

FILED: October 20, 2017

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-7100
(5:10-cr-00271-FL-3)
(5:16-cv-00565-FL)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JOSAND FARMER, a/k/a Johan Farmer

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:10-CR-271-FL-3

No. 5:16-CV-565-FL

JOSAND FARMER,	)	
	)	
Petitioner,	)	
	)	
v.	)	ORDER
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

This matter is before the court on the following motions filed by petitioner: 1) a motion to vacate, set aside, or correct sentence, made pursuant to 28 U.S.C. § 2255 (DE 275); 2) a motion to proceed pro se (DE 289); 3) a motion challenging § 851 enhancement (DE 296); 4) a motion to dismiss indictment (DE 305); and 5) a motion to remand (DE 308). The issues raised are ripe for ruling. For the reasons that follow, the court denies petitioner's motion to vacate, denies as moot petitioner's motion to proceed pro se, dismisses petitioner's motion challenging § 851 enhancement, dismisses petitioner's motion to dismiss indictment, and dismisses petitioner's motion to remand.

BACKGROUND

On August 4, 2010, petitioner was charged in three counts of an eight-count indictment with the following: conspiracy to distribute and possess with the intent to distribute 50 grams or more of cocaine base (crack), one kilogram or more of phencyclidine (PCP) and a quantity of three, four methylenedioxymethamphetamine (MDMA), in violation of 21 U.S.C. § 846 (Count One); distribution of five grams or more of cocaine base (crack) and aiding and abetting, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (Count Three); and distribution of a quantity of cocaine base (crack) and aiding and abetting, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (Count

Seven).

At petitioner's arraignment, held on February 14, 2011, he pleaded not guilty. Following a four-day jury trial, petitioner was found guilty of all three counts. On September 26, 2011, this court sentenced petitioner to 360 months imprisonment on each of Counts One, Three, and Seven, to be served concurrently for a total of 360 months. Petitioner appealed his judgment, and the Fourth Circuit Court of Appeals affirmed. See United States v. Farmer, 482 F. App'x 805 (4th Cir. 2012) (per curiam). Petitioner did not file a petition for certiorari with the Supreme Court.

On November 5, 2012, petitioner filed his first motion to vacate pursuant to 28 U.S.C. § 2255. The motion was denied on December 20, 2013. On June 21, 2016, the Fourth Circuit Court of Appeals granted authorization for petitioner to file a second or successive § 2255 motion. On June 26, 2016, petitioner, through appointed counsel, filed the instant § 2255 motion, arguing that in light of Johnson v. United States, 135 S. Ct. 2551 (2015), he no longer qualifies as a career offender subject to an enhanced sentence.¹

On August 2, 2016, this court stayed the case pending the Supreme Court's final decision in Beckles v. United States, No. 15-8544. On March 14, 2017, this court lifted the stay. Petitioner was directed to show cause, within thirty days, why his § 2255 motion should not be dismissed in light of Beckles v. United States, 137 S. Ct. 886 (2017).

On November 7, 2016, petitioner filed his motion to proceed pro se. On February 2, 2017, petitioner filed a motion challenging § 851 enhancement, arguing that the government failed to comply with the statutory requirements of his § 851 enhancement. On March 30, 2017, petitioner's appointed counsel withdrew from representation. Then, on April 27, 2017, petitioner filed his

¹ Petitioner's counsel was appointed pursuant to Standing Order 15-SO-02.

motion to dismiss indictment. In his motion, petitioner argues that his indictment must be dismissed for lack of subject matter jurisdiction. Finally, on May 30, 2017, petitioner filed his motion to remand, in which he argues that removal was improper and requests an order remanding his case to Superior Court in Wilson, North Carolina.

COURT'S DISCUSSION

A. Standard of Review

A petitioner seeking relief pursuant to 28 U.S.C. § 2255 must show that “the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.” 28 U.S.C. § 2255(a). “Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.” Id. § 2255(b).

B. Analysis

1. Motion to Proceed Pro Se

In petitioner’s initial motion before this court, he seeks permission to proceed pro se on his § 2255 motion. See Mot. Proceed (DE 289). Permission is not necessary to proceed pro se because petitioner’s appointed counsel withdrew on March 30, 2017. Therefore, petitioner’s motion to proceed pro se is DENIED as moot.

2. Motion to Vacate

In petitioner’s second motion before this court, he raises a claim under Johnson, 135 S. Ct. at 2551. Mot. Vacate (DE 275) at 4. In particular, petitioner contends that following Johnson, he

is not a career offender and his sentence was improperly enhanced as such. Id.

Prior to Johnson, an offense was deemed a “violent felony” under the Armed Career Criminal Act’s (“ACCA”) so-called “residual clause” if it was punishable by greater than one year’s imprisonment and “involve[d] conduct that present[ed] a serious potential risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B). In Johnson, the Supreme Court struck down the residual clause of the ACCA as unconstitutionally vague. 135 S. Ct. at 2563.

In this case, petitioner relies on Johnson’s reasoning to challenge application of a similar clause found in U.S.S.G. § 4B1.2(a) at the time of his sentencing.² The Supreme Court recently held, however, that the Guidelines are not “amenable to a vagueness challenge.” Beckles, 137 S. Ct. at 894. Because petitioner may not rely on Johnson’s reasoning to attack his career offender designation, his motion to vacate must be denied.

3. Successive Motions

Petitioner’s remaining motions before the court include the following: 1) a motion challenging § 851 enhancement (DE 296); 2) a motion to dismiss indictment (DE 305); and 3) a motion to remand (DE 308).

Each of these motions raises issues that are more appropriately raised in a motion to vacate pursuant to 28 U.S.C. § 2255.³ See United States v. Winestock, 340 F.3d 200, 203 (4th Cir. 2003) (stating that district courts are bound to “classify pro se pleadings from prisoners according to their contents, without regard to their captions”). As noted, petitioner previously filed a § 2255 motion

² The definition of “crime of violence,” revised August 1, 2016, no longer contains a residual clause.

³ Title 28, United States Code, Section 2255 states four grounds upon which such relief may be claimed: (1) that the sentence was imposed in violation of the Constitution or laws of the United States; (2) that the court was without jurisdiction to impose such sentence; (3) that the sentence was in excess of the maximum authorized by law; or (4) that the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255(a).

that was resolved on the merits. See (DE 181, 214). Moreover, petitioner's authorization from the Fourth Circuit, received on June 21, 2016, permitted him to file a second or successive motion with a claim based on Johnson. See (DE 272).

Pursuant to 28 U.S.C. § 2244(b)(3)(A), "[b]efore a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." In this case, petitioner must first obtain an order from the Fourth Circuit Court of Appeals before this court will consider any successive motion under 28 U.S.C. § 2255. Petitioner has provided no evidence that he has secured the necessary authorization from the Fourth Circuit. In sum, this court is without jurisdiction to consider petitioner's remaining motions. Therefore, petitioner's remaining motions must be DISMISSED as successive.

C. Certificate of Appealability

A certificate of appealability may issue only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner must demonstrate that reasonable jurists could debate whether the issues presented should have been decided differently or that they are adequate to deserve encouragement to proceed further. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 483-84 (2000). After reviewing the claims presented on collateral review in light of the applicable standard, the court finds that a certificate of appealability is not warranted.

CONCLUSION

Based on the foregoing, this court DENIES petitioner's motion to vacate (DE 275), DENIES as moot petitioner's motion to proceed pro se (DE 289), DISMISSES petitioner's motion

challenging § 851 enhancement (DE 296), DISMISSES petitioner's motion to dismiss indictment (DE 305), and DISMISSES petitioner's motion to remand (DE 308). This court also DENIES a certificate of appealability. The clerk is DIRECTED to close this case.

SO ORDERED, this the 17th day of July, 2017.


LOUISE W. FLANAGAN
United States District Judge

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