FILED
United States Court of Appeals
Tenth Circuit

September 10, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CLARENCE LEE DAVIS,

Defendant - Appellant.

No. 20-5119
(D.C. Nos. 4:20-CV-00235-CVE-JFJ
& 4:04-CR-00085-CVE-2)
(N.D. Okla.)

ORDER AND JUDGMENT*

Before **BACHARACH**, **MURPHY**, and **CARSON**, Circuit Judges.

This case stems from Mr. Clarence Lee Davis's conviction for using a firearm during a crime of violence. *See* 18 U.S.C. § 924(c)(1). Mr. Davis twice moved to vacate his conviction and sentence under 28 U.S.C. § 2255. The federal district court dismissed the second motion, ruling that Mr.

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* Oral argument would not help us decide the appeal, so we have decided the appeal based on the record and the parties' briefs. *See* Fed. R. App. P. 34(a)(2)(C); 10th Cir. R. 34.1(G).

This order and judgment does not constitute binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But the order and judgment may be cited for its persuasive value if otherwise appropriate. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

Davis had not based his second § 2255 motion on a new rule of constitutional law. *See* 28 U.S.C. § 2255(h). We affirm.

Mr. Davis urges vacatur of (1) his § 924(c) conviction based on the absence of a crime of violence and (2) his sentence based on improper enhancement under sentencing guidelines. For both arguments, Mr. Davis asserts reliance on a new rule of constitutional law.

First, Mr. Davis argues that his § 924(c) conviction should be vacated. Section 924(c) provides a mandatory minimum sentence for using a firearm in relation to a crime of violence. 28 U.S.C. § 924(c)(1). At the time of Mr. Davis's conviction, a "crime of violence" was defined as an offense involving either

- "the use, attempted use, or threatened use of physical force" (the elements clause) or
- "a substantial risk" of the use of physical force (the residual clause).

28 U.S.C. § 924(c)(3).

After Mr. Davis was convicted, the Supreme Court held that the residual clause in another statute was unconstitutionally vague. *Johnson v. United States*, 576 U.S. 591, 601–02, 606 (2015). The Supreme Court later extended that holding to § 924(c)'s residual clause in *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019). Under *Davis*, a § 924(c) conviction is invalid when the underlying crime would qualify as a "crime of violence" only under the residual clause. *Id.* But a § 924(c) conviction can be based

on conduct constituting a crime of violence under the elements clause. The question here is whether Mr. Davis's conduct would have fit § 924(c)'s elements clause.

Mr. Davis was convicted of three offenses:

1. conspiring to commit an offense against the United States under 18 U.S.C. § 371 (count one)

2. attempting armed bank robbery under 18 U.S.C. § 2113(a) (count two)

3. using a firearm during and in relation to a crime of violence under 18 U.S.C. § 924(c) (count three)

He challenges only the third conviction (§ 924(c)), arguing that the conspiracy (count one) cannot qualify as a predicate crime of violence under the elements clause.

But Mr. Davis mistakenly assumes that the crime of violence underlying his § 924(c) conviction consisted of the conspiracy (count one). The Second Superseding Indictment states that the crime of violence was in fact attempted armed bank robbery (count two). And in several unpublished opinions, we have concluded that attempted armed bank robbery and armed bank robbery qualify as crimes of violence under § 924(c)'s elements clause. *See, e.g.*, *United States v. Rinker*, 746 F. App'x 769, 771–72 (10th Cir. 2018); *United States v. Hill*, 745 F. App'x 77, 78–79 (10th Cir. 2018); *United States v. Smith*, 730 F. App'x 710, 711 (10th Cir. 2018). Mr. Davis supplies no reason to question these opinions.

Mr. Davis also argues that the jury instructions allowed the jury to find attempted armed bank robbery (count two) from conspiracy (count one). Mr. Davis is correct. Jury Instruction No. 22 allowed such a finding.

But Jury Instruction No. 22 does not conflict with *Davis v. United States*. In *Davis*, the Supreme Court affirmed the Fifth Circuit's conclusion that a conspiracy count alone could not suffice as a predicate offense for a § 924(c) conviction. 139 S. Ct. 2319, 2325, 2336 (2019). That's not the case here: The jury found Mr. Davis guilty of attempted armed bank robbery in addition to conspiracy. Regardless of how the jury found attempted armed bank robbery, this finding would satisfy § 924(c)'s elements clause.[1]

Second, Mr. Davis challenges his sentence, which was based on enhancement under a guideline provision for crimes of violence. When Mr. Davis was sentenced, the guideline (like § 924(c)) provided two ways for an offense to qualify as a crime of violence:

1. the elements clause
2. the residual clause

[1] Because we conclude that Mr. Davis's conviction for attempted armed bank robbery satisfied § 924(c), we need not address the government's denial of actual prejudice.

See U.S.S.G. § 4B1.2 (2004).[2] Mr. Davis again argues that his offense could qualify as a crime of violence only under the residual clause.

But Mr. Davis is pressing this argument through a second motion under § 2255. He can do so only if he's relying on a new rule of constitutional law. 28 U.S.C. § 2255(h)(2). He isn't. Mr. Davis points to a Supreme Court opinion treating a statute as unconstitutionally vague, but that opinion does not state a new rule for a sentencing guideline with similar language. *United States v. Pullen*, 913 F.3d 1270, 1284–85 (10th Cir. 2019). So Mr. Davis can't pursue this claim through a second motion under § 2255.[3]

Affirmed.

Entered for the Court

Robert E. Bacharach
Circuit Judge

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[2] The guideline was amended in 2016 and no longer includes language resembling the residual clause. *See* U.S.S.G. § 4B1.2 (2016).

[3] In a supplemental brief, Mr. Davis argues that reasonable jurists could debate the classification of his prior state convictions as crimes of violence for purposes of a sentence enhancement. But we do not address this argument because Mr. Davis did not make it in district court. *See Fairchild v. Workman*, 579 F.3d 1134, 1144 (10th Cir. 2009) (stating that "we ordinarily do not decide issues raised for the first time on appeal").