

08-2016-cr
U.S. v. Thrower

1 UNITED STATES COURT OF APPEALS
2
3 FOR THE SECOND CIRCUIT
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7 September Term, 2009
8

9 (Argued: September 11, 2009 Decided: October 14, 2009)

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11 Docket No. 08-2016-cr
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13
14 UNITED STATES OF AMERICA,
15

16 *Appellee,*

17
18 -v.-

19
20 WILLIAM THROWER,
21

22 *Defendant - Appellant.*
23
24

25
26 Before:

27 PARKER and WESLEY, *Circuit Judges*, RESTANI, *Judge**
28

29 Appeal from an April 23, 2008 order of the United
30 States District Court for the Eastern District of New York
31 (Ross, J.), entering judgment on a jury verdict convicting
32 the defendant for being a felon in possession of a firearm
33 and ammunition in violation of 18 U.S.C. § 922(g)(1) and
34 imposing the statutory minimum sentence of fifteen years

*The Honorable Jane A. Restani, Chief Judge of the
United States Court of International Trade, sitting by
designation.

1 imprisonment under the Armed Career Criminal Act, 18 U.S.C.
2 § 924(e)(1).

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4 AFFIRMED.

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8 _____
9 NORMAN TRABULUS, New York, NY, *for Defendant -*
10 *Appellant.*

11 AMANDA HECTOR, Assistant United States Attorney
12 (Emily Berger, Assistant United States
13 Attorney, *of counsel*) *for* BENTON J. CAMPBELL,
14 United States Attorney for the Eastern
15 District of New York, *for Appellee.*
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17 _____

18
19 PER CURIAM:

20 Defendant-Appellant William Thrower ("Thrower") appeals
21 from a judgment entered on April 23, 2008, in the United
22 States District Court for the Eastern District of New York
23 (Ross, J.), after a jury verdict convicting Thrower of being
24 a felon in possession of a firearm and ammunition in
25 violation of 18 U.S.C. § 922(g)(1), and appeals his
26 statutory minimum sentence of fifteen years imposed under
27 the Armed Career Criminal Act ("ACCA"), 18 U.S.C. §
28 924(e)(1). For the reasons stated below, the district
29 court's order entering final judgment and sentencing
30 determination are AFFIRMED.

1 **Background**

2 Thrower was indicted and charged with one count of
3 violating 18 U.S.C. § 922(g)(1), which criminalizes the
4 knowing possession of a firearm in and affecting commerce by
5 an individual who has previously been convicted in any court
6 of a crime punishable by a term of imprisonment exceeding
7 one year. A jury convicted him of the charge.

8 At sentencing, the Probation Department provided a
9 Presentence Investigation Report ("PSR") that listed
10 Thrower's five previous felony convictions in New York state
11 courts. Because of this criminal history, Probation
12 recommended that Thrower's sentence be enhanced pursuant to
13 the Armed Career Criminal Act ("ACCA"), 18 U.S.C. §
14 924(e)(1). The PSR did not designate which of Thrower's
15 five previous felony convictions counted as predicate
16 offenses for the purposes of the ACCA. The PSR also noted
17 that Thrower's criminal history report indicated that he was
18 granted a Certificate of Relief from Disabilities from the
19 New York State Division of Parole, but the Probation
20 Department failed to provide a copy of the document.

21 The court found that the ACCA enhancement applied to

1 Thrower and sentenced him to 15 years imprisonment, the
2 statutory minimum. Thrower contests the enhancement, *inter*
3 *alia*, arguing that he does not have the requisite number of
4 offenses necessary to qualify for the ACCA. He claims that
5 two of his offenses do not count because he received a
6 Certificate of Relief from Disabilities that restored his
7 civil rights, and that a third conviction – larceny in the
8 fourth degree – does not qualify as a violent felony.¹
9 Because we find that New York’s larceny in the fourth
10 degree, specifically larceny from the person, N.Y. Penal Law
11 §155.30(5), does qualify as a violent felony under the
12 residual clause for purposes of the ACCA, Thrower has three

¹Thrower also argues that he was unlawfully arrested in violation of the Fourth Amendment. We have reviewed this argument, and the additional arguments raised in his supplemental *pro se* brief, and find them to be without merit.

Thrower submitted a letter to the court that was received on September 28, 2009, seventeen days after oral argument. Attached to the letter was Thrower’s *pro se* reply brief. Under Federal Rule of Appellate Procedure 31, a reply brief must be filed at least three days before argument. FED. R. APP. P. 31(a)(1). However, we may extend the time limits dictated by the rules for good cause. FED. R. APP. P. 26(b). We give *pro se* defendants wider latitude with procedural rules. See *In re Sims*, 534 F.3d 117, 133 (2d Cir. 2008). As a result, we accept the reply brief as part of the record. We have reviewed the brief, and the arguments therein, and find them to be without merit.

1 eligible convictions that support the district court's ACCA
2 enhancement. As a result, we need not reach the Certificate
3 of Relief from Disabilities issue.

4 **Discussion**

5 The ACCA dictates a 15-year mandatory minimum sentence
6 for a felon convicted of possessing a firearm when that
7 felon has three previous convictions for violent felonies.
8 18 U.S.C. § 924(e)(1). A "violent felony" is defined as
9 "any crime punishable by imprisonment for a term exceeding
10 one year . . . that (i) has as an element the use, attempted
11 use, or threatened use of physical force against the person
12 of another; or (ii) is burglary, arson, or extortion,
13 involves use of explosives, or otherwise involves conduct
14 that presents a serious potential risk of physical injury to
15 another." 18 U.S.C. § 924(e)(2)(B). A crime may qualify as
16 a violent felony even if it does not have an element of
17 physical force against another person as described in clause
18 (i), or is not one of the enumerated offenses detailed in
19 clause (ii). To qualify, the crime must fit within the
20 remaining language in clause (ii), "conduct that presents a
21 serious potential risk of physical injury to another," known

1 as the residual clause. *Id.*

2 In order to fall within the residual clause, a crime
3 must both "involve[] conduct that presents a serious
4 potential risk of physical injury to another" and be
5 "roughly similar, in kind as well as in degree of risk
6 posed" to the enumerated offenses in the ACCA. 18 U.S.C. §
7 924(e)(2)(B)(ii); *Begay v. United States*, 128 S. Ct. 1581,
8 1585 (2008). Thrower has a previous conviction for grand
9 larceny in the fourth degree under New York Penal Law §
10 155.30. The PSR does not specify under which subdivision of
11 New York Penal Law § 155.30 Thrower was convicted.
12 Thrower's plea colloquy indicates it was larceny from the
13 person, falling within subdivision (5), meaning he "st[ole]
14 property and . . . [t]he property, regardless of its nature
15 and value, [wa]s taken from the person of another." N.Y.
16 Penal Law § 155.30(5).

17 We may look to the guilty plea transcript to determine
18 whether the conviction is a violent felony. See *Shepard v.*
19 *United States*, 544 U.S. 13, 20 (2005). New York Penal Law §
20 155.30 has a number of subsections detailing conduct that
21 qualifies as larceny in the fourth degree – including theft

1 of property worth over one thousand dollars and theft of
2 secret scientific material – that on their face do not
3 appear to qualify as violent crimes. N.Y. Penal Law §§
4 155.30(1), (3). Because larceny in the fourth degree has
5 subsections that potentially may not fit as violent felonies
6 under the ACCA, we must determine if the subcategory of
7 conduct to which Thrower pled qualifies as a violent felony.
8 We look to the plea colloquy, then, not to analyze whether
9 Thrower's specific conduct meets the violent felony
10 requirements (an inquiry barred by *Taylor v. United States*,
11 495 U.S. 575, 600-02 (1990)), but instead to determine under
12 which subsection his conviction falls. Once we have
13 determined the subsection in play, we look only to the
14 elements of the offense itself without examining Thrower's
15 specific conduct. *James v. United States*, 550 U.S. 192, 202
16 (2007).

17 The government argues that larceny from the person
18 qualifies under the residual clause. This court has not yet
19 addressed the question of whether larceny from the person
20 qualifies as a violent felony, though seven sister circuits
21 have answered in the affirmative. See, e.g. *United States*

1 v. *Hawley*, 516 F.3d 264, 272 (5th Cir. 2008), cert. denied,
2 129 S. Ct. 994 (2009); *United States v. Jennings*, 515 F.3d
3 980, 988 (9th Cir. 2008); *United States v. Strong*, 415 F.3d
4 902, 908 (8th Cir. 2005); *United States v. Smith*, 359 F.3d
5 662, 665 (4th Cir. 2004); *United States v. Howze*, 343 F.3d
6 919, 923-24 (7th Cir. 2003); *United States v. Payne*, 163
7 F.3d 371, 375 (6th Cir. 1998); *United States v. De Jesus*,
8 984 F.2d 21, 25 (1st Cir. 1993).

9 **1) Conduct presenting serious potential risk of**
10 **physical injury to another**

11 In *Taylor*, the Supreme Court noted that "Congress
12 singled out burglary (as opposed to other frequently
13 committed property crimes such as larceny and auto theft)
14 for inclusion as a predicate offense . . . because of its
15 inherent potential for harm to persons." 495 U.S. at 588.
16 The harm includes the "possibility of a violent
17 confrontation" between the perpetrator and the victim, or a
18 third party bystander or investigator. *Id.* Because of this
19 possibility of confrontation, there is an assumption that
20 the perpetrator is aware of the risk, and most likely is
21 prepared to use violent means to escape or complete his

1 criminal objective. *Id.* This risk of confrontation alone
2 is enough to qualify the offense for inclusion as a
3 predicate offense. *Id.* It need not be present for every
4 possible factual scenario covered by the conduct described
5 in the elements of the offense. *James*, 550 U.S. at 208. An
6 offense qualifies as a violent felony if “the conduct
7 encompassed by the elements of the offense, in the ordinary
8 case, presents a serious potential risk of injury to
9 another.” *Id.*

10 Larceny from the person as defined by New York Penal
11 Law § 155.30(5) requires the victim and perpetrator to be in
12 very close proximity. Under New York law, larceny from the
13 person requires a physical nexus between the person and the
14 property, meaning “physical contact between the victim and
15 either the property taken or, at least, the article from
16 which the property was taken.” *People v. Cheatham*, 168
17 A.D.2d 258, 259 (N.Y. App. Div. 1990); *see also People v.*
18 *Auguste*, 283 A.D.2d 373, 373 (N.Y. App. Div. 2001) (finding
19 theft of a purse from the back of a chair as insufficient
20 physical nexus to support a conviction of fourth degree
21 larceny). Surely larceny that requires a physical nexus

1 between the victim and the property, as opposed to larceny
2 generally, creates a risk of violent confrontation. The
3 victim's presence is an element of the crime. This fact
4 alone makes the risk of violence and struggle ubiquitous.
5 Thus, in our view, larceny from the person meets the first
6 prong of the inquiry required under the residual clause of
7 the ACCA.

8 **2) Roughly similar to an offense enumerated in the ACCA**

9 In order to qualify, the offense must not only present
10 a serious risk of physical injury, but must also be roughly
11 similar to an enumerated offense in the ACCA. In *Begay v.*
12 *United States*, the Supreme Court determined that a DUI
13 conviction could not serve as a violent felony under the
14 ACCA. 128 S. Ct. 1581 (2008). Although the offense
15 certainly created a serious potential risk of physical
16 injury to another, the Court found that a DUI was not
17 similar in kind to the enumerated offenses. *Id.* at 1584,
18 1588. The Court noted that the offenses listed in the
19 statute "all typically involve purposeful, violent, and
20 aggressive conduct." *Id.* at 1586 (internal quotation marks
21 omitted). The purpose of the statute was to address the

1 "special danger created when a particular type of offender –
2 a violent criminal or drug trafficker – possesses a gun."
3 *Id.* at 1587. The Court read the residual clause of the
4 statute as limited to crimes that are "roughly similar, in
5 kind as well as in degree of risk posed, to the examples
6 themselves." *Id.* at 1585.

7 Of the crimes enumerated in the ACCA, larceny from the
8 person most closely resembles burglary. Burglary under the
9 ACCA is defined as "unlawful or unprivileged entry into, or
10 remaining in, a building or structure, with intent to commit
11 a crime." *Taylor*, 495 U.S. at 599. Burglary is considered
12 violent and aggressive because of the inherent potential for
13 harm to others. Entering a building to commit a crime
14 creates the possibility of a violent confrontation with
15 someone in the building or someone who comes to investigate,
16 and the perpetrator's awareness of that risk may indicate
17 his willingness to use violence in order to accomplish his
18 unlawful objective or to escape. *Id.* at 588.

19 Larceny from the person involves the same type of
20 conduct. It is surely purposeful; the perpetrator must gain
21 control of the property by stealing it. See N.Y. Penal Law

1 § 155.30(5). The perpetrator must act "with intent to
2 deprive another of property or to appropriate the same to
3 himself or to a third person" and "wrongfully take[],
4 obtain[] or withhold[]" the property from its owner. N.Y.
5 Penal Law § 155.05(1). The perpetrator must have the
6 requisite intent to take property wrongfully when he acts.
7 *See People v. Green*, 5 N.Y.3d 538, 543 (N.Y. 2005). Thus,
8 larceny is characterized by purposeful conduct.

9 Larceny from the person is as inherently violent and
10 aggressive as burglary. Larceny from the person raises the
11 possibility of a violent confrontation between the victim
12 and perpetrator or someone who witnesses the offense. The
13 perpetrator's purposeful theft from the victim also may
14 indicate both his awareness of that risk and his willingness
15 to use violence in order to commit the larceny or escape.
16 Larceny from the person may, in fact, carry higher risk of
17 confrontation than burglary. Burglary can occur without
18 anyone other than the offender present, whereas larceny from
19 the person requires the immediate presence of the victim.

20 Because it is defined by conduct that presents a
21 serious potential risk of violence and is roughly similar to

1 burglary, larceny from the person meets both requirements
2 for a violent felony under the residual clause of the ACCA.
3 As a result, Thrower's conviction for larceny in the fourth
4 degree qualifies as a predicate offense for purposes of the
5 ACCA.

6 **Conclusion**

7 The district court's order of April 23, 2008 entering
8 final judgment and the district court's sentencing
9 determination is hereby AFFIRMED.