

APPENDIX

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Opinion of the Eleventh Circuit Court of Appeals, *United States v. Tavaris Hunter*, ___ Fed. Appx. ___, 2018 WL 4355870 (September 12, 2018).....A-1

Judgment In a Criminal Case, *United States v. Tavaris Hunter*, No. 17-80130-CR-MIDDLEBROOKS (November 8, 2017)A-2

A-1

2018 WL 4355870

Only the Westlaw citation is currently available.

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S. Ct. of App. 11th Cir. Rule 36-2. United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Tavaris Jemario HUNTER, Defendant-Appellant.

No. 17-15206

|
Non-Argument Calendar

|
(September 12, 2018)

Attorneys and Law Firms

Laura Thomas Rivero, Andrea G. Hoffman, Emily M. Smachetti, U.S. Attorney Service - Southern District of Florida, U.S. Attorney Service - SFL, Miami, FL, for Plaintiff-Appellee

Peter Vincent Birch, Federal Public Defender's Office, West Palm Beach, FL, Michael Caruso, Federal Public Defender, Federal Public Defender's Office, Miami, FL, for Defendant-Appellant

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 9:17-cr-80130-DMM-1

Before MARTIN, BRANCH, and FAY, Circuit Judges.

Opinion

PER CURIAM:

*1 Tavaris Jemario Hunter appeals his 180-month mandatory minimum sentence after he pled guilty to being a felon in possession of a firearm. He argues the district court erred in sentencing him under the Armed Career Criminal Act ("ACCA") because his previous Florida convictions for robbery and aggravated assault were not "violent felonies," and his Florida felony convictions for sale of cocaine and possession of cocaine with intent to sell

were not "serious drug offenses." After careful review, we affirm.

I.

Hunter pled guilty to one count of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1). A probation officer prepared a Presentence Investigation Report ("PSR"), which found Hunter qualified as an armed career criminal based on four convictions for violent felonies or serious drug offenses. Those convictions were for Florida crimes of robbery, sale of cocaine, possession of cocaine with intent to sell, and aggravated battery.

Hunter objected to his classification as an armed career criminal, arguing that his convictions for Florida robbery and aggravated battery did not qualify as violent felonies under ACCA. He also argued that his two drugs convictions should not qualify as ACCA predicates because the relevant Florida statutes lacked mens rea requirements. Hunter acknowledged his objections were foreclosed by binding precedent in the Eleventh Circuit.

At sentencing, the district court overruled Hunter's objections and sentenced Hunter to a mandatory minimum 180-month term of imprisonment. This appeal followed.

II.

We review de novo whether a particular conviction qualifies as a violent felony or a serious drug offense under ACCA. United States v. Hill, 799 F.3d 1318, 1321 (11th Cir. 2015) (per curiam); United States v. Robinson, 583 F.3d 1292, 1294 (11th Cir. 2009) (per curiam).

ACCA provides for a sentence of no less than fifteen years for a defendant who violates § 922(g) and has three or more prior convictions for a "violent felony" or a "serious drug offense." 18 U.S.C. § 924(e)(1). The term "serious drug offense" includes "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance ... for which a maximum term of imprisonment of ten years or more is prescribed by law." Id. § 924(e)(2)(A)(ii). A

“violent felony” is defined as any crime punishable by a term of imprisonment exceeding one year that:

- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
- (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[.]

Id. § 924(e)(2)(B). The first part of this definition is known as the “elements clause.” See Mays v. United States, 817 F.3d 728, 730–31 (11th Cir. 2016) (per curiam). The second part of this definition contains both the “enumerated offenses clause” and the “residual clause.” Id. In Johnson v. United States, the Supreme Court held that ACCA’s residual clause was unconstitutionally vague. 576 U.S. —, 135 S.Ct. 2551, 2563, 192 L.Ed.2d 569 (2015). But Johnson did not affect the status of convictions qualifying under the elements or enumerated offenses clauses, or as serious drug offenses.

*2 Under the prior precedent rule, we are bound by our prior decisions unless and until they are overruled by the Supreme Court or this Court sitting en banc. United States v. Brown, 342 F.3d 1245, 1246 (11th Cir. 2003). This Court has previously held that a conviction for robbery under Florida Statute § 812.13(1) is a violent

felony under ACCA’s elements clause. See United States v. Fritts, 841 F.3d 937, 940 (11th Cir. 2016). This Court has also said a conviction for aggravated battery under Florida Statute § 784.045 qualifies as a violent felony under the elements clause. Turner v. Warden Coleman FCI (Medium), 709 F.3d 1328, 1341 (11th Cir. 2013), abrogated on other grounds by Johnson, — U.S. —, 135 S.Ct. 2551, 192 L.Ed.2d 569. And we have held that the sale of and possession with intent to sell cocaine, in violation of Florida Statute § 893.13(1), are serious drug offenses even in the absence of a mens rea requirement. United States v. Smith, 775 F.3d 1262, 1268 (11th Cir. 2014).

The district court did not err in sentencing Hunter under ACCA because binding precedent in this Court says that his convictions for Florida aggravated battery and robbery qualify as violent felonies under the elements clause, and his convictions for sale of cocaine and possession with intent to sell cocaine qualify as serious drug offenses. Even setting aside Hunter’s conviction for Florida robbery,¹ Hunter has three convictions that qualify as ACCA predicate offenses.

AFFIRMED.

All Citations

--- Fed.Appx. ----, 2018 WL 4355870

Footnotes

- 1 As Hunter points out, the Supreme Court granted certiorari on another case presenting whether Florida robbery qualifies as a violent felony under ACCA. See United States v. Stokeling, 684 F. App’x 870 (11th Cir. 2017), cert. granted, — U.S. —, 138 S.Ct. 1438, 200 L.Ed.2d 716 (2018).

UNITED STATES DISTRICT COURT
Southern District of Florida
West Palm Beach Division

UNITED STATES OF AMERICA
v.
TAVARIS JEMARIO HUNTER

JUDGMENT IN A CRIMINAL CASE

Case Number: **17-80130-CR-MIDDLEBROOKS**
USM Number: **16332-104**

Counsel For Defendant: **Peter Birch**
Counsel For The United States: **John McMillan**
Court Reporter: **Diane Miller**

The defendant pleaded guilty to count(s) One.

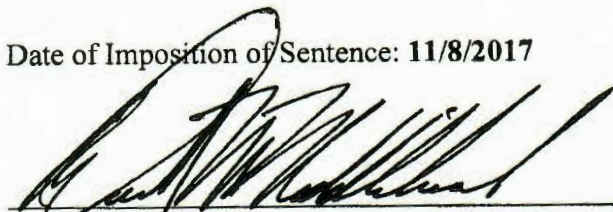
The defendant is adjudicated guilty of these offenses:

<u>TITLE & SECTION</u>	<u>NATURE OF OFFENSE</u>	<u>OFFENSE ENDED</u>	<u>COUNT</u>
18 U.S.C. §922(g)(1) and §924(e)	Felon in possession of a firearm and ammunition	02/28/2017	1

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Date of Imposition of Sentence: **11/8/2017**



Donald M. Middlebrooks
United States District Judge

Date: 11/8/17

DEFENDANT: TAVARIS JEMARIO HUNTER
CASE NUMBER: 17-80130-CR-MIDDLEBROOKS

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **ONE HUNDRED EIGHTY (180) MONTHS as to Count One.**

The court makes the following recommendations to the Bureau of Prisons:

- 1. the Defendant be designated to a facility in or as close to South Florida as possible.**

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

DEPUTY UNITED STATES MARSHAL

DEFENDANT: TAVARIS JEMARIO HUNTER
CASE NUMBER: 17-80130-CR-MIDDLEBROOKS

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **FIVE (5) YEARS as to Count One.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: TAVARIS JEMARIO HUNTER
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SPECIAL CONDITIONS OF SUPERVISION

Employment Requirement - The defendant shall maintain full-time, legitimate employment and not be unemployed for a term of more than 30 days unless excused for schooling, training or other acceptable reasons. Further, the defendant shall provide documentation including, but not limited to pay stubs, contractual agreements, W-2 Wage and Earnings Statements, and other documentation requested by the U.S. Probation Officer.

Permissible Search - The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Substance Abuse Treatment - The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

DEFENDANT: TAVARIS JEMARIO HUNTER
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CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$100.00	\$0.00	\$0.00

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>NAME OF PAYEE</u>	<u>TOTAL LOSS*</u>	<u>RESTITUTION ORDERED</u>	<u>PRIORITY OR PERCENTAGE</u>
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* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

**Assessment due immediately unless otherwise ordered by the Court.

DEFENDANT: TAVARIS JEMARIO HUNTER
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SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A. Lump sum payment of \$100.00 due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

This assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 08N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

<u>CASE NUMBER</u> <u>DEFENDANT AND CO-DEFENDANT NAMES</u> <u>(INCLUDING DEFENDANT NUMBER)</u>	<u>TOTAL AMOUNT</u>	<u>JOINT AND SEVERAL AMOUNT</u>
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The Defendant's right, title and interest to the property identified in the plea agreement and preliminary order of forfeiture entered by this Court on September 5, 2017 and is incorporated by reference herein, is hereby forfeited.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.