FILED
United States Court of Appeals
Tenth Circuit

July 25, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JASON RYAN EATON,

Defendant - Appellant.

No. 20-5105
(D.C. Nos. 4:19-CV-00717-TCK-JFJ &
4:98-CR-00086-TCK-1)
(N.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

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

Jason Ryan Eaton, appearing pro se, seeks a certificate of appealability ("COA") to challenge the district court's denial of his 28 U.S.C. § 2255 motion. *See* 28 U.S.C. § 2253(c)(1)(B) (an appeal may not be taken from a final order denying relief under § 2255 unless the movant obtains a COA). Exercising jurisdiction under 28 U.S.C. § 1291, we deny a COA and dismiss the appeal.

I.

In 1998, Eaton pled guilty to one count of attempted Hobbs Act robbery and two counts of using and carrying a firearm during and in relation to several completed Hobbs

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

Act robberies, in violation of 18 U.S.C. § 924(c). Eaton's § 924(c) violations were predicated on two completed Hobbs Act robberies he committed, and the completed Hobbs Act robbery charges were dismissed pursuant to a plea agreement. Under that agreement, Eaton pleaded guilty to the two § 924(c) charges and a single count of attempted Hobbs Act robbery, but he was not convicted of a § 924(c) violation based on the attempted Hobbs Act robbery. The district court sentenced Eaton to a total of 468 months' imprisonment, comprised of consecutive terms of 168 months on the attempted Hobbs Act robbery count and an additional 60 months and 240 months on the two § 924(c) counts.

In 2015, Eaton filed his first motion under 28 U.S.C. § 2255, which the district court dismissed as untimely. Eaton appealed and we declined to issue a COA and dismissed the appeal. *United States v. Eaton*, 614 F. App'x 380 (10th Cir. 2015) (unpublished). One year later, Eaton moved to reduce his sentence following the Supreme Court's decision in *Johnson v. United States*, 576 U.S. 591 (2015), which is retroactive on collateral review under *Welch v. United States*, 136 S. Ct. 1257 (2016). The district court converted the motion to a § 2255 motion and transferred it to this Court for Eaton to seek authorization to file a second or successive § 2255 motion. Eaton supplemented his motion, arguing that his § 924(c) convictions should be vacated according to the Supreme Court's decision in *United States v. Davis*, 139 S. Ct. 2319 (2019). *Davis* determined that § 924(c)(3)(B)'s residual clause was unconstitutionally vague, and we declared *Davis* retroactively applies on collateral review in *United States*

v. Bowen, 936 F.3d 1091, 1097 (10th Cir. 2019). We granted Eaton permission to file the motion but did not consider its merits.

Eaton next filed a successive § 2255 motion, asserting that his convictions and sentence under § 924(c) should be vacated because Hobbs Act robbery is no longer a "crime of violence" under § 924(c) after *Davis*. The government moved to dismiss Eaton's motion. The district court granted the motion to dismiss, finding that Tenth Circuit precedent foreclosed Eaton's motion, that Eaton failed to establish that *Davis* impacted the validity of his § 924(c)(3)(A) convictions, and that he did not show that his motion rested on a new rule of constitutional law. Eaton again sought a COA, which the district court denied. Eaton timely appeals the latest denial and simultaneously requests a COA.

We abated this case pending the United States Supreme Court's decision in *United States v. Taylor*. The Supreme Court held in *Taylor* that an "[a]ttempted Hobbs Act robbery is not a 'crime of violence' under § 924(c)(3)(A) because no element of the offense requires proof that the defendant used, attempted to use, or threatened to use force." 142 S. Ct. 2015, 2016 (2022). We thereafter lifted the abatement.

II.

To obtain a COA, a criminal defendant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Because the district court denied Eaton's claims on the merits, Eaton must show that reasonable jurists "could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed

further." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (cleaned up). Whether to grant a COA is a "threshold question [that] should be decided without full consideration of the factual or legal bases adduced in support of the claims." *Id.* (cleaned up). Eaton is a pro se movant, so we construe his briefing liberally. *See United States v. Griffith*, 928 F.3d 855, 864 n.1 (10th Cir. 2019).

At the time of Eaton's offenses, § 924(c) prohibited using or carrying a firearm during or in relation to a crime of violence. Since then, the Supreme Court declared the residual clause, § 924(c)(3)(B), was unconstitutionally vague. *Davis*, 139 S. Ct. at 2336. Thus, to qualify as a violent felony under the applicable elements clause, the underlying felony must have "as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). The term "physical force" requires a showing of "*violent* force . . . capable of causing physical pain or injury to another person." *Bowen*, 936 F.3d at 1101 (cleaned up) (emphasis in original).

To determine whether Eaton's convictions meet this elemental requirement, we apply a categorical approach and look "only to the fact of conviction and the statutory definition of the prior offense." *Id.* at 1102 (cleaned up). In doing so, "[w]e must compare the scope of conduct covered by the elements of the crime" with the "crime of violence" definition. *United States v. O'Connor*, 874 F.3d 1147, 1151 (10th Cir. 2017). At this stage, the only question is whether Eaton has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed

further," and if he has made this showing, the COA must be granted. *United States v. Sanchez*, 748 F. App'x 801, 803–04 (10th Cir. 2018) (unpublished)[1] (cleaned up).

The Hobbs Act penalizes "interference with commerce by threats of violence," and anyone who "obstructs, delays, or affects commerce" in any way, "by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property" in furtherance of the offense will be fined or imprisoned. 18 U.S.C. § 1951(a). The Act also defines "robbery" as the unlawful taking or obtaining of personal property from a person against their will, "by means of actual or threatened force, or violence, or fear of injury, immediate or future" against a person, their property, "property in [their] custody or possession," or "the person or property of a relative or member of [their] family or of anyone in [their] company" at the time of the robbery. *Id*. § 1951(b)(1).

III.

Among other arguments, Eaton claims that his convictions rest on the residual clause that *Davis* declared unconstitutionally vague and that his sentence should be vacated because Hobbs Act robbery no longer qualifies as a crime of violence under § 924(c). Further, he asserts that he could not have been convicted under the elements clause because (1) Hobbs Act robbery can be committed by causing fear of injury to property; and (2) Hobbs Act robbery by causing fear of injury to property fails to meet our precedent's requirement that the prior offense involves actual or threatened physical

[1] Unpublished decisions are not precedential, but may be cited for their persuasive value. Fed. R. App. P. 32.1; 10th Cir. R. 32.1 (2023).

force that is violent. Eaton also argues that we should overrule our decision in *United States v. Melgar-Cabrera* and that the district court failed to follow our decision in *Bowen*.

Eaton's argument is precluded by *United States v. Melgar-Cabrera*. *See* 892 F.3d 1053 (10th Cir. 2018); *see also United States v. Baker*, 49 F.4th 1348, 1359 (10th Cir. 2022) (Hobbs Act robbery is categorically a crime of violence under § 924(c)'s elements clause because it entails the use or threatened use of violence to injure a person or property). In *Melgar-Cabrera*, we considered whether Hobbs Act robbery categorically constitutes a crime of violence under the statute's elements clause—the exact issue that Eaton raises. 892 F.3d at 1060; *see also United States v. Myers*, 786 F. App'x 161 (10th Cir. 2019) (unpublished) (reaffirming after *Davis* that Hobbs Act robbery is categorically a crime of violence under the elements clause of § 924(c)). Our logic from *Melgar-Cabrera* applies here. Putting someone in "fear of injury" under the Hobbs Act necessarily involves the "threatened use of physical force" and satisfies the elements clause. *Melgar-Cabrera*, 892 F.3d at 1066. *Melgar-Cabrera* carries its precedential force, and Eaton fails to prove that he was convicted under the residual clause of § 924(c). Additionally, Eaton's other claims are not persuasive.

Nor does the Supreme Court's decision in *Taylor* have any bearing on Eaton's conviction or sentence. The government and Eaton agree on this point. Eaton's § 924(c) violations were predicated on the two completed Hobbs Act robberies he committed, and he was not convicted of a § 924(c) violation based on the attempted Hobbs Act robbery.

Neither *Davis* nor *Johnson* affect the validity of Eaton's convictions. Given this authority, no reasonable jurist would debate the district court's dismissal of Eaton's § 2255 motion, nor conclude that the issues presented are adequate to deserve encouragement in proceeding further. Eaton fails to make a substantial showing that he was denied a constitutional right or that his convictions rely on a new rule of constitutional law made retroactive on collateral review.

IV.

We DENY Eaton's request for a certificate of appealability and DISMISS this appeal.

Entered for the Court

Allison H. Eid
Circuit Judge