

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

February 2, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

TRACY LYNN BRUNKEN,

Defendant - Appellant.

No. 17-6085
(D.C. Nos. 5:16-CV-00107-R &
5:11-CR-00307-R-1)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **HOLMES**, **McHUGH**, and **MORITZ**, Circuit Judges.

Tracy Lynn Brunken appeals the district court's denial of his 28 U.S.C. § 2255 motion. He asserted his criminal sentence was enhanced under the now-invalid "residual clause" of the Armed Career Criminal Act (ACCA), in violation of his due process rights. The district court denied the motion, ruling Mr. Brunken had three prior convictions that still qualified for enhancement purposes under the ACCA. We

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

granted Mr. Brunken a certificate of appealability (COA) under 28 U.S.C. § 2253(c)(1)(B), and now affirm.

Background

Mr. Brunken pleaded guilty in 2011 to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The presentence report (PSR) determined that Mr. Brunken's sentence should be enhanced because his prior Oklahoma criminal convictions qualified him as an armed career criminal under the ACCA. To be an armed career criminal under the ACCA, a defendant must have "three previous convictions by any court . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. § 924(e)(1).

The PSR identified Mr. Brunken's ACCA predicate offenses as one serious drug offense and five violent felonies:

- a 1993 conviction for possession of a controlled dangerous substance (marijuana) with intent to distribute;
- a 1993 conviction for first degree burglary;
- a 1993 conviction for assault with a dangerous weapon;
- a 1994 conviction for first degree burglary;
- a 1994 conviction for pointing a firearm at another person; and
- a 2008 conviction for domestic assault and battery.

Mr. Brunken did not object to the PSR or his classification as an armed career criminal. Under the ACCA enhancement, Mr. Brunken's mandatory minimum sentence was 180 months' imprisonment. The PSR assigned Mr. Brunken an offense

level of 31, criminal history category VI, and an advisory guideline range of 188 to 235 months' imprisonment. The district court sentenced Mr. Brunken to 200 months' imprisonment in March 2012. Mr. Brunken did not appeal.

In June 2015, the Supreme Court struck down one clause of the ACCA's definition of a violent felony. *See Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015). The ACCA defines a violent felony as an offense that (1) "has as an element the use, attempted use, or threatened use of physical force against the person of another" (the elements clause); (2) "is burglary, arson, or extortion, [or] involves use of explosives" (the enumerated-offenses clause); or (3) "otherwise involves conduct that presents a serious potential risk of physical injury to another" (the residual clause). *See* 18 U.S.C. § 924(e)(2)(B). *Johnson* held that the residual clause was void for vagueness under the Due Process Clause. 135 S. Ct. at 2557. The Court later held that *Johnson* applies retroactively to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016).

In February 2016, Mr. Brunken filed a § 2255 motion seeking relief under *Johnson*. The district court appointed counsel to represent him. Mr. Brunken argued his 2008 domestic-assault-and-battery conviction, 1993 assault-with-a-dangerous-weapon conviction, and 1994 pointing-a-firearm conviction could only qualify as violent felonies under the now-invalidated residual clause. He conceded that his 1993 and 1994 first degree burglary convictions qualified as violent felonies under the enumerated-offenses clause and that his 1993 drug conviction qualified as a serious drug offense. But Mr. Brunken argued that he still had fewer than three

qualifying convictions because the 1993 drug, burglary, and assault convictions should count as only one predicate offense because they all occurred on the same day and were charged in the same Information. *See* § 924(e)(1) (requiring that each predicate felony be “committed on occasions different from one another”).

The district court concluded Mr. Brunken still had three qualifying predicate offenses unaffected by *Johnson*: the 1993 drug offense for possession of marijuana with the intent to distribute, and the 1993 and 1994 first degree burglary convictions. It rejected his argument that the 1993 drug offense was committed on the same occasion as the 1993 burglary and assault offenses. Though Mr. Brunken was arrested for these offenses on the same day, it ruled they did not involve the same conduct, and did not occur at the same time or in the same location. Because the 1993 drug, 1993 burglary, and 1994 burglary convictions were not invalidated as predicate offenses by *Johnson* and were sufficient to qualify Mr. Brunken for the enhanced sentence under the ACCA, the court denied his § 2255 motion. Mr. Brunken appealed and we granted him a COA.

Discussion

“In considering the denial of a § 2255 motion for post-conviction relief, we review the district court’s findings of fact for clear error and its conclusions of law *de novo*.” *United States v. Rushin*, 642 F.3d 1299, 1302 (10th Cir. 2011)). “But where, as here, the district court does not hold an evidentiary hearing, but rather denies the motion as a matter of law upon an uncontested trial record, our review is strictly *de novo*.” *Id.*

On appeal, Mr. Brunken argues the district court erred by finding his 1993 drug offense occurred on a different occasion than his 1993 burglary and assault offenses, and thus erred in ruling that he has three non-residual clause qualifying offenses.¹ He argues the three 1993 state convictions count as only one predicate qualifying conviction, and that the 2008 domestic-assault-and-battery conviction could only qualify as a violent felony under the residual clause.

Mr. Brunken concedes that his 1993 and 1994 first-degree burglary convictions and his 1993 drug conviction qualify as predicate offenses for enhancement purposes under the ACCA. Thus, if the 1993 drug conviction and 1993 burglary convictions were committed on “occasions different from one another”

¹ Mr. Brunken also argues that the Government conceded the three 1993 convictions counted as only one predicate offense, citing a footnote in the Government’s response to his § 2255 motion. We find no waiver, as the footnote was clearly a mistake that the Government promptly corrected. In the text of the Government’s response it argued that the three 1993 convictions each counted as a separate predicate conviction under the ACCA. *See* Government’s Response at 6, *United States v. Brunken*, No. 5:11-cr-00307-R-1 (W.D. Okla. April 12, 2016). But a footnote to that statement inconsistently stated that: “As [the three 1993 convictions] occurred on the same day, they count as single predicate conviction for the ACCA.” *Id.* at n.5. The Government filed a surreply to explain that the footnote was a typographical error clearly in conflict with the text of its brief, and it argued at length that the 1993 convictions were separate predicate offenses. Mr. Brunken then replied to the Government’s surreply. The inconsistent footnote in the Government’s initial brief was clearly a mistake and was promptly corrected, and therefore was not a waiver, which is “the intentional relinquishment or abandonment of a known right.” *United States v. Olano*, 507 U.S. 725, 733 (1993) (internal quotation marks omitted).

under § 924(e)(1), Mr. Brunken has at least three qualifying convictions irrespective of *Johnson*.²

Mr. Brunken admitted that on November 13, 1993, he burglarized a home with intent to commit assault, and also possessed marijuana. When he pleaded guilty to the 1993 offenses, he described his actions as follows:

I kicked the door of a house (occupied) and had a fight and I through [sic] a beer bottle at one of the occupants. Also, I had in my possession marijuana but did not [indecipherable] to sale [sic] it. I believe the state has enough evidence to convict me.

R. Vol. 1, at 120.

The district court concluded from the Information and guilty plea that Mr. Brunken possessed the marijuana at a time separate from the burglary even though he was arrested for both offenses on the same day. It concluded that Mr. Brunken could have ended his criminal spree, but chose to continue. We agree with the district court that the drug and burglary offenses occurred on separate occasions for purposes of § 924(e)(1).³

² The district court did not reach Mr. Brunken's argument that the 2008 domestic-assault-and-battery conviction, 1993 assault-with-a-dangerous-weapon conviction, and 1994 pointing-a-firearm conviction could only qualify as violent felonies under the residual clause. We have since held that Oklahoma's assault-with-a-dangerous-weapon statute is categorically a crime of violence under the elements clause, *United States v. Taylor*, 843 F.3d 1215, 1223-24 (10th Cir. 2016), *cert. denied*, 137 S. Ct. 1608 (2017), but Oklahoma's pointing-a-firearm is not, *United States v. Titties*, 852 F.3d 1257, 1275 (10th Cir. 2017).

³ Because we conclude the 1993 drug-possession and the burglary convictions occurred on different occasions, we need not consider whether the 1993 burglary and assault offenses occurred on different occasions—an issue that the district court did
(continued)

We have held the phrase “committed on occasions different from one another” in § 924(e)(1) “was intended to reach multiple criminal episodes distinct in time.” *United States v. Delossantos*, 680 F.3d 1217, 1219 (10th Cir. 2012) (internal quotation marks omitted). Offenses that are similar and occur closely in time may constitute separate, predicate offenses when the defendant could have chosen to stop his illegal conduct but continued nonetheless. *See United States v. Tisdale*, 921 F.2d 1095, 1099 (10th Cir. 1990). Indeed, we have held that two felonies committed on the same day were nonetheless committed on separate occasions for purposes of § 924(e)(1). *See United States v. Lloyd*, 13 F.3d 1450, 1454 (10th Cir. 1994) (“[W]e have previously held that offenses which occurred on the same date and were prosecuted together may nonetheless be considered separate offenses for enhancement purposes.”). Even a small difference in time or place distinguishes convictions for purposes of the ACCA. Thus, in *Tisdale*, we held that breaking into a shopping mall and burglarizing three different businesses inside on one night were three separate and distinct predicate offenses for § 924(e)(1) enhancement purposes. 921 F.2d at 1098-99.

Applying these standards, Mr. Brunken’s possession of marijuana with intent to distribute was separate and distinct from his burglary offense. He concedes he had the marijuana on his person at the time he committed the burglary and assault offenses. *Aplt. Br.* at 15. Clearly then, his criminal possession of the marijuana

not address and Mr. Brunken did not raise on appeal, or at least not adequately enough to discern.

began at a time prior to, and a place different from, the burglary and assault. There is no suggestion in the Information or Mr. Brunken's guilty plea that his possession of the marijuana with intent to distribute it bore any temporal, contextual or other relationship to the burglary. Mr. Brunken had the opportunity to cease his possession of the marijuana before he committed the burglary and assault offenses. And the nature of, and intended victims of, the drug possession offense are different than those of the burglary offense. *See Tisdale*, 921 F.2d at 1098-99 (concluding the defendant's choice to burglarize again the same night evidenced an "intent to engage in a separate criminal episode.").

Because the 1993 drug and 1993 burglary convictions were "committed on occasions different from one another," § 924(e)(1), Mr. Brunken had three ACCA qualifying convictions that were unaffected by *Johnson*. Accordingly, we affirm the district court's order denying Mr. Brunken's § 2255 motion.

Entered for the Court

Jerome A. Holmes
Circuit Judge

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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CR-11-307-R
	)	CIV-16-107-R
	)	
TRACY LYNN BRUNKEN,	)	
	)	
Defendant.	)	

ORDER

Before the Court is Defendant's Motion under 28 U.S.C. § 2255 to correct his sentence. [ECF 16-107, Doc. 1]. The Government has responded. [Doc. 34].¹ Defendant replied. [Doc. 40]. The Government then filed a surreply [Doc. 45], to which Defendant filed a supplemental response. [Doc. 48].

For the following reasons, the Court DENIES Defendant's Motion.

Discussion

On September 20, 2011, a grand jury sitting in the Western District of Oklahoma indicted Defendant Tracy Brunken for possessing a firearm as a felon, in violation of 18 U.S.C. § 922(g)(1). Federal law prohibits convicted felons from possessing firearms, imposing a punishment of at least fifteen years' imprisonment for violators with three or more prior convictions for serious drug offenses or violent felonies under the Armed Career Criminal Act (ACCA). 18 U.S.C. §§ 922(g), 924(e)(1). Mr. Brunken pled guilty to being

¹ Unless otherwise indicated, document numbers refer to ECF 11-307.

a felon in possession of a firearm [Doc. 15], and because he had three prior convictions for a serious drug offense or a violent felony under the ACCA, the Court sentenced him to 200 months' imprisonment, followed by five years of supervised release. [Doc. 26].

Mr. Brunken argues that in light of the Supreme Court's decision in *Johnson v. United States*, 135 S.Ct. 2551 (2016), he no longer has three prior enhancement-qualifying convictions (serious drug offenses or violent felonies) under 18 U.S.C. § 924(e)(1) of the ACCA. If that is the case, his current sentence exceeds the 10-year statutory maximum for non-ACCA offenses and thus violates due process. 18 U.S.C. § 924(a)(2).

Before *Johnson*, the ACCA defined the term "violent felony" as "any crime punishable by imprisonment for a term exceeding one year" that met one of three requirements: (1) "has as an element the use, attempted use, or threatened use of physical force against the person of another"—referred to as the *elements clause*; (2) is "burglary, arson, or extortion, or involves the use of explosives"—referred to as the *enumerated-offense clause*; or (3) "otherwise involves conduct that presents a serious potential risk of physical injury to another"—referred to as the *residual clause*. § 924(e)(2)(B)(i), (ii). *Johnson* affected the validity of only the residual clause, with the Supreme Court deeming it unconstitutionally vague since it "both denie[d] fair notice to defendants and invite[d] arbitrary enforcement by judges." 135 S.Ct. at 2557. Now, in the wake of *Johnson*, a prior conviction qualifies as a violent felony under the ACCA only if it falls within the enumerated-felony clause or the elements clause. The Supreme Court would later make *Johnson* retroactive to cases on collateral review such as Mr. Brunken's. *Welch v. United States*, 136 S.Ct. 1257, 1265 (2016).

So as it stands today, § 924(e)(1) still calls for an enhanced sentence if a person who violates § 922(g)—possessing a firearm as a felon—has three or more earlier convictions for a serious drug offense or a violent felony. The statutory hiccup after *Johnson* is merely that a defendant’s conviction qualifies as a violent felony only if it falls under the elements clause or the enumerated-offense clause. Mr. Brunken’s requested relief thus depends on whether, in light of *Johnson*, he still has three prior convictions that qualify as a serious drug offense or a violent felony. If he does, then he is not entitled to relief. If he does not, then relief habeas relief must follow.

The Court need not rehash Mr. Brunken’s extensive criminal history to conclude that he is not entitled to relief under 28 U.S.C. § 2255: Mr. Brunken has one prior conviction for a serious drug offense and two prior convictions for a violent felony.

First, Mr. Brunken’s conviction for a serious drug offense. The ACCA includes in its definition of “serious drug offense” a state-law conviction “involving . . . possessing with intent to . . . distribute, a controlled dangerous substance . . . for which a maximum term of imprisonment of ten years or more is prescribed by law.” 18 U.S.C. § 924(e)(2)(A)(ii). Mr. Brunken pled guilty on April 10, 1995, to possession of a controlled dangerous substance (marijuana) with intent to distribute, in violation of Okla. Stat. tit. 63, § 2–401(B)(2). [Doc. 23, ¶ 34]. This conviction qualifies as a serious drug offense under the ACCA because, one, it involved the intent to distribute marijuana, a Schedule I substance under 21 U.S.C. §§ 802(7), 812(c)(1), and, two, it carries a possible punishment of life. See *United States v. McMahon*, 91 F.3d 1394, 1398 (10th Cir. 1996) (upholding

district court's finding that defendant's former conviction for possession of marijuana with intent to distribute qualified as an ACCA predicate offense).

Mr. Brunken's other two ACCA-enhancement-qualifying offenses consist of convictions for first-degree burglary. On April 10, 1995, Mr. Brunken pled guilty to two incidents of first-degree burglary: one that he committed on November 13, 1993 [PSR, Doc. 22, ¶ 34, CF-1993-7023], and another that occurred March 19, 1994 [PSR, Doc. 22, ¶ 35, CF-1994-2161]. Under Supreme Court precedent, these convictions for first-degree burglary in Oklahoma qualify as violent felonies for purposes of the ACCA. The Supreme Court has created a generic definition of burglary to use in determining whether a state-law conviction for burglary qualifies as an enhancement-qualifying offense under the enumerated-offense clause of the ACCA. *See Taylor v. United States*, 495 U.S. 575 (1990). In order to qualify, the state-law definition of burglary must meet *Taylor*'s generic definition of burglary: an "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Taylor*, 495 U.S. at 599. Oklahoma's first-degree burglary statute mirrors this generic definition of burglary:

Every person who breaks into and enters the dwelling house of another, in which there is at the time some human being, with intent to commit some crime therein, either:

1. By forcibly bursting or breaking the wall, or an outer door, window, or shutter of a window of such house or the lock or bolts of such door, or the fastening of such window or shutter; or
2. By breaking in any other manner, being armed with a dangerous weapon or being assisted or aided by one or more confederates then actually present; or

3. By unlocking an outer door by means of false keys or by picking the lock thereof, or by lifting a latch or opening a window, is guilty of burglary in the first degree.

Okla. Stat. tit. 21, § 1431.

Oklahoma's first-degree burglary statute satisfies *Taylor's* generic definition of burglary: it prohibits the unlawful entry into a building with the intent to commit a crime. It thus qualifies as a violent felony under § 924(e)(2)(B)(ii). *Cf. United States v. Bennett*, 108 F.3d 1315, 1317 (10th Cir. 1997) (recognizing that first-degree burglary in Oklahoma would categorically be a crime of violence under the United States Sentencing Guidelines because it requires "that the burglary be of a dwelling"); *see also United States v. Maines*, 920 F.3d 1525, 1529 (10th Cir. 1990) (holding that similar Texas burglary statute is categorically a violent felony because it covers one "who with intent to commit a felony or theft, by breaking enters a house in the daytime"). And because these two convictions for first-degree burglary each qualify as violent felonies under the ACCA, they each justify enhancing Mr. Brunken's sentence under § 924(e)(1).

Further, there can be little question that Mr. Brunken's guilty pleas to separate counts of first-degree burglary constitute separate offenses under the ACCA. The ACCA requires that each felony be "committed on occasions different from one another" for it to constitute a separate offense. 18 U.S.C. § 924(e)(1). As the Presentence Investigation Report shows, Brunken's burglaries took place on November 13, 1993, and March 19,

1994. [Doc. 23, ¶¶ 34, 35]. The offenses are thus separate, and each qualifies as an enhancement-qualifying offense under the ACCA.²

This brings Mr. Brunken’s number of enhancement-qualifying offenses to three: one for a serious drug offense (possession of marijuana with intent to distribute) and two for a violent felony (two convictions for first-degree burglary). He argues, however, that one of his convictions for first-degree burglary, along with his conviction for possession of marijuana with the intent to distribute, together constitute only a single offense under § 924(e)(1) because it took place on the same day.

That misconstrues Tenth Circuit precedent. In adhering to § 924(e)(1)’s mandate that each felony “be committed on occasions different from one another,” the Tenth Circuit has noted that Congress “intended to reach multiple criminal episodes distinct in time.” *United States v. Delossantos*, 680 F.3d 1217, 1219 (10th Cir. 2012). That is why “[c]riminal acts—even those that are similar and occur closely in time—may constitute separate, predicate offenses when the defendant could have chosen to stop his illegal conduct but continued nonetheless.” *United States v. Cherry*, 641 F. Appx. 829, 832 (10th Cir.) (unpublished), *cert. denied*, 137 S. Ct. 89, 196 L. Ed. 2d 76 (2016). The law only asks “whether a defendant could have ended his criminal spree but chose instead to continue.” *Id.* at 833.

² Examining the Presentence Investigation Report is proper when deciding whether two offenses are separate for ACCA-enhancement purposes. See *United States v. Delossantos*, 680 F.3d 1217, 1219 n.1 (10th Cir. 2012) (holding that the district court properly relied on the presentence investigation report to determine whether defendant’s prior crimes were separate and distinct, in order to determine the number of predicate offenses supporting sentence under the ACCA).

True, Mr. Brunken committed both his crimes of possession of marijuana and his first incident of first-degree burglary on November 13, 1993. Yet that does not mean, as he contends, that the offenses occurred at the same time, in the same location, and involved the same conduct. As the PSR makes clear, Mr. Brunken possessed marijuana with the intent to distribute it at a time separate from when he committed the burglary. [Doc. 22, ¶ 34].³ The underlying intent to commit a felony—as required by burglary—was not to distribute marijuana. Instead, Mr. Brunken burglarized a home with the intent to commit assault. [*Id.*] His possession of a controlled dangerous substance with intent to distribute and his burglary with intent to commit assault were thus “criminal episodes distinct in time.” *Delossantos*, 680 F.3d at 1219. Mr. Brunken might have possessed marijuana with the intent to distribute and later burglarized a home. Or, vice versa, he could have burglarized a home and later possessed marijuana with the intent to distribute it. Either way, the ACCA views these as separate offenses because Mr. Brunken “could have ended his criminal spree but chose instead to continue.” *Cherry*, 641 F. Appx. at 833.

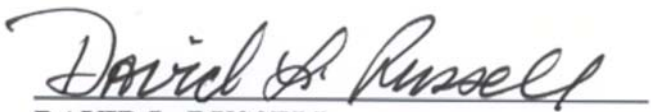
³ “[O]n or about November 13, 1993, the crime of Possession of a Controlled Dangerous Substance with Intent to Distribute was feloniously committed in Oklahoma County, Oklahoma, by the defendant who willfully [sic] and knowingly had within his possession a quantity of marijuana classified as a controlled dangerous substance in Schedule I of the Controlled Dangerous Substance Act of this state, with the intent to distribute it . . . [O]n the same date, the crime of Burglary in the First Degree was committed in Oklahoma County, Oklahoma, by the defendant and [co-defendant] who acting jointly, willfully [sic], and knowingly entered 5945 NW 60th, a dwelling house . . . by entering through the front door . . . with the intent to commit assault.” Doc. 23, ¶ 34.

Mr. Brunken thus still “has three previous convictions . . . for a violent felony or a serious drug offense . . . committed on occasions different from one another.” § 924(e)(1). His sentence is thus unaffected by *Johnson* and his petition for habeas relief is DENIED.

Further, the Court denies Mr. Brunken a Certificate of Appealability (COA) under Rule 11(a) of the Rules Governing Section 2255 Cases in the United States District Courts. Given (1) that convictions for first-degree burglary in Oklahoma qualify as violent felonies and (2) precedent outlining what constitutes a separate offense for ACCA-enhancement purposes, the Court denies Mr. Brunken’s petition on the merits. When a habeas petition is denied on the merits, Petitioner is entitled to a COA only if he demonstrates “that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S.Ct. 1029 (2003). Because Mr. Brunken has not made this showing, he is not entitled to a COA. He may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22 if he wishes to appeal the Court’s ruling on his motion.

In conclusion, Mr. Brunken’s motion under 28 U.S.C. § 2255 is DENIED and DISMISSED WITH PREJUDICE because it lacks merit.

IT IS SO ORDERED this 10th day of April 2017.


DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE