

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

January 23, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JIMMY EUGENE RHODES,

Defendant - Appellant.

No. 17-6096
(D.C. Nos. 5:16-CV-00799-R and
5:01-CR-00202-R-1)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **LUCERO, BALDOCK**, and **HARTZ**, Circuit Judges.

Jimmy Rhodes appeals the district court's denial of his 28 U.S.C. § 2255 motion. Exercising jurisdiction under 28 U.S.C. § 2253(c), we affirm.

I

In 2002, Rhodes was convicted in federal court of several drug and firearm offenses. A Presentence Investigation Report ("PSR") indicated that Rhodes was subject to a fifteen-year mandatory minimum under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(1). It identified a prior conviction for shooting with intent to kill and two prior convictions for second degree burglary, all in Oklahoma state court. At sentencing, the district court asked defense counsel whether he

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

disagreed with the ACCA enhancement “based on the defendant’s prior convictions” and counsel responded that he had no objection. The district court adopted the PSR. It imposed a total sentence of 260 months. Neither the PSR nor the district court explicitly stated which clause of ACCA was applied.¹

We affirmed on direct appeal. United States v. Rhodes, 62 F. App’x 869, 870 (10th Cir. 2003) (unpublished). Rhodes did not raise any sentencing issues. He then filed a § 2255 habeas motion arguing ineffective assistance of counsel, which was denied. We did not grant a COA. United States v. Rhodes, 157 F. App’x 84 (10th Cir. 2005) (unpublished).

Following the Supreme Court’s decision in Johnson v. United States, 135 S. Ct. 2551 (2015), which invalidated the residual clause of ACCA, we granted Rhodes authorization to file another habeas motion to raise claims based on Johnson. In his motion, Rhodes argued that his sentence was invalid because his prior convictions were considered under the residual clause of ACCA. The district court stated that “the record does not support his contention” and concluded that Rhodes was not actually raising a Johnson claim. It dismissed his motion as untimely. Rhodes appealed, and we granted him a certificate of appealability.

¹ At the time of Rhodes’ sentencing, a prior conviction could qualify as a violent felony for ACCA purposes under three separate clauses: the elements clause, which includes felonies that have “as an element the use, attempted use, or threatened use of physical force against the person of another,” § 924(e)(2)(B)(i); the enumerated offense clause, which covers “burglary, arson, or extortion, [or] involves use of explosives,” § 924(e)(2)(B)(ii); or the residual clause, which encompassed felonies that “otherwise involve[] conduct that presents a serious potential risk of physical injury to another,” § 924(e)(2)(B)(iii).

II

In a § 2255 appeal, we “review the district court’s findings of fact for clear error and its conclusions of law de novo.” United States v. Barrett, 797 F.3d 1207, 1213 (10th Cir. 2015) (quotation omitted). As relevant here, a habeas motion must be filed within one year of “the date on which the judgment of conviction becomes final” or “the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review,” whichever date is later. § 2255(f)(1), (3). The district court concluded that, because Rhodes failed to show his ACCA enhancement was imposed under the residual clause, he was not actually asserting a claim under Johnson and that decision did not provide him a new limitations period.

After briefing in this appeal was complete, we issued an opinion holding that “to be timely under § 2255(f)(3), a § 2255 motion need only ‘invoke’ the newly recognized right, regardless of whether or not the facts of record ultimately support the movant’s claim.” United States v. Snyder, 871 F.3d 1122, 1126 (10th Cir. 2017). We ordered supplemental briefing on the impact of Snyder. In light of that decision, the government concedes that Rhodes’ motion is timely.

Although Snyder establishes that Rhodes motion is timely, it also fatally undermines his claim. As we explained in that case, “it may be possible to determine that a sentencing court did not rely on the residual clause—even when the sentencing record alone is unclear—by looking to the relevant background legal environment at

the time of sentencing.” Id. at 1129 (quotation omitted). If a sentencing court did not rely on the residual clause, a Johnson claim necessarily fails because the Supreme Court did “not call into question application of [ACCA] to the four enumerated offenses, or the remainder of [ACCA’s] definition of a violent felony.” 135 S. Ct. at 2563.

At the time Rhodes was sentenced, our court had repeatedly held that Oklahoma second degree burglary qualified as an enumerated offense if underlying documents indicated that the defendant burgled a building. See United States v. Green, 55 F.3d 1513, 1515-16 (10th Cir. 1995); United States v. Hill, 53 F.3d 1151, 1153-55 (10th Cir. 1995) (en banc); United States v. Amos, 984 F.2d 1067, 1070-71 (10th Cir. 1993).² Rhodes’ PSR and the government’s ACCA notice (to which state court documents were attached) indicate that Rhodes was convicted of burgling homes. We are not directed to any prior decision considering the Oklahoma statute at issue under the residual clause. To the contrary, we declined to analyze whether Oklahoma second degree burglary involved “serious potential risk of physical injury to another” in Amos because we concluded the crime “meets the Taylor court’s

² To qualify as an enumerated offense, a state statute must comport with the “generic” definition of the crime: “an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.” Taylor v. United States, 495 U.S. 575, 598 (1990). Courts apply the categorical approach in considering whether a prior offense qualifies, but may look to state court documents in a narrow range of cases to determine whether a defendant was convicted of generic burglary despite an otherwise overbroad statute. Id. at 602. We express no opinion as to whether our prior cases remain good law following the Supreme Court’s more recent clarifications regarding the so-called “modified categorical approach.” See Mathis v. United States, 136 S. Ct. 2243, 2249 (2016).

definition of burglary” under the enumerated offense clause and thus “qualifies as a ‘violent felony.’” 984 F.2d at 1071.

As in Snyder, “there would have been little dispute at the time of . . . sentencing that” Rhodes’ burglary convictions constituted enumerated offenses. 871 F.3d at 1129. Accordingly, his “Johnson claim must fail because the district court’s ACCA[] determination at the time of sentencing rested on the enumerated [offense] clause rather than the residual clause.” Id. at 1130.

III

AFFIRMED.

Entered for the Court

Carlos F. Lucero
Circuit Judge

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

UNITED STATES OF AMERICA,

Plaintiff,

V.

JIMMY EUGENE RHODES,

Defendant.

CR-01-202-R
CIV-16-799-R

ORDER

Defendant filed a Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255, having been granted authorization to file a second or successive motion by the United States Court of Appeals for the Tenth Circuit.¹ (Doc. Nos. 125, 126). Following the filing of the Government’s response and Defendant’s reply, on January 4, 2017, the Court entered an Order abating the proceedings pending the decision of the United States Supreme Court in *Beckles v. United States*. Doc. No. 134. On March 6, 2017, the Supreme Court issued its decision in *Beckles*, --- U.S. ---, --- S.Ct. ---, 2017 WL 855781 (2017). In light of the Supreme Court’s decision in *Beckles*, Defendant’s § 2255 motion is ripe for review. Having considered the parties’ filings, the Court finds as follows.

On February 6, 2002, Defendant was charged in a five-count superseding indictment with two counts of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g) (Counts 1 and 3), one count of simple possession of methamphetamine in violation

1 The decision by the Tenth Circuit permitting Mr. Rhodes to file a second or successive petition was “an initial gate-keeping ruling.” *Case v. Hatch*, 731 F.3d 1015, 1029 (10th Cir. 2013). This Court is still called upon to make a second gate-keeping ruling as to whether Defendant has met § 2244’s jurisdictional requirements. *Id.*

of 18 U.S.C. § 844(a) (Count 2), one count of possession of stolen firearms in violation of 18 U.S.C. § 922(j) (Count 4), and one count of maintaining a dwelling used to manufacture methamphetamine in violation of 18 U.S.C. § 856(a)(1) (Count 5). A felon in possession normally faces a maximum penalty of ten years imprisonment under 18 U.S.C. § 924(a)(2). However, if the felon possesses the firearm after having sustained three prior convictions “for a violent felony or serious drug offense, or both,” the Armed Career Criminal Act (“ACCA”) mandates a fifteen-year minimum sentence. 18 U.S.C. § 924(e)(1). Here, the Court imposed sentences of 260 months imprisonment on Counts One and Three, as the result of the ACCA enhancement. Petitioner challenges this enhancement under *Johnson v. United States*, 135 S.Ct. 2551 (2015), wherein the Court invalidated a portion of the Act commonly referred to as the residual clause. Defendant also challenges his sentences on Counts 4 and 5 on the basis that similar residual clause language in the applicable United States Sentencing Guidelines increased his base level offense and therefore his sentence on each of those Counts. The United States’ opposition to the instant motion asserts that Petitioner’s four prior convictions for burglary in the second degree as well as a prior conviction for shooting with the intent to kill were sufficient to support both the statutory and guidelines enhancements without reference to the residual clause of either. After review of the parties’ submissions, this Court concludes Petitioner is not entitled to relief pursuant to *Johnson* as to either the ACCA or the applicable provision of the United States Sentencing Guidelines.

The Armed Career Criminal Act defines a “violent felony” as “any crime punishable by imprisonment for a term exceeding one year” that (1) “has as an element the use,

attempted use, or threatened use of physical force against the person of another” (the “use-of-physical-force clause”); (2) “is burglary, arson, or extortion, involves use of explosives” (the “enumerated-offense clause”); or (3) “otherwise involves conduct that presents a serious potential risk of physical injury to another” (the “residual clause”). 18 U.S.C. § 924(e)(2)(B). In *Johnson*, the Supreme Court held that the residual clause of the Act was unconstitutionally vague. *Id.* at 2563 (“imposing an increased sentence under the residual clause of the [ACCA] violates the Constitution’s guarantee of due process.”). The Court noted, however, that its decision did not implicate the enumerated offenses of burglary, arson, extortion, or use of explosives, nor did it invalidate enhancement for those prior convictions for offenses that include “a threat or use of physical force against another person,” known as the elements clause. *Id.* at 2563.

Although Mr. Rhodes contends this Court analyzed his prior state-court convictions for second-degree burglary under the residual clause, the record does not support his contention. The residual clause was not referenced in sentencing memorandums, in objections to the pre-sentence investigation report or at his sentencing hearing. As such, Petitioner has failed to establish that the Court relied on the residual clause. In his Reply (Doc. No. 132), Petitioner, citing *United States v. Mathis*, --- U.S. ---, argues that his burglary in the second degree convictions cannot be considered violent crimes, because *Mathis* renders the modified categorical approach inapplicable to this offense. As noted by Petitioner, the Supreme Court applied its long-standing precedents to explain application of the modified categorical approach when the statutory conduct encompasses conduct outside the scope of generic burglary. Although Petitioner’s *Johnson* claims rely on *Mathis*

for their success, *Mathis* did not announce a new rule of constitutional law, and the Tenth Circuit has specifically held that it does not apply retroactively. *United States v. Taylor*, -- - Fed.Appx. ---, 2016 WL 7093905 at *5 (10th Cir. Dec. 6, 2016). Because Petitioner provides no evidence that the Court relied on the residual clause in concluding that his prior convictions for burglary in the second degree were violent felonies, he is not entitled to relief under *Johnson*. Petitioner's authorization from the Tenth Circuit was limited to claims under *Johnson*, and Petitioner's attempt to rely on *Mathis* must fail.

In *United States v. Taylor*, 2016 WL 7093905 (10th Cir. Dec. 6, 2016), the Tenth Circuit denied a certificate of appealability to a prisoner seeking to challenge his sentencing enhancement under *Johnson*. Like Mr. Rhodes, Eric Taylor argued that his second-degree burglary convictions could not be used as predicate offenses under the Act. The district court concluded that the convictions qualified as "violent felonies" under the enumerated offenses clause. On appeal Taylor cited *Mathis v. United States*, --- U.S. ---, 136 S.Ct. 2243, 195 L.Ed.2d 604 (2016), arguing that under its analysis burglary in the second degree under Oklahoma law could not be an enumerated felony for ACCA purposes. Although the Court of Appeals agreed with the substance of Mr. Taylor's arguments, its ultimate conclusion on the issue guides this Court's resolution of the issues herein.

But even if reasonable jurists would disagree with the district court's analysis applying the modified categorical approach, we still must address the issue of whether Mr. Taylor may rely on *Mathis* in this collateral proceeding. The district court entered its final judgment in Mr. Taylor's criminal case on December 28, 2001. Mr. Taylor had one year from that date to assert a habeas challenge to his sentence. 28 U.S.C. § 2255(f). Although it has been approximately fifteen years, Mr. Taylor filed the present case under § 2255(f)(3), which allows a prisoner to file a habeas application within one year of "the date on which the right asserted was initially recognized by the

Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.” We must therefore determine whether *Mathis* provides a new right made retroactive on collateral review.

Id. at *4. The court then considered whether *Mathis* provided a new rule, and noted the answer was provided by the Supreme Court. “Here, the Supreme Court explicitly stated in *Mathis* that it was not announcing a new rule and that its decision was dictated by decades of prior precedent. . . .” *Id.* at * 4. Because *Mathis* was not a new rule, it could not be used to avoid the statute of limitations period and his request for relief thereunder was untimely.

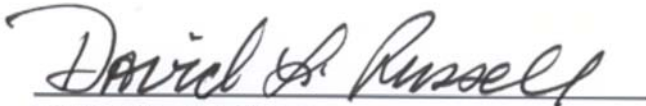
The Court finds no basis for distinguishing the instant case from *Taylor*. Defendant made no previous challenge to whether his convictions for second degree burglary could be considered enumerated felonies under the ACCA, and his challenge at this juncture is untimely given that *Mathis*, upon which he relies, did not announce a new rule of law. *See United States v. Byers*, CR-05-10-HE (W.D. Okla. April 6, 2017)(Doc. No. 69). Accordingly, Mr. Rhodes is not entitled to § 2255 relief on this basis.

Defendant also challenges the Court’s decision to utilize these prior convictions to support a higher base level offense under two provisions of the United States Sentencing Guidelines, specifically § 4B1.1 and § 2K2.1 based on prior violent felonies. Although this case was stayed pending the outcome of the Supreme Court’s decision in *Beckles*, that case is not directly applicable, because it addressed advisory sentencing guidelines, and Mr. Rhodes was sentenced before the Supreme

Courts declared the guidelines advisory, not mandatory, in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). However, regardless of whether *Beckles* applies to mandatory sentencing guidelines, for the same reasons Defendant is not entitled to relief on his contention that his ACCA sentence was unconstitutional, he is not entitled to relief on his challenge to the Court's application of the Sentencing Guidelines to his case. That is, his contention that burglary in the second degree cannot qualify as an enumerated felony is untimely.

For the reasons set forth herein, the Defendant's Motion to Vacate pursuant to 28 U.S.C. § 2255 is hereby DENIED. The Court further denies Petitioner a Certificate of Appealability for the reasons set forth in *Taylor*.

IT IS SO ORDERED this 18th day of April 2017.


DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE