FILED
United States Court of Appeals
Tenth Circuit

June 29, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARCUS LAMONT CROCKER,

Defendant - Appellant.

No. 22-4120
(D.C. Nos. 2:16-CV-00681-HCN &
2:08-CR-00122-DB-1)
(D. Utah)

ORDER DENYING CERTIFICATE OF APPEALABILITY[*]

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

Marcus Lamont Crocker is serving a life sentence after pleading guilty to Hobbs Act robbery, *see* 18 U.S.C. § 1951(a), and to discharging a firearm in relation to a crime of violence (the crime of violence being the Hobbs Act robbery), *see* 18 U.S.C. § 924(c). He moved under 28 U.S.C. § 2255 to vacate his § 924(c) conviction, arguing that his Hobbs Act conviction is not a valid predicate crime of violence. The district court denied his motion, and he now seeks to appeal. To appeal, he needs a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(B). We deny his request for one and dismiss this matter.

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[*] This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

Background

More than twenty years ago, Mr. Crocker robbed a convenience store in Salt Lake City. During the robbery he shot and killed a store employee. The government charged him through a felony information with two crimes: (1) Hobbs Act robbery and (2) discharging a firearm in relation to a crime of violence (the Hobbs Act robbery) under § 924(c). He pleaded guilty to both crimes and received a life sentence.

In 2016, he moved to vacate the § 924(c) conviction under § 2255, arguing that his Hobbs Act conviction could not serve as a predicate crime of violence for the § 924(c) conviction. A felony qualifies as a crime of violence under § 924(c) if it meets either of two definitions. The first definition (often called the elements clause) covers felonies having "as an element the use, attempted use, or threatened use of physical force against the person or property of another." § 924(c)(3)(A). The second definition (often called the residual clause) brings in felonies that by their nature involve "a substantial risk that physical force against the person or property of another may be used." § 924(c)(3)(B). While Mr. Crocker's § 2255 motion was pending, the Supreme Court decided *United States v. Davis*, holding that the residual clause is unconstitutionally vague. *See* 139 S. Ct. 2319, 2336 (2019). So after *Davis*, a conviction qualifies as a predicate crime of violence under § 924(c) only if it satisfies the elements clause. *United States v. Baker*, 49 F.4th 1348, 1355 (10th Cir. 2022). Mr. Crocker asserted that the elements clause did not cover his Hobbs Act conviction. And from that premise he concluded his § 924(c) conviction could not stand.

To determine whether Mr. Crocker's Hobbs Act conviction qualified as a crime of violence under the elements clause, the district court used an analysis known as the categorical approach. The categorical approach does not involve an inquiry into the facts of a particular crime: "The only relevant question is whether the federal felony at issue always requires the government to prove—beyond a reasonable doubt, as an element of its case—the use, attempted use, or threatened use of force." *United States v. Taylor*, 142 S. Ct. 2015, 2020 (2022). Our cases hold that *completed* Hobbs Act robbery is a categorical crime of violence under the elements clause. *See Baker*, 49 F.4th at 1356–57; *United States v. Melgar-Cabrera*, 892 F.3d 1053, 1060 & n.4 (10th Cir. 2018). *Attempted* Hobbs Act robbery, however, does not satisfy the elements clause. *See Taylor*, 142 S. Ct. at 2025–26.

Mr. Crocker disputed that he had pleaded guilty to completed, as opposed to attempted, Hobbs Act robbery. To address that issue, the district court turned to an analysis known as the modified categorical approach. The modified categorical approach allows courts to consult certain documents—for example, the charging document, plea agreement, and transcript of the plea colloquy—to decide "what crime, with what elements, a defendant was convicted of." *Mathis v. United States*, 579 U.S. 500, 505–06 (2016). This inquiry focuses "on the elements, rather than the facts, of a crime." *Descamps v. United States*, 570 U.S. 254, 263 (2013).

Completed and attempted Hobbs Act robbery have different elements. A conviction for Hobbs Act robbery requires proof, in relevant part, of "the unlawful taking or obtaining of personal property from the person or in the presence of another, against

his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property." § 1951(b)(1). A conviction for attempted Hobbs Act robbery, by contrast, requires proof that the defendant "intended to unlawfully take or obtain personal property by means of actual or threatened force" and that "he completed a 'substantial step' toward that end." *Taylor*, 142 S. Ct. at 2020.

To determine which crime Mr. Crocker had pleaded guilty to, the district court reviewed the felony information, Mr. Crocker's written statement in advance of his plea, and a transcript of the combined plea and sentencing hearing.

- The count in the felony information charging a Hobbs Act violation alleged in part that Mr. Crocker "did take from an employee, against his will, at the Sunshine convenience store . . . by physical force and violence, threatened force and violence and fear of injury, U.S. currency." Aplt. App. at 24 (internal quotation marks omitted).

- Mr. Crocker's statement in advance of his plea listed the following relevant elements of the Hobbs Act count: "1. The defendant knowingly obtained or attempted to obtain, property of another, from the person or presence of another; 2. The defendant took the property against the victim's will, by means of actual or threatened force or violence or fear of injury." *Id.* at 25 (internal quotation marks omitted).

- At the plea and sentencing hearing, Mr. Crocker pleaded guilty to both counts against him.

Based on its review of the relevant documents, the district court concluded that Mr. Crocker pleaded guilty to completed Hobbs Act robbery. The court acknowledged that the statement in advance of the plea listed one element as requiring proof that Mr. Crocker "obtained *or attempted* to obtain, property of another." *Id.* (emphasis added) (internal quotation marks omitted). But the court noted that the very next element in that document required proof that he "*took* the property against the victim's will." *Id.* at 30

(internal quotation marks omitted). Moreover, the court pointed out, the felony information said nothing about attempt, instead alleging that Mr. Crocker "did take" money from an employee "against his will." *Id.* (internal quotation marks omitted).

Having concluded that Mr. Crocker pleaded guilty to completed Hobbs Act robbery, the district court held that our precedent dictated the disposition of Mr. Crocker's motion. Under our cases, the district court concluded, completed Hobbs Act robbery is a categorical crime of violence under the elements clause, so Mr. Crocker's conviction for that crime is a valid predicate for his § 924(c) conviction. On that basis, the district court denied Mr. Crocker's motion.

Discussion

To obtain a certificate of appealability, Mr. Crocker must show "that reasonable jurists could debate whether (or, for that matter, agree that) [his 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).

Mr. Crocker disputes that he pleaded guilty to completed (rather than attempted) Hobbs Act robbery.[1] He underscores the element listed in his statement in advance of his plea requiring proof that he "obtained *or attempted* to obtain, property of another." Aplt.

[1] At the same time, he asserts that "a conviction for Hobbs Act robbery can be sustained through the attempt to commit Hobbs Act robbery." Aplt. Br. at 15. That is incorrect. Although the Hobbs Act proscribes both completed and attempted robbery, Hobbs Act robbery and attempted Hobbs Act robbery are different crimes comprising different elements. *See Taylor*, 142 S. Ct. at 2020 (distinguishing the two crimes).

App. at 25 (emphasis added) (internal quotation marks omitted). But he ignores that the next element required proof that he "took the property." *Id.* (internal quotation marks omitted). He also ignores the felony information's allegation that he "did take" money from the store employee. *Id.* at 24 (internal quotation marks omitted). Viewed as a whole, the relevant documents place beyond debate that Mr. Crocker pleaded guilty to completed Hobbs Act robbery and not to a mere attempt to commit that crime.

Even so, Mr. Crocker insists that Hobbs Act robbery is not a categorical crime of violence under the elements clause. Our cases foreclose this argument. Not only have we held that "Hobbs Act robbery is a crime of violence under the elements clause," *Melgar-Cabrera*, 892 F.3d at 1060 n.4, but we have also rejected an attempt to get around that holding by raising new arguments against it, *see Baker*, 49 F.4th at 1358. Like the defendant in *Baker*, Mr. Crocker advances arguments against our holding in *Melgar-Cabrera* that we did not address in that case—for example, that Hobbs Act robbery does not satisfy the elements clause because it can be committed through a threat to intangible property. And like the panel in *Baker*, "we are bound to follow *Melgar-Cabrera* absent a contrary decision by the Supreme Court or en banc reconsideration." *Id.* That remains true even though the defendant in *Melgar-Cabrera* did not present the same arguments that Mr. Crocker makes now. *See id.*

Mr. Crocker implies that the Supreme Court has already abrogated *Melgar-Cabrera*. *See* Aplt. Br. at 9 (asserting that "decisions from the Supreme Court" show that Hobbs Act robbery is not a categorical crime of violence under the elements clause). He points to *Taylor*. But *Taylor* addressed only attempted Hobbs Act robbery.

See 142 S. Ct. at 2020 ("Whatever one might say about *completed* Hobbs Act robbery, *attempted* Hobbs Act robbery does not satisfy the elements clause."). For that reason, "*Taylor* does not implicate our holding in *Melgar-Cabrera*." *Baker*, 49 F.4th at 1360. Mr. Crocker also cites *Borden v. United States*, a decision holding that a crime requiring a mental state of mere recklessness cannot qualify as a "violent felony" under the elements clause of the Armed Career Criminal Act, § 924(e)(2)(B)(i). 141 S. Ct. 1817, 1821–22 (2021). To the extent he intends to argue that *Borden* undermines *Melgar-Cabrera*, we do not consider that argument because he did not present it to the district court. *See United States v. Viera*, 674 F.3d 1214, 1220 (10th Cir. 2012).

Conclusion

Mr. Crocker's Hobbs Act conviction is a valid predicate crime of violence for his § 924(c) conviction. That point is not debatable. So we deny Mr. Crocker's request for a certificate of appealability and dismiss this matter.

Entered for the Court

Timothy M. Tymkovich
Circuit Judge