FILED
United States Court of Appeals
Tenth Circuit

November 4, 2019

Elisabeth A. Shumaker
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: BRIAN M. MULLINS, Movant.	No. 19-3158 (D.C. Nos. 6:16-CV-01199-EFM & 6:11-CR-10205-EFM-1) (D. Kan.)

ORDER

Before **TYMKOVICH**, Chief Judge, and **BRISCOE** and **BACHARACH**, Circuit Judges.

Movant Brian Mullins seeks authorization from this court to file a second or successive motion under 28 U.S.C. § 2255 to challenge his conviction under 18 U.S.C. § 924(c) for possession of a firearm during and in relation to a conspiracy to commit a Hobbs Act robbery. In addition to the § 924(c) offense, Mullins was convicted of conspiracy to commit a Hobbs Act robbery and possession of a firearm by a felon. He received concurrent 84-month sentences for these two convictions and a consecutive 60-month sentence for the § 924(c) conviction. Mullins did not file a direct appeal, but he did file a § 2255 motion challenging his § 924(c) conviction. The district court denied that § 2255 motion and Mullins did not appeal.

Because he filed an earlier unsuccessful § 2255 motion, Mullins must first receive authorization from this court before filing a second or successive § 2255 motion in

district court. *See* 28 U.S.C. § 2255(h); *id.* § 2244(b)(3). Mullins seeks authorization to file a second § 2255 motion to challenge his § 924(c) conviction based on the Supreme Court's recent decision in *United States v. Davis*, 139 S. Ct. 2319 (2019).

Section 924(c) provides in pertinent part that "any person who, during and in relation to any crime of violence . . . uses or carries a firearm or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence . . . be sentenced to a term of not less than 5 years." 18 U.S.C. § 924(c)(1)(A)(i). The statute further provides:

> For purposes of this subsection the term "crime of violence" means an offense that is a felony and--
>
> (A) has as an element the use, attempted use, or threatened use of physical force against the 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.

Id. § 924(c)(3). Subsection (A) of this definition is referred to as the elements clause and subsection (B) is referred to as the residual clause. The crime of violence underlying Mullins' § 924(c) conviction was conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a).

To obtain authorization to file a second § 2255 motion, Mullins must make a prima facie showing, 28 U.S.C. § 2244(b)(3)(C), that he satisfies one of the gatekeeping provisions contained in § 2255(h). Mullins contends that his challenge based on *Davis* satisfies the gatekeeping provision in § 2255(h)(2): his claim relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court,

that was previously unavailable." The government concedes in its response to Mullins' motion for authorization that his *Davis* claim meets this standard. Resp. of United States at 4.

In *Davis*, the Supreme Court held that the residual clause in § 924(c)(3)'s definition of "crime of violence" is unconstitutionally vague. 139 S. Ct. at 2336. Accordingly, it struck down the residual clause, as it had done with similarly worded residual clauses in the Armed Career Criminal Act (ACCA), *see Johnson v. United States*, 135 S. Ct. 2551 (2015), and in 18 U.S.C. § 16(b), *see Sessions v Dimaya*, 138 S. Ct. 1204 (2018). Mullins contends that his § 924(c) conviction could rest only on application of § 924(c)(3)'s residual clause, so his conviction is invalid under *Davis*.

Before we can authorize Mullins to pursue his *Davis* claim in district court, he must show that it satisfies the gatekeeping requirements of § 2255(h)(2). Thus, he must show (1) that *Davis* announced a new rule of constitutional law, (2) that *Davis* has been made retroactive to cases on collateral review by the Supreme Court, and (3) that the rule announced in *Davis* was previously unavailable. *Id.*

This court has already determined that *Davis* announced a new rule of constitutional law. *United States v. Bowen*, 936 F. 3d 1091, 1098 (10th Cir. 2019). We turn, then, to whether the Supreme Court has made *Davis* retroactive to cases on collateral review. For purposes of the second or successive gatekeeping provisions, "a new rule is not made retroactive to cases on collateral review unless the Supreme Court holds it to be retroactive." *Tyler v. Cain*, 533 U.S. 656, 663 (2001) (internal quotation

marks omitted).[1] The holding need not be contained in a single case, however, as a combination of Supreme Court holdings also can make a new rule retroactive. *Id.* at 666. But "[m]ultiple cases can render a new rule retroactive only if the holdings in those cases necessarily dictate retroactivity of the new rule." *Id.* Mullins contends that the Supreme Court has made *Davis* retroactive to cases on collateral review through its holdings in multiple cases, namely *Welch v. United States*, 136 S. Ct. 1257 (2016), and *Davis*. The government agrees with this contention. Resp. of United States at 2-3.

Justice O'Connor explained in her concurrence in *Tyler* how the Supreme Court can be said to have made a new rule retroactive through the holdings in multiple cases:

> [I]f we hold in Case One that a particular type of rule applies retroactively to cases on collateral review and hold in Case Two that a given rule is of that particular type, then it necessarily follows that the given rule applies retroactively to cases on collateral review. In such circumstances, we can be said to have "made" the given rule retroactive to cases on collateral review.

121 S. Ct. at 668-69 (O'Connor, J., concurring). She cautioned, however, that "[t]he relationship between the conclusion that a new rule is retroactive and the holdings that 'ma[k]e' this rule retroactive . . . must be strictly logical—*i.e.*, the holdings must dictate the conclusion and not merely provide principles from which one may conclude that the rule applies retroactively." *Id.* at 669 (second alteration in original). In other words, the Supreme Court makes a new rule retroactive through multiple cases "only where the

[1] While this court determined in *Bowen* that *Davis* is retroactive to cases on collateral review, because *Bowen* did not involve the gatekeeping provisions of § 2255(h), it did not expressly determine whether the *Supreme Court* has made *Davis* retroactive.

Court's holdings logically permit no other conclusion than that the rule is retroactive." *Id.*

The "required logical relationship" is "relatively easy" to see when considering a new substantive rule, *i.e.*, one that "'places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" *Id.* (quoting *Teague v. Lane*, 489 U.S. 288, 311 (1989) (plurality opinion) (further internal quotation marks omitted)). The Supreme Court has held that such a rule should be applied retroactively to cases on collateral review. *Teague*, 489 U.S. at 310-11 (plurality opinion). "When the Court holds as a new rule in a subsequent case that a particular species of primary, private individual conduct is beyond the power of the criminal lawmaking authority to proscribe, it necessarily follows that this Court has 'made' that new rule retroactive to cases on collateral review." *Tyler*, 533 U.S. at 669 (O'Connor, J. concurring).

In *Welch*, the Court held that its earlier holding in *Johnson*, striking down the residual clause in the ACCA's definition of "violent felony" as void for vagueness, was a new substantive rule that was retroactive to cases on collateral review. 136 S. Ct. at 1264-65. The ACCA's residual clause had permitted a defendant to be punished based on prior convictions that presented a serious potential risk of physical injury in the ordinary case. *See Johnson*, 135 S. Ct. at 2557. The Court held in *Welch* that "[b]y striking down the residual clause as void for vagueness, *Johnson* changed the substantive reach of the Armed Career Criminal Act, altering 'the range of conduct or the class of persons that the [Act] punishes.'" 136 S. Ct. at 1265 (quoting *Schriro v. Summerlin*,

542 U.S. 348, 353 (2004)). As the Court explained, before *Johnson*, a defendant could be punished under the ACCA even if his prior convictions qualified as violent felonies only under the residual clause of the ACCA. But "[a]fter *Johnson*, the same person engaging in the same conduct is no longer subject to the [ACCA]." *Welch*, 136 S. Ct. at 1265.

The same is true of *Davis*: by striking down the residual clause in the definition of "crime of violence" in § 924(c)(3), *Davis* "alter[ed] the range of conduct or the class of persons that [§ 924(c)] punishes," *Welch*, 136 S. Ct. at 1265 (internal quotation marks omitted); *see also Bowen*, 936 F.3d at 1101; *In re Hammoud*, 931 F.3d 1032, 1039 (11th Cir. 2019). As we explained in *Bowen*,

> Before *Davis*, a person could be convicted for the crime of using a firearm in connection with a crime of violence, even if the predicate crime qualified as a crime of violence only under § 924(c)(3)'s residual clause. After *Davis*, "the same person engaging in the same conduct is no longer subject to" this conviction.

936 F.3d at 1101 (quoting *Welch*, 136 S. Ct. at 1265).

Because *Davis* has the same limiting effect on the range of conduct or class of people punishable under § 924(c) that *Johnson* has with respect to the ACCA, *Welch* dictates that *Davis*—like *Johnson*—"announced a substantive rule that has retroactive effect in cases on collateral review," *Welch*, 136 S. Ct. at 1268; *see also Bowen*, 936 F.3d at 1101 ("'It follows that [*Davis*] announced a substantive rule that has retroactive effect in cases on collateral review.'" (alteration in original) (quoting *Welch*, 136 S. Ct. at 1268)); *Hammoud*, 931 F.3d at 1039 ("*Davis* announced a new substantive rule, and *Welch* tells us that a new rule such as the one announced in *Davis* applies retroactively to criminal cases that became final before the new substantive rule as announced.").

For purposes of § 2255(h)(2), then, we conclude that the Supreme Court has made *Davis* retroactively applicable to cases on collateral review. The Court's holdings in *Welch* and *Davis* "logically permit no other conclusion than that the rule [in *Davis*] is retroactive," *Tyler*, 533 U.S. at 669 (O'Connor, J. concurring); *see also Hammoud*, 931 F.3d at 1039 ("[T]aken together, the Supreme Court's holdings in *Davis* and *Welch* 'necessarily dictate' that *Davis* has been 'made' retroactively applicable to criminal cases that became final before *Davis* was announced." (quoting *Tyler*, 533 U.S. at 666)).

Having determined that Mullins has established both that *Davis* announced a new rule of constitutional law and that the Supreme Court has made *Davis* retroactively applicable to cases on collateral review, we must determine as a final matter whether Mullins' proposed claim under *Davis* was previously unavailable. Mullins was convicted in 2012. He filed his previous § 2255 motion in 2016, and the district court denied it on March 11, 2019. At that time, the Supreme Court had not yet issued its decision in *Davis*; the decision did not issue until June 24, 2019. Accordingly, Mullins has not previously had an opportunity to challenge his § 924(c) conviction based on the new rule announced in *Davis* that the residual clause in § 924(c)(3)(B) is void for vagueness.

Based on the foregoing, we conclude that Mullins has made a prima facie showing that he meets the gatekeeping requirements of § 2255(h). We therefore grant his motion for authorization to file a second or successive § 2255 motion challenging his § 924(c) conviction for possession of a firearm during and in relation to a conspiracy to commit

Hobbs Act robbery based on the holding of *Davis* striking down the residual clause in § 924(c)(3)(B).

Entered for the Court

ELISABETH A. SHUMAKER, Clerk