

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 17-1612

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 08, 2017
DEBORAH S. HUNT, Clerk

ROBERT HOMRICH,)	
)	
Petitioner-Appellant,)	
)	
v.)	ON APPEAL FROM THE UNITED
)	STATES DISTRICT COURT FOR
)	THE WESTERN DISTRICT OF
UNITED STATES OF AMERICA,)	MICHIGAN
)	
Respondent-Appellee.)	
)	

ORDER

Before: CLAY, McKEAGUE, and DONALD, Circuit Judges.

Robert Homrich, a federal prisoner represented by counsel, appeals the district court’s judgment denying his motion to vacate under 28 U.S.C. § 2255. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In 1993, a jury found Homrich guilty of conspiring to distribute and possess with intent to distribute controlled substances, in violation of 21 U.S.C. §§ 841 and 846. The district court determined that Homrich was a career offender based in part on its finding that his 1981 Colorado conviction for attempted second-degree burglary was a crime of violence under the residual clause in USSG § 4B1.2. Because he was a career offender, Homrich’s total offense level was 37 and his criminal history category was VI, resulting in a sentencing range of 360 months to life under the guidelines, which were mandatory at the time. In 1994, the district court sentenced Homrich to 360 months in prison. We affirmed the district court’s judgment. Homrich unsuccessfully sought relief under § 2255.

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In 2015, Homrich moved this court for authorization to file a second or successive motion to vacate, arguing that, in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), he should not be subject to an enhanced sentence as a career offender because his prior conviction for attempted second-degree burglary no longer qualified as a crime of violence. 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. *Id.* at 2555, 2563. Section 4B1.2, at the time of Homrich’s sentencing, used an identical residual clause in its definition of “crime of violence.” We granted Homrich authorization to file his proposed motion in the district court, and he did so. The district court dismissed the motion, concluding that Homrich failed to show that his claim relied on a new rule of constitutional law, made retroactive to cases on collateral review, that was previously unavailable.

On appeal, Homrich argues that the district court erred by concluding that he is not entitled to relief under *Johnson*. When reviewing the denial of a motion under § 2255, we review legal conclusions de novo and factual findings for clear error. *Braden v. United States*, 817 F.3d 926, 929 (6th Cir. 2016). A district court must dismiss a claim in a second or successive motion to vacate unless the movant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. *See* 28 U.S.C. § 2244(b)(4); *Tyler v. Cain*, 533 U.S. 656, 660–61 & n.3 (2001); *In re Embry*, 831 F.3d 377, 378 (6th Cir. 2016).

The district court properly dismissed Homrich’s motion to vacate because *Johnson* did not announce a new, retroactive rule of constitutional law that invalidated the residual clause in § 4B1.2 of the mandatory sentencing guidelines. *See Raybon v. United States*, 867 F.3d 625, 629–30 (6th Cir. 2017).

Accordingly, we **AFFIRM** the district court’s judgment.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk