FILED
United States Court of Appeals
Tenth Circuit

August 22, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SHAWNDELL LEE HARRISON,

Defendant - Appellant.

No. 17-6119
(D.C. Nos. 5:16-CV-00571-F &
5:10-CR-00243-F-1)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **McHUGH**, **MORITZ**, and **EID**, Circuit Judges.

Eight years ago, appellant Shawndell Harrison pleaded guilty to one count of being a felon in possession of a firearm and ammunition. At sentencing, the district judge ruled that three of his prior convictions qualify as violent felonies and applied the enhancement found in the Armed Career Criminal Act ("ACCA"). Following the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), which held that the ACCA's residual clause is unconstitutionally vague, Harrison filed a second habeas motion. The district court denied the motion and ruled that Harrison's prior convictions qualify as violent felonies under the ACCA's elements clause. In this appeal,

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Harrison asks us to reverse the district court's decision on the ground that two of his prior convictions do not qualify as violent felonies under the elements clause. We do not reach this question. Instead, we conclude that Harrison has failed to satisfy the threshold requirements in 28 U.S.C. § 2255(h), which requires him to demonstrate that the district court relied on the residual clause. Accordingly, we vacate the district court's order and remand with instructions for the district court to dismiss Harrison's habeas motion for lack of jurisdiction.

I.

On November 2, 2010, Harrison pleaded guilty to one count of being a felon in possession of a firearm and ammunition under 18 U.S.C. § 922(g)(1). *See* R. at 30. Because Harrison had three prior qualifying convictions under the ACCA, 18 U.S.C. § 924(e)(2)(B), and thereby qualified for a minimum sentence of fifteen years, the district judge sentenced Harrison to a term of 188 months' imprisonment. *See* Tr. at 28:17–20. Harrison's three prior qualifying offenses were two convictions for domestic abuse assault and battery and one conviction of possession with intent to distribute a controlled substance. *See* R. at 179–98 (Presentence Investigation Report).

Following the sentencing hearing, Harrison noticed an appeal. *See* R. at 6. However, his plea agreement contained a waiver of appellate rights. This court enforced the waiver and granted the government's motion to dismiss the appeal. *See United States v. Harrison*, 441 F. App'x 607 (10th Cir. 2011). After losing on direct appeal, Harrison filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. *See* R.

at 43–54. The district judge denied the motion, *see* R. at 111, and Harrison did not appeal.

On March 2, 2016, Harrison received authorization from this court to file a second or successive habeas motion under 28 U.S.C. § 2255. Harrison's second habeas motion sought relief under the Supreme Court's decision in *Johnson*, 135 S. Ct. 2551, which held that the ACCA's residual clause is unconstitutionally vague. Harrison contended that the district judge had relied upon the residual clause to hold that his two convictions for domestic abuse assault and battery qualify as violent felonies. The district judge denied Harrison's second habeas motion. *See* R. at 170–71. He ruled that Harrison's convictions for domestic abuse assault and battery qualify as violent felonies under the ACCA's elements clause. *See* R. at 163–70.

Harrison appealed. This court granted a COA "as to whether, after *Johnson v. United States*, 135 S. Ct. 2551 (2015), Harrison's Oklahoma convictions for domestic abuse assault and battery qualify as violent felonies for purposes of 18 U.S.C. § 924(e)."

II.

Harrison has not satisfied the jurisdictional requirements of section 2255(h) because he has failed to show that his sentence rested on the ACCA's residual clause. Accordingly, we remand with instructions for the district court to vacate its prior order and dismiss Harrison's motion for failure to satisfy section 2255(h).

We review de novo whether the movant has satisfied section 2255's jurisdictional requirements. *See United States v. Murphy*, 887 F.3d 1064, 1068 (10th Cir. 2018). Generally, an individual in federal custody may only bring one motion for habeas relief.

See 28 U.S.C. § 2255. But section 2255(h) states that an individual in federal custody may bring a second or successive motion if "a panel of the appropriate court of appeals" certifies that the motion contains "newly discovered evidence" or "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *Id.* § 2255(h).

We have held that section 2255(h) sets up two "gates" that a movant must pass through before the district court can consider the merits of his or her motion for habeas relief. *Murphy*, 887 F.3d at 1068. First, the movant must make "a prima facie showing to the court of appeals that the motion satisfies the requirements of § 2255(h), defined as 'a sufficient showing of possible merit to warrant a fuller exploration by the district court.'" *Id.* (citation omitted). Second, the district court must determine "that the petition does, in fact, satisfy those requirements." *Id.*; *see* 28 U.S.C. § 2244(b)(4) ("A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section."). Importantly, the gatekeeping requirements of section 2255 for bringing a second or successive habeas motion are jurisdictional. *See Case v. Hatch*, 731 F.3d 1015, 1027 (10th Cir. 2013) ("Section 2244's gate-keeping requirements are jurisdictional in nature, and must be considered prior to the merits of a § 2254 petition."); *Murphy*, 887 F.3d at 1068 (ruling that section 2244's gate keeping requirements apply to section 2255 motions, and that, accordingly, a "second or successive § 2255 motion must pass through [the] two gates before its merits can be considered").

Here, because we authorized Harrison's second or successive section 2255 motion, he has "passed" the first gate. Turning to the second gate, we must consider whether the district court correctly determined "that the petition does, in fact, satisfy [the section 2255(h)] requirements." Here, the district court did not perform the second-gate analysis. Considering the question ourselves, we conclude that Harrison's section 2255 motion does not "in fact, satisfy [the section 2255(h)] requirements."

To show that his motion satisfies section 2255(h), Harrison must show that his motion contains newly discovered evidence or that it rests on a new rule of constitutional law. Harrison contends that his motion rests on the new rule of constitutional law the Supreme Court announced in *Johnson*. *See* 135 S. Ct. 2551. *Johnson* held that the residual clause in the ACCA is unconstitutionally vague. *See id.* Under the ACCA, if a defendant has three prior convictions that qualify as violent felonies, he or she automatically receives a 15-year minimum sentence. *See* 18 U.S.C. § 924(e)(2)(B). Before *Johnson*, the ACCA provided three options for prior convictions to qualify as violent felonies. *See id.* After *Johnson*, only two remained: the elements clause and the enumerated offenses clause. *See* 135 S. Ct. at 2563. Additionally, *Johnson* was made retroactively applicable to collateral review in *Welch v. United States*, 136 S. Ct. 1257 (2016). Following *Johnson* and *Welch*, a habeas movant like Harrison can generally show that he or she received an unconstitutional sentence if the sentencing judge used the residual clause in enhancing his or her sentence.

Importantly though, because the elements and enumerated offenses clauses remain, we have stated that "[a] claim does not 'rely' on [*Johnson*] if it is possible to

conclude . . . that the sentencing court's ACCA determination did not rest on the residual clause." *Murphy*, 887 F.3d at 1068 (second alteration in original). To determine which clause the sentencing court relied on, we look to the "record and relevant background legal environment at the time of sentencing." *Id.* The relevant background legal environment is "a 'snapshot' of what the controlling law was at the time of sentencing and does not take into account post-sentencing decisions that may have clarified or corrected pre-sentencing decisions." *United States v. Snyder*, 871 F.3d 1122, 1129 (10th Cir. 2017). The movant must show it is "more likely than not" that the sentencing court "relied on the residual clause to enhance his sentence under the ACCA." *United States v. Driscoll*, 892 F.3d 1127, 1135 (10th Cir. 2018) (holding this in a different, but analogous, context).

Here, by not addressing the second gate and proceeding to the merits, *see* R. at 163–70, the district judge can fairly be said to have assumed without deciding that Harrison passed the second gate. *See id.* The government believes this assumption was an error, and we agree. Harrison does not pass the second gate because he has not shown it is more likely than not that the sentencing court "relied on the residual clause" when it determined that his two prior convictions for domestic abuse assault and battery qualify as violent felonies under the ACCA. To reach this determination, we look first to the sentencing transcript.

The district judge stated at sentencing:

> First, on the issue of whether these [domestic abuse assault and battery convictions], as a matter of Oklahoma law, are offenses which qualify, I note that under Section 924(e)(2)(B), Subsection (i) and (ii), we have a violent

> felony if the act -- or if the offense "has as an element the use, attempted use, or threatened use of physical force against the person of another" or if it "presents a serious potential risk of physical injury to another."
>
> That brings us into 21 -- Title 21, Oklahoma Statutes, Section 644-C, which makes a crime an assault and battery against a current or former spouse or individuals in other relationships. The statute defines that as domestic abuse. And Section 641 of Title 21 defines assault as "any willful and unlawful attempt or offer with force or violence to do a corporal hurt to another." Battery is defined in Section 642 as "any willful and unlawful use of force or violence upon the person of another."
>
> I have no trouble at all concluding that these offenses, these domestic abuse offenses committed by this defendant, do fall within Section 924(e) as a definitional matter in terms of an analysis of the elements of the crime.

Tr. at 14–15 (alteration to original).

The reference to "the elements of the crime" appears to indicate that the district judge relied on the elements clause and not the residual clause. Harrison, however, contends that this statement is not conclusive. Harrison points out that at the time of sentencing, the court's application of the residual clause would have been based on a categorical test that, much like the elements test, hinged on an analysis of the elements of the crime at issue. *See James v. United States*, 550 U.S. 192, 202 (2007) ("[W]e consider whether the elements of the offense are of the type that would justify its inclusion within the residual provision, without inquiring into the specific conduct of this particular offender." (emphasis omitted)).

Harrison also contends that, at the time of sentencing, there was binding Tenth Circuit precedent stating that Oklahoma assault and battery does not qualify as a violent felony under the ACCA's elements clause. In *United States v. Smith*, 652 F.3d 1244 (10th Cir. 2011), we considered in dicta whether the Oklahoma offense of "assault,

battery or assault and battery upon the person of an Office of Juvenile Affairs employee" qualifies as a violent felony under the elements clause. *Id.* at 1246 (quotations omitted). We noted that battery in Oklahoma is satisfied by the "slightest touching," and accordingly, it does not require sufficient force to make it a violent crime. *See id.* at 1247. We further noted that because a conviction for "assault, battery or assault and battery" could be based on the commission of a battery accomplished by the slightest touching, the "statute clearly reaches behavior that does not ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another as required for enhancement under [the elements clause]." *Id.* (first alteration in original) (quotations omitted).

It is possible, as Harrison argues, that the sentencing judge could have looked at *Smith* and reasoned that Harrison's Oklahoma assault and battery convictions did not qualify under the elements clause. But it is also possible that the district court could have distinguished *Smith*. In fact, the district court eventually *did* distinguish *Smith* when he denied Harrison's second section 2255 motion. *See* R. at 167–68. The court distinguished *Smith* by highlighting that *Smith* treated the conviction at issue as one of "assault *or* battery," R. at 168 (emphasis in original), whereas here, Harrison's convictions are for "assault *and* battery." *See id.* at 167–68. This distinction, according to the district judge, is material because "assault *and* battery" entails that the defendant must have committed both an assault and a battery. *See id.* While battery only requires the "slightest touching," *see id.* at 166, assault is "a willful and unlawful attempt or offer with force or violence to do a corporal hurt to another." *Id.* (quotations omitted). Thus,

even though the force required to commit a battery is insufficient for the ACCA, the attempted force involved in assault is not. *See id.* at 163–70. And because Harrison's convictions for assault *and* battery required him to have committed both an assault and a battery, the conviction required sufficient force to satisfy the elements clause. *See id.*

In any event, as we read the sentencing transcript, it is not ambiguous whether the district judge applied the elements clause or the residual clause. *See* Tr. at 14–15. He found that Harrison's prior convictions for domestic abuse assault and battery qualified under *both* clauses. *See id.* This is apparent from the fact that he set up the discussion above by noting that a violent felony can be established by satisfying either the elements or the residual clause and that he then proceeded to find that the convictions at issue here "fall within Section 924(e) as a definitional matter in terms of an analysis of the elements of the crime." *Id.* at 15.

Accordingly, we conclude Harrison has failed to meet his burden of showing it is more likely than not that his conviction rested on the residual clause. Rather, his conviction rested on both clauses, which is insufficient to pass the second gate. *See Murphy*, 887 F.3d at 1068; *see also Dimott v. United States*, 881 F.3d 232, 243 (1st Cir. 2018) ("We hold that to successfully advance a *Johnson II* claim on collateral review, a habeas petitioner bears the burden of establishing that it is more likely than not that he was sentenced solely pursuant to ACCA's residual clause."); *Beeman v. United States*, 871 F.3d 1215, 1222 (11th Cir. 2017) ("If it is just as likely that the sentencing court relied on the elements or enumerated offenses clause, solely or as an alternative basis for the enhancement, then the movant has failed to show that his enhancement was due to use

of the residual clause."). Consequently, Harrison has failed to satisfy the requirements of section 2255(h).

III.

Because Harrison has not satisfied the jurisdictional requirements of section 2255(h), we **VACATE** the district court's order and **REMAND** with instructions for the district judge to enter an order dismissing the motion for lack of jurisdiction.

Entered for the Court

Allison H. Eid
Circuit Judge