[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-13129
Non-Argument Calendar

D.C. Docket Nos. 1:16-cv-22605-UU,
1:11-cr-20700-UU-1

GERARD MANN,

Petitioner-Appellee,

versus

UNITED STATES OF AMERICA,

Respondent-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(October 26, 2018)

Before WILLIAM PRYOR, MARTIN, and ANDERSON, Circuit Judges.

PER CURIAM:

The government appeals the district court's order granting Gerard Mann relief under 28 U.S.C. § 2255, which invalidated Mann's conviction under 18 U.S.C. § 924(c) based on Johnson v. United States, 576 U.S. ___, 135 S. Ct. 2551

(2015). After careful review, we conclude the government's appeal is timely. And we conclude our en banc decision in Ovalles v. United States, No. 17-10172, __ F.3d __, 2018 WL 4830079 (11th Cir. Oct. 4, 2018) (en banc), requires us to vacate the district court's decision and remand.

I.

Mann pled guilty in 2011 to conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) and using and carrying a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c).[1] The district court sentenced Mann to 26 months for the conspiracy conviction and a mandatory consecutive 84 months for the § 924(c) conviction.

On June 24, 2016, Mann filed a § 2255 motion asking the district court to vacate his § 924(c) conviction. He argued that conspiracy to commit Hobbs Act robbery is not a "crime of violence" as defined in § 924(c)(3) after Johnson and Descamps v. United States, 570 U.S. 254, 133 S. Ct. 2276 (2013). The district court granted the motion on March 16, 2017 and filed the order in Mann's civil habeas case as well as his underlying criminal case. The next day, the court entered an order sua sponte closing the civil case and an order in the criminal case scheduling a resentencing hearing. The government then filed a motion for reconsideration in the civil case, which the district court denied on April 19, 2017.

[1] In exchange for Mann's guilty plea to these charges, the government agreed to dismiss a third charge of Hobbs Act robbery.

At the resentencing hearing on June 8, 2017, the court sentenced Mann to 84 months for the conspiracy conviction. The amended judgment issued on June 13, 2017. The government filed a notice of appeal in the civil case on July 10, 2017, saying it was appealing the amended judgment, the order granting Mann's § 2255 motion, and the order denying reconsideration. On July 11, 2017, the government filed a motion for a stay in light of this Court's decision in Ovalles v. United States, 861 F.3d 1257 (11th Cir. 2017), which the district court granted.

II.

Mann argues the government's appeal is untimely, because it was filed outside the 60-day period following the district court's denial of the government's motion for reconsideration in his civil case. See Fed. R. App. P. 4(a)(1)(B). The government disagrees, arguing it had 60 days from the date of the amended judgment to file its notice of appeal. At bottom, this is a dispute about when the § 2255 proceedings were complete: when the court denied the government's motion for reconsideration on April 19, 2017, or when the court resentenced Mann and issued the amended judgment on June 13, 2017. This is a jurisdictional question, so we must address it before reaching the merits. See Bowles v. Russell, 551 U.S. 205, 208–09, 213, 127 S. Ct. 2360, 2363, 2366 (2007); United States v.

Lopez, 562 F.3d 1309, 1311 (11th Cir. 2009). The government has the better of the argument here.

A line of cases defines what constitutes a "final judgment on application for a writ of habeas corpus" from which "[a]n appeal may be taken to the court of appeals." 28 U.S.C. § 2255(d); see Andrews v. United States, 373 U.S. 334, 338–40, 83 S. Ct. 1236, 1239–40 (1963); United States v. Futch, 518 F.3d 887, 894 (11th Cir. 2008); United States v. Dunham Concrete Prods., Inc., 501 F.2d 80, 81–82 (5th Cir. 1974).[2] These cases have defined "final judgment" under § 2255(d) with reference to "[t]he long-established rule against piecemeal appeals in federal cases and the overriding policy considerations upon which that rule is founded." Andrews, 373 U.S. at 339, 83 S. Ct. at 1240; see Futch, 518 F.3d at 894; Dunham, 501 F.2d at 81. These cases have also defined "final judgment" with reference to the relief § 2255 authorizes the district court to grant, the relief the movant requests, and the relief the district court in fact granted. See Andrews, 373 U.S. at 339–40, 83 S. Ct. at 1239–40; Futch, 518 F.3d at 894; Dunham, 501 F.2d at 81–82.

In Andrews, the Supreme Court held a § 2255 proceeding was not final within § 2255(d) where a resentencing order had issued but the resentencing had not yet occurred. See Andrews, 373 U.S. at 339–40, 83 S. Ct. at 1239–40. In

[2] In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981. Id. at 1209.

Dunham, the former Fifth Circuit concluded an order granting a new trial was final under § 2255, observing that "[a] more final termination of the § 2255 action can scarcely be imagined." Dunham, 501 F.2d at 82. And in Futch, this Court held that entry of a new sentence after the district court granted and held a resentencing hearing "completed the § 2255 proceedings by providing the relief awarded in that § 2255 case," even though the court had previously denied the § 2255 movant relief on his claims challenging his underlying convictions. See Futch, 518 F.3d at 890–891, 894.

Like the movants in Andrews and Futch, Mann asked the district court to alter his sentence. See Andrews, 373 U.S. at 339, 83 S. Ct. at 1239; Futch, 518 F.3d at 890, 894; Motion at 1, Mann v. United States, 1:16-cv-22605-UU (S.D. Fla. June 24, 2016), Doc. No. 1 ("MOTION TO CORRECT SENTENCE UNDER 28 U.S.C. § 2255"). And, like the district courts in Andrews and Futch, the district court here properly ordered a resentencing hearing after vacating Mann's § 924(c) conviction. See 28 U.S.C. § 2255(b) (authorizing the district court to "vacate and set the [illegal] judgment aside and . . . discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate"); Andrews, 373 U.S. at 339–40, 83 S. Ct. at 1239–40; Futch, 518 F.3d at 890, 894.

While Dunham might weigh in Mann's favor, Futch suggests we should treat resentencings differently from new trials. See Futch, 518 F.3d at 893–94.

Though it might "'waste litigants' and the district courts' resources to conduct the new trial only for the appellate court to determine, after the trial was completed, that it was not necessary in the first place," Futch noted "these efficiency considerations are not present when the district court conducts a run-of-the-mill resentencing." Id. (quotation marks omitted and alteration adopted).

Perhaps most important, a ruling that the district court's vacatur of Mann's conviction started the appeal clock would be inconsistent with the rule against piecemeal litigation. The government's appeal was timely, and this Court has jurisdiction.

III.

We now turn to the merits question before us. Mann argued to the district court that § 924(c)(3)(B) is unconstitutionally vague under Johnson. He also argued that conspiracy to commit Hobbs Act robbery does not qualify as a "crime of violence" under the elements clause in § 924(c)(3)(A). He thus asked the district court to vacate his § 924(c) conviction. The district court accepted Mann's arguments and granted relief.

In Ovalles, our en banc Court concluded that § 924(c)(3)(B) is not unconstitutionally vague under Johnson and its progeny, as long as we do not apply the categorical approach. See Ovalles, 2018 WL 4830079, at *1–2. As a result, this Circuit no longer applies the categorical approach in assessing whether

an offense qualifies as a crime of violence under § 924(c)(3)(B). See Ovalles, 2018 WL 4830079 at *1–2. Instead, we apply "a conduct-based approach, pursuant to which the crime-of-violence determination should be made by reference to the actual facts and circumstances underlying a defendant's offense." Id. at *2.

The district court applied the categorical approach in evaluating Mann's challenge to his § 924(c) conviction, both as to § 924(c)(3)(A) and § 924(c)(3)(B). That remains proper as to § 924(c)(3)(A), see Ovalles v. United States, No. 17-10172, 2018 WL 4868740, at *2 (11th Cir. Oct. 9, 2018) (per curiam), but not as to § 924(c)(3)(B). We therefore **VACATE** the district court's decision and **REMAND** for reconsideration in light of our en banc decision in Ovalles. We also **DENY** Mann's motion to hold this case in abeyance.

VACATED AND REMANDED.