

IN THE
SUPREME COURT OF THE UNITED STATES

Patrick Salvador v. United States of America

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
LEWIS T. BABCOCK, JUDGE

Criminal Case No. 06-cr-00032-LTB-01

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. PATRICK SALVADOR,

Defendant.

ORDER

This matter is before me on Defendant Patrick Salvador's 28 U.S.C. § 2255 Motion to Vacate Sentence [Doc # 145]. This motion has been fully briefed by the parties. After consideration of the motion and all related pleadings, I deny the motion to vacate Mr. Salvador's sentence for the reasons set forth below.

I. Background

After pleading guilty, Mr. Salvador was convicted of two counts of using a firearm during and in relation to a crime of violence pursuant to 18 U.S.C. §§ 2 & 924(c). The predicate crime of violence was armed bank robbery. Mr. Salvador was sentenced to imprisonment of 120 months on Count 1 of the Information and 300 months on Count 2 of the Indictment, to run consecutively for a total prison term of 420 months.

Section 924(c)(3), 18 U.S.C., defines "crime of violence" as a felony that

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Mr. Salvador now argues that aiding and abetting an armed bank robbery does not constitute a crime of violence under § 924(c)(3)(A), also known as the elements clause, and that he was therefore necessarily convicted under § 924(c)(3)(B), also known as the residual or risk of force clause. As such, Mr. Salvador argues that his sentence must be vacated pursuant to *Johnson v. United States*, – U.S. –, 135 S. Ct. 2551 (2015), wherein the Supreme Court held that the residual clause in the definition of a “violent felony” set forth in the Armed Career Criminal Act (the “ACCA”) is unconstitutionally vague.

The Government argues that Mr. Salvador’s § 2255 motion fails on the following grounds: (1) the motion is untimely; (2) the motion is procedurally barred because Mr. Salvador did not raise the underlying issues on appeal; (3) § 924(c)(3)(B) is not unconstitutionally vague; and (4) even if § 924(c)(3)(B) is unconstitutionally vague, armed bank robbery still qualifies as a crime of violence.

Because I conclude that Mr. Salvador’s motion is untimely and that federal armed bank robbery is a crime of violence under §924(c)(3)(A) in any event, I need not address the parties’ remaining arguments.

II. Analysis

A. Timeliness of the Motion

As relevant here, a § 2255 motion must be filed either within one year after the judgment of conviction becomes final or within one year after “the date on which the right asserted was initially recognized by the Supreme Court.” 28 U.S.C. § 2255(f)(1) & (3). Mr. Salvador filed

his § 2255 motion on June 20, 2016, which is almost ten years after his conviction became final but less than one year after the Supreme Court decided *Johnson*. Thus, in order for Mr. Salvador's § 2255 motion to be timely, *Johnson* must establish the right now asserted by Mr. Salvador.

As set forth above, Mr. Salvador is challenging his sentence under § 924(c)(3)(B) whereas *Johnson* involved the residual clause of the ACAA. The residual clause of the ACAA defines the term "violent felony" as

any crime punishable for a term exceeding one year ... that - ...

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B)(ii). This language is similar but not identical to § 924(c)(3)(B)'s definition of a "crime of violence" to include a felony "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

Mr. Salvador argues that *Golicov v. Lynch*, 837 F.3d 1065 (10th Cir. 2016) dictates that *Johnson* established his right to challenge his sentence on the basis that § 924(c)(3)(B) is unconstitutionally vague. In *Golicov*, the Tenth Circuit held that the Immigration and Nationality Act's residual definition of "crime of violence" as incorporated from 18 U.S.C. § 16(b) was not meaningfully distinguishable from the residual clause of the ACAA and was therefore unconstitutionally vague following *Johnson*. *Golicov*, 837 F.3d at 1072. Because the language of § 924(c)(3)(B) is identical to § 16(b), it is reasonable to argue that the Tenth Circuit may likewise conclude that § 924(c)(3)(B) is unconstitutionally vague following *Johnson*.

However, in determining the timeliness of Mr. Salvador's § 2255 motion, the question is not whether the Tenth Circuit has recognized the right at issue but rather whether the Supreme Court has done so.

The Supreme Court did not expressly recognize that § 924(c)(3)(B) is unconstitutionally vague in *Johnson*, and several other federal appellate courts have expressly rejected the argument that *Johnson* dictates this conclusion. See *United States v. Prickett*, 839 F.3d 697, 699-700 (8th Cir. 2016); *United States v. Hill*, 832 F.3d 135, 145-50 (2d Cir. 2016); *United States v. Taylor*, 814 F.3d 340, 375-79 (6th Cir. 2016). Under these circumstances, I conclude that *Johnson* did not recognize the right that Mr. Salvador asserts in his § 2255 motion and that the motion is therefore untimely because it was filed more than one year after his conviction became final.

B. Applicability of § 924(c)(3)(A)

Even if Mr. Salvador's § 2255 motion was timely, it would nonetheless fail because armed bank robbery is a "crime of violence" under § 924(c)(3)(A) in that it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." In reaching this conclusion, I first reject Mr. Salvador's argument that his predicate offense was not armed bank robbery but rather aiding and abetting that offense. Aiding and abetting under 18 U.S.C. § 2 is not a separate crime. *United States v. Cooper*, 375 F.3d 1041 (10th Cir. 2004) (citations omitted). Rather, § 2 operates to remove the distinction between principal and accessory. *Id.* The acts of the principal are therefore deemed to be the acts of the aider and abettor. *In re Colon*, 826 F.3d 1301, 1305 (11th Cir. 2016). Thus, whether Mr. Salvador acted as principal or as an aider and abettor, the predicate offense is armed bank

robbery, and the appropriate inquiry is whether that offense is a “crime of violence” under § 924(c)(3)(A).

In determining whether § 924(c)(3)(A) is applicable to federal armed bank robbery, I apply the “categorical approach” which looks to the elements of the predicate offense rather than the particular facts of the defendant’s conduct. *United States v. Serafin*, 562 F.3d 1105, 1108 (10th Cir. 2009). Under 18 U.S.C. § 2113(a), a person may be convicted for the forceful or violent taking of property from a bank or for entering a bank with the intent to commit a bank-affected felony or larceny. Because § 2113(a) sets out alternative offenses with different elements, I apply a variant of the categorical approach known as the “modified categorical approach.” *Descamps v. United States*, –U.S. –, 133 S. Ct. 2276, 2281 (2013). This approach allows me to refer to a limited class of documents including the indictment to determine which alternative offense formed the basis of Mr. Salvador’s conviction. *Id.* See also *Mathis v. United States*, –U.S. –, 136 S. Ct. 2243, 2256 (2016) (if conviction is under statute with alternatively phrased elements, sentencing court may review materials in the record to determine which alternative relates to defendant’s conviction). I then consider whether that particular alternative offense satisfies the definition of “crime of violence” set forth in § 924(c)(3)(A). *Descamps*, 133 S. Ct. at 2281.

From the indictment, information, and plea agreement, it is clear that Mr. Salvador’s predicate offense was armed bank robbery, *i.e.*, the forceful or violent taking of property from a bank. I must therefore determine whether that offense “has as an element the use, attempted use, or threatened use of physical force against the person or property of another.”

The elements of armed bank robbery are

- (1) the defendant took, or attempted to take, money belonging to a bank, credit union, or any savings and loan association;
- (2) by using force and violence, or intimidation;
- (3) the deposits of the institution were federally insured; and
- (4) in committing or attempting to commit the offense, the defendant assaulted any person, or put in jeopardy the life of any person by the use of a dangerous weapon or device.

United States v. Davis, 437 F.3d 989, 993 (10th Cir. 2006). *See also* 18 U.S.C. § 2113(a) & (d).

Mr. Salvador advances several arguments as to why armed bank robbery does not satisfy the “crime of violence” definition of § 924(c)(3)(A). Under the modified categorical approach set forth above, Mr. Salvador’s argument based on the alternative offense under § 2113(a) of entering a bank with the intent to commit a bank-affected felony or larceny is easily dismissed because he was not convicted of this offense. Mr. Salvador’s remaining arguments are likewise without merit.

First, Mr. Salvador argues that armed bank robbery is not a “crime of violence” under § 924(c)(3)(A) because it encompasses attempted bank robbery which Mr. Salvador argues can be completed before the defendant has used, threatened to use, or attempted to use physical force. This argument ignores the fact that “by using force and violence, or intimidation” is an element of the crime of armed bank robbery. Any attempt to commit this offence therefore necessarily entails, at a minimum, the attempted use of force and violence or intimidation. § 924(c)(3)(A) defines “crime of violence” to include felonies that have the “attempted use” of physical force.

Mr. Salvador next argues because a person can be convicted under § 2113(a) for armed bank robbery by intimidation, the physical force requirement of § 924(c)(3)(A) is not satisfied.

Other federal appellate courts, however, have recognized that “intimidation” under § 2113(a) means the threat of force. *See e.g. United States v. McNeal*, 818 F.3d 141, 153 (4th Cir. 2016); *United States v. Jones*, 932 F.2d 624, 625 (7th Cir. 1991). § 924(c)(3)(A) defines “crime of violence” to include felonies that have the “threatened use” of physical force. In addition, the Tenth Circuit recently held that Colorado’s robbery statute which defines the offense, in part, to include “knowingly tak[ing] anything of value ... by the use ... threats, or intimidation” required the use or threatened use of physical force and was therefore a violent felony under the ACAA’s elements clause. *United States v. Harris*, – F.3d –, 2017 WL 34458 at *9 (10th Cir. Jan. 4, 2017). Consistent with these authorities, I conclude that armed bank robbery by intimidation constitutes a crime of violence under § 924(c)(3)(A).

Finally, Mr. Salvador argues that the bank robbery statute fails to satisfy § 924(c)(3)(A) because it does not require force that is violent physical force. In support of this argument, Mr. Salvador cites *United States v. Rodriguez-Enriquez*, 518 F.3d 1191 (10th Cir. 2008), wherein the Tenth Circuit concluded since a drugging by surreptitious means would be achieved by chemical action rather than mechanical impact, it would not involve physical force. Mr. Salvador then hypothesizes that a defendant charged with bank robbery could cause or threaten to cause physical injury without the use of physical force by utilizing or threatening to utilize hazardous chemicals.

The problem with Mr. Salvador’s argument is twofold. First, there is Supreme Court authority casting doubt on *Rodriguez-Enriquez*’s seeming requirement of mechanical impact for physical force. *See Johnson v. United States* (“*Curtis Johnson*”), 559 U.S. 133, 138 - 40 (2010) (adjective “physical” in term “physical force” means force exerted through concrete

bodies as opposed to intellectual force or emotional force while “force” means “violent force - that is, force capable of causing physical injury or pain to another person”). *See also United States v. Castelman*, – U.S. –, 134 S.Ct. 1405 (2014) (citing *(Curtis) Johnson* as support for conclusion that force need not be applied directly to the body for purposes of common law battery but instead encompasses acts such as administering poison, infecting with disease, or using a laser beam). Second, Mr. Salvador has failed to demonstrate through citation to other cases that there is “realistic probability, not a theoretic possibility” that the federal bank robbery statute would be applied to his proposed hypotheticals. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007).

In sum then, Mr. Salvador’s arguments to the contrary are without merit, and federal armed bank robbery is a “crime of violence” under § 924(c)(3)(A). It is therefore irrelevant to the disposition of Mr. Salvador’s motion whether § 924(c)(3)(B) is unconstitutionally vague following *Johnson*.

IV. Conclusion

For the reasons set forth above, Mr. Salvador’s 28 U.S.C. § 2255 Motion to Vacate Sentence [Doc # 145] is DENIED.

Dated: January 26, 2017 in Denver, Colorado.

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK