

No. 17-1821

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DENNIS CRUMP,

Petitioner-Appellant,

V.

UNITED STATES OF AMERICA,

Respondent-Appellee.

FILED
Nov 20, 2017
DEBORAH S. HUNT, Clerk

ORDER

Dennis Crump, a federal prisoner represented by counsel, appeals the district court's order denying his motion to vacate under 28 U.S.C. § 2255. This court construes Crump's notice of appeal as an application for a certificate of appealability. Crump has moved for leave to file a pro se supplemental brief after the filing of any brief by counsel.

Crump pleaded guilty to being a felon in possession of firearms, in violation of 18 U.S.C. § 922(g)(1), possessing with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C), and possessing firearms in furtherance of drug trafficking, in violation of 18 U.S.C. § 924(c)(1)(A)(i). The district court determined that Crump was an armed career criminal and sentenced him to an aggregate prison term of 280 months. We dismissed Crump's appeal. He unsuccessfully sought relief under § 2255.

In 2016, Crump filed another motion to vacate in the district court, arguing that, in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), he should not be subject to an enhanced sentence as an armed career criminal. Specifically, he asserted that his 1985 Michigan conviction for felonious assault no longer qualified as a “violent felony” under 18 U.S.C. § 924(e)(2)(B). In *Johnson*, the Supreme Court held that the residual clause of the Armed Career

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Criminal Act, which defines “violent felony” to include a felony that involves conduct that presents a serious potential risk of physical injury to another, is unconstitutionally vague. *Id.* at 2555, 2563. The district court transferred Crump’s motion to vacate to this court for a determination of whether he could proceed. We granted Crump authorization to proceed and remanded the case to the district court. The district court denied the motion to vacate and declined to issue a certificate of appealability, concluding that Crump’s felonious assault conviction qualified as a violent felony under the Act’s elements clause in 18 U.S.C. § 924(e)(2)(B)(i), which *Johnson* left undisturbed. *Id.* at 2563.

To obtain a certificate of appealability, a movant must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Where a district court has rejected a constitutional claim on the merits, a movant must show that jurists of reason would find the district court’s assessment of the claim to be debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Reasonable jurists would not debate the district court’s denial of Crump’s motion to vacate. In *United States v. Harris*, 853 F.3d 318 (6th Cir. 2017), we concluded that a conviction under Michigan’s current felonious assault statute is a “crime of violence” under the elements clause in USSG § 4B1.2(a)(1), which is typically interpreted the same way as the identical elements clause in § 924(e)(2)(B)(i). *Id.* at 320-21. The felonious assault statute that was in effect in Michigan in 1985 is equivalent to the current statute. Mich. Comp. Laws § 750.82 (1931) (amended 1994). And so Crump’s prior felonious assault conviction is a violent felony under the elements clause in § 924(e)(2)(B)(i).

Accordingly, Crump’s application for a certificate of appealability is **DENIED**, and his motion for leave to file a supplemental brief is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DENNIS CRUMP,

Movant,

Case No. 1:16-CV-162

v.

HON. GORDON J. QUIST

UNITED STATES OF AMERICA,

Respondent.

OPINION

On February 16, 2016, Movant, Dennis Crump, filed a Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, or Correct Sentence By a Person in Federal Custody, seeking relief pursuant to the United States Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), which held that the residual clause of the Armed Career Criminal Act is unconstitutionally vague. *Id.* at 2563. Because Crump had previously filed a § 2255 Motion, this Court transferred the motion to the Sixth Circuit as a second or successive § 2255 Motion. (ECF No. 3.) On October 21, 2016, the Sixth Circuit authorized Crump to proceed with a second or successive § 2255 Motion in light of *Johnson*.

The Government has filed a response to Crump's § 2255 Motion, Crump has filed a reply, and the Government has filed a notice of supplemental authority. For the reasons that follow, the Court will deny Crump's § 2255 Motion.

On April 4, 2009, Crump was charged in a three-count superseding indictment. Count 1 charged Crump with being a felon in possession of firearms, in violation of 18 U.S.C. §§ 922(g)(1),

intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C). Count 3 charged Crump with possessing firearms in furtherance of drug trafficking, in violation of 18 U.S.C. § 924(c)(1)(A)(i). Crump pled not guilty and proceeded to trial, which began on August 25, 2009. On the second day of trial, Crump pled guilty to all three counts of the superseding indictment.

The presentence investigation report determined that Crump was an armed career criminal under 18 U.S.C. § 924(e) because he had one prior conviction for felonious assault, in violation of M.C.L. § 750.82, and two prior convictions for serious drug offenses. (Case No. 1:09-CR-73-01, PSR ¶¶ 36, 44–46.) On January 14, 2010, this Court sentenced Crump to 220 months on Count 1, 220 months on Count 2, to run concurrently with Count 1, and 60 months on Count 3, to run consecutively with Counts 1 and 2.

[The Armed Career Criminal Act (ACCA) provides for a mandatory minimum sentence of 15 years imprisonment for a violation of 18 U.S.C. § 922(g) if the defendant has three prior convictions for a “violent felony” or a “serious drug offense” or both. 18 U.S.C. § 924(e). The ACCA contains three clauses that determine whether a prior conviction qualified as a “violent felony”: (1) the “elements clause”; (2) the “enumerated offenses clause”; and (3) the “residual clause.” *United States v. Patterson*, 853 F.3d 298, 302 (6th Cir. 2017). *Johnson* invalidated only the “residual clause.” See *Johnson*, 135 S. Ct. at 2563 (“Today’s decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act’s definition of violent felony.”). Because assault is not one of the enumerated offenses under the ACCA, whether Crump is entitled to relief under *Johnson* depends on whether felonious assault under M.C.L. § 750.82 falls within the elements clause.]

The Sixth Circuit’s decision in *United States v. Harris*, 853 F.3d 318 (6th Cir. 2017), squarely answers the question. In *Harris*, the court held that felonious assault under M.C.L. §

750.82 constitutes a “crime of violence” under the “elements clause” of § 4B1.2(a) of the Sentencing Guidelines. Applying the categorical approach, the court said that “[t]aken together, the[] elements [of an offense under M.C.L. § 750.82] entail ‘the use, attempted use, or threatened use of physical force’ under the federal Sentencing Guidelines.” *Id.* at 321. The court noted that felonious assault qualifies as a crime of violence because it proscribes not “common law assault but common law assault *with a dangerous weapon*,” which suffices to render the offense a “crime of violence.” *Id.* at 322. Because the courts interpret the elements clause of the Sentencing Guidelines and the elements clause of the ACCA “the same way,” *id.* at 320; *see also United States v. McMurray*, 653 F.3d 367, 371 n.1 (6th Cir. 2011) (“Whether a conviction is a ‘violent felony’ under the ACCA is analyzed in the same way as whether a conviction is a ‘crime of violence’ under the United States Sentencing Guidelines.”), *Harris* controls the outcome of Crump’s motion.

Accordingly, *Johnson* affords Crump no relief.

Having concluded that Crump is not entitled to relief under *Johnson*, the Court must next determine whether a certificate of appealability should issue under 28 U.S.C. § 2253(c)(2). A certificate should issue if a movant has demonstrated a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The Sixth Circuit has disapproved issuance of blanket denials of certificates of appealability. *Murphy v. Ohio*, 263 F.3d 466, 467 (6th Cir. 2001). Rather, the district court must “engage in a reasoned assessment of each claim” to determine whether a certificate is warranted. *Id.* at 467. Each issue must be considered under the standards set forth by the Supreme Court in *Slack v. McDaniel*, 529 U.S. 473, 120 S. Ct. 1595 (2000). *Murphy*, 263 F.3d at 467.

Under *Slack*, 529 U.S. at 484, 120 S. Ct. at 1604, to warrant a grant of the certificate, “[t]he petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the

constitutional claims debatable or wrong.” The Court concludes that reasonable jurists could not find this Court’s conclusion that Crump is not entitled to relief under *Johnson* debatable or wrong. Therefore, the Court will deny Crump a certificate of appealability.

An Order consistent with this Opinion will enter.

Dated: June 29, 2017

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DENNIS CRUMP,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

Case No. 1:16-CV-162

HON. GORDON J. QUIST

ORDER

In accordance with the Opinion entered today,

IT IS HEREBY ORDERED that Movant's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, or Correct Sentence By a Person in Federal Custody (ECF No. 1) is **DENIED**.

A certificate of appealability is **DENIED**.

This case is **concluded**.

Dated: June 29, 2017

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DENNIS CRUMP,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

Case No. 1:16-cv-162

HON. GORDON J. QUIST
United States District Court Judge

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the Movant, Dennis Crump, hereby APPEALS to the United States Court of Appeals for the Sixth Circuit from the *Opinion* and *Order* entered in this action on the 29th day of June, 2017.

Respectfully submitted,

SHARON A. TUREK
Federal Public Defender

/s/ Elizabeth A. LaCosse
ELIZABETH A. LACOSSE
Assistant Federal Public Defender
925 W. Washington Street, Ste. 104
Marquette, MI 49855
(906) 226-3050

Dated: July 12, 2017

No. 16-1378

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct 21, 2016
DEBORAH S. HUNT, Clerk

In re: DENNIS CRUMP,

Movant.

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ORDER

Before: BOGGS, SILER, and McKEAGUE, Circuit Judges.

Dennis Crump, a federal prisoner proceeding pro se, moves for authorization to proceed with a second or successive motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255.

Crump pleaded guilty to being a felon in possession of firearms, in violation of 18 U.S.C. § 922(g)(1), possessing cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1), and possessing firearms in furtherance of drug trafficking, in violation of 18 U.S.C. § 924(c)(1)(A)(i). The district court determined that Crump was an armed career criminal and sentenced him to an aggregate prison term of 280 months. We dismissed Crump's appeal. He unsuccessfully sought relief under § 2255.

In 2016, Crump filed another motion to vacate in the district court, arguing that, in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), he should not be subject to an enhanced sentence as an armed career criminal because his prior Michigan conviction for felonious assault no longer qualifies as a "violent felony" under 18 U.S.C. § 924(e)(2)(B). In *Johnson*, the Supreme Court held that the residual clause of the Armed Career Criminal Act, which defines "violent felony" to include a felony that involves conduct that presents a serious potential risk of physical injury to another, is unconstitutionally vague. 135 S. Ct. at 2555, 2563. The district court transferred Crump's motion to this court for a determination of whether he may proceed.

We may authorize a movant to proceed with a second or successive motion to vacate when the movant makes a prima facie showing that his proposed claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. 28 U.S.C. § 2255(h)(2). Such a prima facie showing is not a difficult standard to meet. *In re McDonald*, 514 F.3d 539, 544 (6th Cir. 2008). The Supreme Court has held that *Johnson* announced a new, substantive rule of constitutional law that is retroactive to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016).

Because *Johnson* announced a new, substantive rule of constitutional law made retroactive to cases on collateral review by the Supreme Court and Crump has made a prima facie showing that he may be entitled to relief, we **GRANT** his motion, **AUTHORIZE** the district court to consider his proposed motion, and **REMAND** the case to the United States District Court for the Western District of Michigan.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

**Additional material
from this filing is
available in the
Clerk's Office.**