[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-12094
Non-Argument Calendar

D.C. Docket Nos. 4:16-cv-00143-WTM-GRS; 4:05-cr-00012-WTM-GRS-1

DONALD LEE UBELE,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

(July 12, 2018)

Before WILSON, JORDAN, and ROSENBAUM, Circuit Judges.

PER CURIAM:

Donald Ubele, a federal prisoner proceeding *pro se*, appeals the district court's dismissal of his second 28 U.S.C. § 2255 motion to vacate his sentence, which he filed with our authorization. *See* 28 U.S.C. § 2255(h). For the reasons explained below, we affirm.

Ubele is serving a total sentence of 262 months of imprisonment after a jury found him guilty of possession of a firearm by a convicted felon, 18 U.S.C. § 922(g)(1), and possession of an unregistered machine gun, 26 U.S.C. § 5861(d). At his sentencing, the district court determined that Ubele qualified for the mandatory minimum sentence under the Armed Career Criminal Act ("ACCA") on the basis of one prior violent felony, a 1998 Georgia conviction for arson, O.C.G.A. § 16-7-60, and two prior serious drug offenses, 1991 convictions for possession of cocaine with intent to distribute, O.C.G.A. § 6-13-30(b). *See* 18 U.S.C. § 924(e)(1) (providing that a fifteen-year minimum applies to any defendant "who violates section 922(g) . . . and has three previous convictions . . . for a violent felony or a serious drug offense").

We affirmed Ubele's convictions and sentence on direct appeal. Later, the district court denied his first 28 U.S.C. § 2255 motion, and we denied a certificate of appealability ("COA").

In June 2016, we granted Ubele's application for leave to file a second or successive 28 U.S.C. § 2255 motion based on *Johnson v. United States*, 576 U.S.

___, 135 S. Ct. 2551 (2015). *Johnson* invalidated the "residual clause" definition of the term "violent felony" in the ACCA, but it left unaffected the "elements clause" and "enumerated-crimes clause" definitions of that term.[1] 135 S. Ct. at 2557–58, 2563. In granting Ubele's application, we concluded that he had made a *prima facie* showing that *Johnson* invalidated his ACCA sentence, though we noted that this determination did not bind the district court.

Back before the district court, Ubele filed a second § 2255 motion alleging, among other grounds for relief, that his sentence had been enhanced under the residual clause, so it was invalid after *Johnson*. The court dismissed his motion after concluding that *Johnson* did not affect the three convictions on which his ACCA enhancement was based. Specifically, the court found that Georgia arson qualified under the enumerated-crimes clause as equivalent to the enumerated crime of "arson," and that possession with intent to distribute cocaine was a serious drug offense. The court denied a COA.

Ubele appealed to this Court, and we granted a COA on "[w]hether Mr. Ubele's 1998 arson conviction qualifies as a violent felony under the ACCA's enumerated crimes clause." In reviewing a district court's denial of a § 2255

[1] The ACCA defines a "violent felony" as any crime punishable by imprisonment for a term exceeding one year that (a) has as an element the use, attempted use, or threatened use of physical force against the person of another; (b) is burglary, arson, or extortion, or involves use of explosives; or (c) otherwise involves conduct that presents a serious potential risk of physical injury to another. 18 U.S.C. § 924(e)(2)(B). We often refer to these three clauses as the "elements clause," the "enumerated-crimes clause," and the "residual clause," respectively.

motion, we review de novo the court's legal conclusions and review the court's factual findings for clear error. *Spencer v. United States*, 773 F.3d 1132, 1137 (11th Cir. 2014) (*en banc*).

After the district court ruled on Ubele's second § 2255 motion, a panel of this Court decided *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017). We held in *Beeman* that, to obtain relief on a § 2255 motion raising a *Johnson* claim, a petitioner must show it is more likely than not that he was sentenced solely under the residual clause. *Id.* at 1221–22. This inquiry is one of "historical fact," looking to the basis for the sentence at the time of sentencing, rather than how a defendant would be sentenced today. *Id.* at 1224 n.5. Precedent announced after sentencing "casts very little light, if any," on the historical fact of "whether [the movant] was, in fact, sentenced under the residual clause only." *Id.*

The status of a Georgia conviction for first-degree arson as an ACCA predicate conviction is still an open question in this circuit. But according to *Beeman*, Ubele's *Johnson* claim depends on whether he can show, as a matter of "historical fact," that his sentence was more likely than not based solely on the residual clause. *Beeman*, 871 F.3d at 1221–22. Because *Beeman* was decided after the district court ruled on Ubele's motion, the court did not make any findings as to the particular record of Ubele's sentencing.

Normally, in these circumstances, we would remand to the district court to apply the new legal test established by *Beeman*. *See Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199, 1203 (11th Cir. 2015) (remanding after this Court adopted a new legal test "[t]o allow the district court to apply this test in the first instance and, if the district court desires, to give the parties an opportunity to further develop the record to address the components of the test"). Before *Beeman*, the showing required by movants to present a *Johnson* claim was disputed. *Compare In re Moore*, 830 F.3d 1268, 1273 (11th Cir. 2016), *with In re Chance*, 831 F.3d 1335, 1339 (11th Cir. 2016).

Based on our review of the record, however, we cannot see how Ubele can show that his sentence was imposed solely under the ACCA's residual clause. *See Beeman*, 871 F.3d at 1221 (declining to remand where the defendant had not shown that it "would do him any good"). First, Ubele's presentence investigation report was silent as to which clause of the ACCA encompassed the arson conviction. Second, the parties' sentencing filings did not indicate that the residual clause was at issue. Third, nothing in the sentencing transcript suggested that the district court relied on the residual clause in enhancing Ubele's sentence under the ACCA. And fourth, no case law from the time of Ubele's sentencing held that a violation of Georgia's arson statute "qualified as a violent felony only under the residual clause." *See id.*; *cf. United States v. Rainey*, 362 F.3d 733, 735–36 (11th

Cir. 2004) (holding that attempted arson in Florida was a predicate felony under the ACCA's residual clause, while noting that the substantive offense of arson was an enumerated felony).

But perhaps most important, "arson" is an enumerated offense under the ACCA. Therefore, even if Ubele was sentenced in part under the ACCA's residual clause, the silence of record leaves no basis to conclude that the residual clause alone was used to qualify his 1998 Georgia arson conviction as a violent felony. *See Beeman*, 871 F.3d at 1222 ("If it is just as likely that the sentencing court relied on the elements or enumerated offenses clause, solely or as an alternative basis for the enhancement, then the movant has failed to show that his enhancement was due to use of the residual clause."). As a result, Ubele could not meet his burden if we remanded this case.

For these reasons, we affirm the dismissal of Ubele's second § 2255 motion.

AFFIRMED.