court agrees with this reasoning. As a result, Movant's prior convictions for first-degree robbery in Missouri qualify as violent felonies for purposes of the force clause of the ACCA.

Similarly, under Okla. Stat. tit. 21, § 801, a person commits the crime of robbery with a firearm when "with the use of any firearms or any other dangerous weapons, whether the firearm is loaded or not, or who uses a blank or imitation firearm capable of raising in the mind of the one threatened with such device a fear that it is a real firearm, attempts to rob or robs any person or persons, or who robs or attempts to rob any place of business, residence or banking institution or any other place inhabited or attended by any person or persons at any time, either day or night . . .". Robbery is defined as the "wrongful taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." Okla. Stat. tit. 21, § 791. "[T]he force or fear must be employed either to obtain or retain possession

of the property, or to prevent or overcome resistance to the taking.” Okla. Stat. tit. 21, § 792. Therefore, Movant’s convictions under Okla. Stat. tit. 21, § 801 also would satisfy the force clause of the ACCA, in that it requires the use, attempted use, or threatened use of physical force to effectuate the taking, specifically with a firearm. *See Hart v. United States*, 2016 WL 3200199 (W.D. Mo. June 7, 2016) (finding an Oklahoma robbery with a firearm conviction under Okla. Stat. tit. 21 § 801 qualifies as a violent felony under 18 U.S.C. § 924(e)).

Consequently, at least three of Movant’s prior felonies qualify as violent felonies under the force clause of the ACCA. Because *Johnson* invalidated only the residual clause definition of a “violent felony” and did not affect the force clause, *Johnson* cannot provide Movant relief. *Johnson*, 135 S. Ct. at 2563. As a result, Movant’s § 2255 motion is denied.

Certificate of Appealability

Pursuant to Rule 11 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 Movant. A certificate of appealability may be issued “only if [Movant] has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Because Movant has made no such showing, the Court declines to issue a certificate of appealability.

Conclusion

For the foregoing reasons, Movant’s motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 is denied, a certificate of appealability is denied, and this case is dismissed.

It is so **ORDERED**.

/s/ Gary A. Fenner
GARY A. FENNER
UNITED STATES DISTRICT JUDGE

Dated: January 10, 2017.