

23-37
Naseer v. United States

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 21st day of April, two thousand twenty-five.

Present:

DENNY CHIN,
MICHAEL H. PARK,
SARAH A. L. MERRIAM,
Circuit Judges.

ABID NASEER,

Petitioner-Appellant,

v.

23-37

UNITED STATES OF AMERICA.

Respondent-Appellee.

FOR PETITIONER-APPELLANT:

RANDA D. MAHER, Great Neck, NY.

FOR RESPONDENT-APPELLEE:

DOUGLAS M. PRAVDA, (Nicholas J. Moscow, *on the brief*) Assistant United States Attorneys, *for* Breon Peace, United States Attorney for the Eastern District of New York, Brooklyn, NY.

1 Appeal from a judgment of the United States District Court for the Eastern District of New
2 York (Dearie, *J.*).

3 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND**
4 **DECREED** that the judgment of the district court is **AFFIRMED**.

5 Following a three-week jury trial, Petitioner Abid Naseer was convicted in 2015 of
6 conspiring to provide and providing material support to a foreign terrorist organization, in violation
7 of 18 U.S.C. § 2339B(a)(1), and conspiring to use a destructive device, in violation of 18 U.S.C.
8 §§ 924(c)(1)(B)(ii) and 924(o). He was sentenced principally to a term of 40 years'
9 imprisonment and a lifetime term of supervised release. On December 15, 2022, the district court
10 granted Naseer's motion under 18 U.S.C. § 2255 to vacate his Section 924(c) conviction in light
11 of *United States v. Davis*, 588 U.S. 445 (2019). The district court declined to hold a de novo
12 resentencing proceeding and reduced Naseer's total term of imprisonment from 40 years to 30
13 years.

14 On appeal, Naseer argues that the district court abused its discretion by declining to hold a
15 de novo resentencing. We assume the parties' familiarity with the underlying facts, procedural
16 history of the case, and issues on appeal.

17 "Section 2255 grants district courts the discretion to choose among four remedies when
18 reviewing a sentence that was not authorized by law or is otherwise open to collateral attack."
19 *United States v. Peña*, 58 F.4th 613, 618 (2d Cir. 2023). The court may "discharge the prisoner
20 or resentence him or grant a new trial or correct the sentence." 28 U.S.C. § 2255(b). This Court
21 has declined to "define the circumstances under which a district court abuses its discretion in

1 denying *de novo* resentencing.” *Peña*, 58 F.4th at 623; *see also Kaziu v. United States*, 108 F.4th
2 86, 91 (2d Cir. 2024) (noting that *Peña* “did not decide that question, and neither do we”). But
3 this Court *has* held that a “district court may properly deny *de novo* resentencing when the exercise
4 would be an empty formality.” *Peña*, 58 F.4th at 623; *see also Tellier v. United States*, 2023 WL
5 3608394 (2d Cir. May 24, 2023); *United States v. Ayyad*, 2023 WL 1975682 (2d Cir. Feb. 14,
6 2023).

7 We have identified “two factors [that] combine to limit the district court’s discretion to
8 dispense with plenary resentencing.” *Kaziu*, 108 F.4th at 92. Those two factors are: (1) whether
9 “the resentencing judge is . . . the original sentencing judge,” and (2) whether the prisoner presents
10 “plausible allegations of changed circumstances that suggest that the original rationale underlying
11 the sentence . . . no longer applies.” *Id.* at 93-94.

12 Here, the district court did not abuse its discretion in declining to hold a *de novo*
13 resentencing. First, the district court here was “amply familiar with the matter” after “presid[ing]
14 over the trial, sentencing and post-conviction proceedings.” App’x at 132. The district court
15 thus understood “the rationale behind the original sentence,” possessed a “deep familiarity of the
16 facts,” and experienced “an in-person observation of the defendant’s allocution.” *Kaziu*, 108
17 F.4th at 92. As the district court explained in resentencing: “Although Naseer’s counts of
18 conviction now change with the vacatur of Count Ten, the conduct in which he engaged and for
19 which this Court deemed a forty-year sentence appropriate, has not.” App’x at 132.

20 Second, Naseer does not “adequately allege[] sufficient changed circumstances” to warrant
21 a *de novo* resentencing. *Kaziu*, 108 F.4th at 93-94. Although Naseer “asked the Court to reduce
22 his sentence to 15 years, citing his record of academic excellence and good conduct during his year



1 in prison,” the district court found that those facts were “not surprising, given the qualities Naseer
2 displayed throughout his trial and initial sentencing and do not alter the sentencing calculus.”
3 App’x at 132-33. In fact, the district court found that “Naseer continues to show no remorse
4 discernible to this Court or, indeed, any change in thinking that would allow this Court to infer
5 that the danger he posed has passed.” *Id.* at 133. The district court did not abuse its discretion
6 in declining to conduct a de novo proceeding.

7 * * *

8 We have considered the remainder of Petitioner’s arguments and find them to be without
9 merit. For the foregoing reasons, we **AFFIRM** the judgment of the district court.

10
11

FOR THE COURT:
Catherine O’Hagan Wolfe, Clerk of Court

UNITED STATES OF AMERICA-against-ABID NASEER, Defendant.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK
2022 U.S. Dist. LEXIS 226246
10 CR 19-5 (RJD),20 CV 4065 (RJD)
December 15, 2022, Decided
December 15, 2022, Filed

Editorial Information: Subsequent History

Affirmed by Naseer v. United States., 2025 U.S. App. LEXIS 9398, 2025 WL 1157078 (2d Cir. N.Y., Apr. 21, 2025)

Editorial Information: Prior History

United States v. Naseer, 2014 U.S. Dist. LEXIS 85459, 2014 WL 12909332 (E.D.N.Y., June 20, 2014)

Counsel

{2022 U.S. Dist. LEXIS 1}For USA, Plaintiff (1:10-cr-00019-BMC):
Zainab Ahmad, LEAD ATTORNEY, United States Attorneys Office, for the Eastern District of New York, Brooklyn, NY; Berit Winge Berger, David Bitkower, David Bitkower, Evan M. Norris, James Patrick Loonam, Michael P Canty, United States Attorneys Office, Eastern District of New York, Brooklyn, NY; Celia Cohen, Norton Rose Fulbright US LLP, New York, NY; Celia Cohen, Douglas M. Pravda, United States Attorneys Office, Brooklyn, NY; David K. Kessler, New York, NY; David K. Kessler, United States Attorney's Office, Brooklyn, NY; Jeffrey Haworth Knox, United States Attorneys Office, Criminal Division, Eastern District of New York, Brooklyn, NY.

Abid Naseer, Petitioner (1:20-cv-04065-RJD), Pro se, THREE

RIVERS, TX.

Judges: RAYMOND J. DEARIE, United States District Judge.

Opinion

Opinion by: RAYMOND J. DEARIE

Opinion

MEMORANDUM & ORDER

DEARIE, District Judge.

In a supplemental motion pursuant to 28 U.S.C. § 2255, **Abid Naseer** asserts that his conviction on Count Ten, which charged him with using a destructive device in connection with a crime of violence in violation of 18 U.S.C. § 924 (c)(1)(B)(ii) and § 924(o), should be vacated in light of United States v. Davis, 139 S. Ct. 2319, 204 L. Ed. 2d 757 (2019).¹

Section 924(c) provides for enhanced penalties for a defendant who uses, carries, or possesses a firearm "during and in{2022 U.S. Dist. LEXIS 2} relation to any crime of violence or drug trafficking crime." 18 U.S.C. § 924(c)(1)(A). Formerly, the statute defined a "crime of violence" as an offense that is a felony and

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

lybcases

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.

18 U.S.C. § 924(c)(3).

Davis held that subsection (B), the so-called "residual clause," is unconstitutionally vague. 139 S. Ct. at 2336. As a result, "for purposes of § 924(c) a 'crime of violence is now defined only as a felony that has as an element the use, attempted use, or threatened use of physical force against the person or property of another.'" United States v. McCoy, 995 F.3d 32, 52 (2d Cir. 2021) (cleaned up). "Physical force" in this context means "violent force" or "force capable of causing physical pain or injury to another person." Johnson v. United States, 559 U.S. 133, 140, 130 S. Ct. 1265, 176 L. Ed. 2d 1 (2010).

The § 924(c) predicates charged here were providing material support to a foreign terrorist organization in violation of 18 U.S.C. § 2339B (Count Three) and conspiring to do so (Count Four). Naseer asserts, and the government agrees, see ECF 532 at 1, 3, that these two crimes qualified as crimes of violence only under § 924(c)'s residual clause and that Naseer's {2022 U.S. Dist. LEXIS 3} conviction under Count Ten must be vacated. See also United States v. Medunjanin, 10 CR 19-1 (BMC), 2020 U.S. Dist. LEXIS 184874, 2020 WL 7408992, at *4 (E.D.N.Y. Oct. 6, 2020) (government concedes that § 2339B and § 2339B conspiracy are not crimes of violence for § 924(c)); United States v. Kaziu, 09 CR 660 (FB), 2021 U.S. Dist. LEXIS 84993, 2021 WL 1751156, at *2 (E.D.N.Y. May 4, 2021) (conviction under 18 U.S.C. § 924(c)(1)(B)(ii) and § 924(o) vacated upon government's concession that neither attempt nor conspiracy version of § 2339 offense is a crime of violence).

Accordingly, Naseer's conviction on Count Ten is vacated.

The remaining issue is the appropriate remedy, a matter on which the Second Circuit has now clearly spoken. See United States v. Peña, __ F.4th __, 2022 U.S. App. LEXIS 34203, 2022 WL 17587854, at *3-5 (2d Cir. Dec. 13, 2022). Joining all the other circuits that have reached the issue, the Second Circuit held that upon the vacatur of a § 924(c) conviction in the § 2255 context, a district court may, but is not required to, hold a de novo resentencing. Id. (collecting cases). The Circuit emphasized the discretion that Section 2255 grants district courts in choosing from among several remedies when reviewing a sentence open to collateral attack. 2022 U.S. App. LEXIS 34203, [WL] at *3 ("A court may: '[1] vacate and set the judgment aside and . . . discharge the prisoner or [2] resentence him or [3] grant a new trial or [4] correct the sentence as may appear appropriate.'") (quoting 28 U.S.C. § 2255). See also Medunjanin, 2020 U.S. Dist. LEXIS 184874, 2020 WL 7408992 at *8 (contrasting, for resentencing purposes, the overturning of a conviction on appeal with vacatur by district court on § 2255) (cited approvingly by {2022 U.S. Dist. LEXIS 4} Peña, 2022 U.S. App. LEXIS 34203, 2022 WL 17587854 at *4). Having presided over the trial, sentencing and post-conviction proceedings, this Court is amply familiar with the matter and the defendant and can correct Naseer's sentence through this order without a de novo proceeding.

At Naseer's initial sentencing, the Court imposed a term of 40 years on the destructive device count² and the statutory maximum of 15 years on each of the material support counts, all terms to run concurrently to each other for a total sentence of 40 years. Although Naseer's counts of conviction now change with the vacatur of Count Ten, the conduct in which he engaged and for which this Court deemed a forty-year sentence appropriate, has not. For having joined al Qaeda and having plotted to bomb innocent civilians and to inflict mass casualties on behalf of al Qaeda, Naseer is as deserving now, as when initially sentenced, of the statutory maximum on his two § 2339B convictions. Naseer

has asked the Court to reduce his sentence to 15 years, citing his record of academic excellence and good conduct during his year in prison. But these facts are not surprising, given the qualities Naseer displayed throughout his trial and initial sentencing and do not alter the sentencing{2022 U.S. Dist. LEXIS 5} calculus. An intelligent, motivated, and proud man who was once preparing to massacre countless innocent civilians, Naseer continues to show no remorse discernible to this Court or, indeed, any change in thinking that would allow this Court to infer that the danger he posed has passed. Therefore, without the 40-year term initially imposed on the destructive device count, there is no longer any just purpose to continue the concurrent nature of the 15 year § 2339B terms. Accordingly, Naseer is resentenced to the statutory maximum of 15 years each on Counts Three and Four to be served consecutively.

For all of the foregoing reasons, Naseer's supplemental claim for relief under 28 U.S.C. § 2255 (ECF 530) is granted, his conviction on Count Ten is vacated, and he is resentenced to a term of 30 years plus lifetime supervised release on the conditions initially imposed. An amended judgment shall issue.

SO ORDERED.

Dated: Brooklyn, New York

December 15, 2022

/s/ RAYMOND J. DEARIE

United States District Judge

Footnotes

1

The parties' familiarity with all prior proceedings and decisions of this Court in this matter is assumed.

2

The sentencing range for the destructive device conviction is one day to life. 18 U.S.C. § 924(o).

**UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22nd day of September, two thousand twenty-five.

Abid Naseer,

Petitioner - Appellant,

v.

United States of America,

Respondent - Appellee.

ORDER

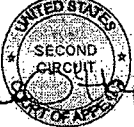
Docket No: 23-37

Appellant, Abid Naseer, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk


Catherine O'Hagan Wolfe