FILED
United States Court of Appeals
Tenth Circuit

September 4, 2019

Elisabeth A. Shumaker
Clerk of Court

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

FLORENTINO VILLANUEVA, JR.,

Defendant - Appellant.

No. 19-6003
(D.C. Nos. 5:16-CV-00726-HE and 5:13-CR-00201-HE-1)
(W.D. Okla.)

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**ORDER DENYING A CERTIFICATE OF APPEALABILITY**

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Before **HARTZ**, **PHILLIPS**, and **EID**, Circuit Judges.

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Defendant Florentino Villanueva Jr. seeks a certificate of appealability (COA) to appeal the denial by the United States District Court for the Western District of Oklahoma of his motion for relief under 28 U.S.C. § 2255. *See* 28 U.S.C. § 2253(c)(1)(B) (requiring COA to appeal denial of motion under § 2255). We decline to grant a COA and dismiss the appeal.

A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To prevail, the defendant must demonstrate "that reasonable jurists could debate whether (or, for that matter, agree that) the [motion] should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted). Put simply, the defendant must

show that the district court's resolution of his or her constitutional claim was either "debatable or wrong." *Slack*, 529 U.S. at 484.

Defendant pleaded guilty to being a felon in possession of a firearm. *See* 18 U.S.C. § 922(g). He was sentenced to a term of 210 months in prison after the district court determined that he was an armed career criminal under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), and the sentencing guidelines, USSG § 4B1.4. The ACCA sets a minimum prison term of 15 years for those convicted under § 924(g) who have three prior convictions for a "violent felony" or a "serious drug offense." The sentencing guidelines also set minimum offense levels and criminal-history categories for such persons. *See* USSG § 4B1.4. Defendant contends that he is not an armed career criminal and that his sentence should therefore be set aside. He does not dispute that he has prior convictions for a serious drug offense (unlawful distribution of marijuana) and one violent felony (using a vehicle to intentionally discharge a firearm). But he argues that he does not have a prior conviction for a second violent felony, contrary to the district court's ruling.

Under the ACCA a *violent felony* is a crime punishable by imprisonment for a term exceeding one year and:

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another [the elements clause]; or
> (ii) is burglary, arson, or extortion, involves use of explosives [the enumerated-offenses clause], or otherwise involves conduct that presents a serious potential risk of physical injury to another [the residual clause].

18 U.S.C. § 924(e)(2)(B). When defendant was initially sentenced, the district court ruled that his second violent-felony conviction was a conviction for assault and battery on

a police officer. But after the Supreme Court held that the residual clause of the ACCA was unconstitutionally vague, *see Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015), Defendant filed a timely § 2255 motion to vacate his sentence. He asserted that absent the now-unconstitutional residual clause, his Oklahoma convictions for assault and battery on a police officer and for robbery did not qualify as violent felonies under the ACCA. The government conceded that the assault-and-battery conviction did not qualify, and the district court agreed, holding that "the imposition of the ACCA enhanced sentence was in error to the extent that it depended on that conviction." Order at 3. But the district court held that Defendant was still an armed career criminal because his prior conviction for conjoint robbery is a violent felony under the elements clause.[1]

Defendant argues that under Oklahoma law conjoint robbery does not qualify as a crime of violence because the amount of force required for its violation does not meet the level of force contemplated under the ACCA. "To determine if a prior conviction qualifies as a violent felony under the ACCA, we apply the categorical approach, focusing on the elements of the crime of conviction, not the underlying facts." *See United States v. Harris*, 844 F.3d 1260, 1263 (10th Cir. 2017). Accordingly, the question we must answer here is whether Oklahoma's conjoint-robbery statute "has as an element the use, attempted use, or threatened use of physical force against the person of another."

[1] Below, Defendant argued that there was uncertainty regarding which Oklahoma robbery statute he was convicted under. But the district court held that it was clear that his conviction was for conjoint robbery under Okla. Stat. tit. 21, § 800. Defendant does not argue the point in this court.

18 U.S.C. 924(e)(2)(B)(i). This analysis requires application of both federal law and Oklahoma state law.

In *Johnson v. United States*, 559 U.S. 133, 140 (2010), the Supreme Court held that "in the context of a statutory definition of '*violent* felony,' the phrase 'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person." The Court's recent decision in *Stokeling v. United States*, 139 S. Ct. 544, 554 (2019), further clarified that force "sufficient to overcome a victim's resistance" is inherently capable of causing physical pain or injury and therefore satisfies the ACCA's elements clause. In particular, the Court said that "robbery that must overpower a victim's will—even a feeble or weak-willed victim—necessarily involves a physical confrontation and struggle," which is "capable of causing physical pain or injury." *Id.* at 553 (internal quotations marks omitted).

Under Oklahoma law conjoint robbery occurs "[w]henever two or more persons conjointly commit a robbery or where the whole number of persons conjointly commits a robbery and persons present and aiding such robbery amount to two or more." Okla. Stat. tit. 21 § 800. Conjoint robbery is thus a subset of robbery, which Oklahoma defines as "a wrongful taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." Okla. Stat. tit. 21 § 791. Such "force or fear must be employed either to obtain or retain possession of the property, or to prevent or overcome resistance to the taking. If employed merely as a means of escape, it does not constitute robbery." *Id.* at § 792**.** The degree of force employed, however, is immaterial. *See id.* at § 793**.**

Defendant argues that because the degree of force is immaterial, a robbery can be accomplished without physical force required by the ACCA. But the Oklahoma Criminal Court of Appeals (OCCA) has interpreted the statutory language as requiring a level of force sufficient to overcome a victim's resistance. *See Monaghan v. State*, 134 P. 77, 79 (Okla. Crim. App. 1913) ("The violence which constitutes an essential element of the crime of robbery must be actual, personal violence, but that degree of force used is immaterial . . . . All the force that is required to make the offense a robbery is such force as is actually sufficient to overcome the victim's resistance."); *see also Marks v. State*, 102 P.2d 955, 958 (Okla. Crim. App. 1940) ("The snatching a thing is not considered a taking by force, but if there be a struggle to keep it, or any violence, or disruption, the taking is robbery, the reason of the distinction being that, in the former case, we can infer neither fear nor *the intention violently to take in face of resisting force*." (emphasis added)).

Defendant also seeks to draw a distinction between the employment of force to "prevent or overcome resistance to the taking" of the property and the employment of force "to obtain or retain possession of the property," arguing that the latter is not contemplated by the reasoning in *Stokeling*. Aplt. Br. at 11. To support this proposition, Defendant discusses the OCCA's decision in *Carter v. State*, 725 P.2d 873, 875-76 (Okla. Crim. App. 1986), which held that the government had enough to establish robbery when it presented evidence that the defendant's companion grabbed a store clerk while the defendant reached into the register to get money and that defendant brandished a baseball bat while attempting to retain possession of money that fell out of the register onto the

floor. But we see no basis in the ACCA or *Stokeling* for the distinction drawn by Defendant. The elements clause simply requires "the use, attempted use, or threatened use of physical force against the person of another"; nothing in that language suggests that the force or threat must be to take property rather than retain it. Nor does *Stokeling* suggest a distinction. The important point in that opinion was the "physical contest between the criminal and the victim," and we see no reason why that contest cannot be to retain property that may not have been acquired by force.

Finally, Defendant cites *United States v. Bong*, 913 F.3d 1252, 1264 (10th Cir. 2019), in which we concluded that the crimes of robbery and aggravated robbery under Kansas state law were not violent felonies under the ACCA because Kansas courts have held that they could be violated through acts such as "purse snatching" that required no "application of force directly to the victim, and also, importantly, without any resistance by or injury to the victim." This argument fails because, unlike the Kansas courts, the OCCA has explicitly stated "[t]he mere snatching of an article from the person of another, without violence or putting in fear, is not robbery." *Monaghan*, 134 P. at 79; *see McClendon v. State*, 319 P.2d 333, 334–35 (1957) (victim's testimony that a defendant had "jerked" money out of her pocket book amounted to grand larceny).

Because the language of the OCCA cases mirror the holding in *Stokeling*, we conclude that conjoint robbery, as defined under Oklahoma state law and applied by Oklahoma courts, qualifies as a violent felony under the ACCA. No reasonable jurist could debate the district court's decision.

We **DENY** a COA, and **DISMISS** the appeal.

Entered for the Court

Harris L Hartz
Circuit Judge