IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LONZO STANLEY,

OPINION AND ORDER

Petitioner,

v.

03-cr-62-jcs
15-cv-222-bbc

UNITED STATES OF AMERICA,

Respondent.

- -

Contending that he was improperly sentenced in 2004 as a career offender, petitioner Lonzo Stanley filed a motion for post conviction relief under 28 U.S.C. § 2255 in April 2015. Petitioner maintained that the sentencing court had erred in finding that he had three previous state court convictions that made him a career offender under the sentencing guidelines, because two of the convictions were not crimes of violence, as they must be to be counted toward career offender status. He later moved to add a claim that under United States v. Johnson, 135 S. Ct. 2551 (2015), his two prior convictions should not have been taken into account in determining career offender status. The government argues that petitioner's § 2255 motion is not timely, the holding in Johnson has no relevance to petitioner's case and two of petitioner's prior convictions were properly considered in the

career offender analysis.

I conclude that petitioner's motion for post conviction relief must be denied. The one-year period in which he could have raised his claim began to run when the Supreme Court decided in Begay v. United States, 553 U.S.137, 142-43 (2008), that a crime is not a "violent felony" unless the criminal conduct is purposeful, violent, and aggressive. The recent decision in Johnson expands on that holding but does not create a new opportunity for him to raise a claim he could have raised seven years ago. Finally, even if his motion were timely, petitioner has failed to show that he did not have the two qualifying predicate convictions that made him a career offender under the sentencing guidelines.

BACKGROUND FACTS

Petitioner was convicted in 2004 of one count of distributing cocaine base in the Western District of Wisconsin. The presiding judge found petitioner to be a career offender under the sentencing guidelines because (1) he had at least two prior felonies that were either crimes of violence or controlled substance offenses; (2) he was at least 18; and (3) the offense for which he had been convicted was a controlled substance offense. U.S.S.G. § 4B1.1(a). The sentencing court found that he had three prior felony convictions in the Circuit Court of Cook County, Illinois: a 1993 conviction for a controlled substance offense, a 1994 conviction for unlawful use of a weapon by a felon and a 1998 conviction for

aggravated battery of a peace officer. Petitioner's sentencing guideline range was 188-235 months; the statutory maximum sentence was 40 years; and he was sentenced to a term of imprisonment of 200 months. He did not appeal from his sentence and never filed a motion for post conviction relief until April of this year.

After petitioner's motion was denied on June 5, 2015, he moved promptly under Fed. R. Civ. P. 59(e) "to alter or amend the judgment." Dkt. #5. Before that motion could be acted upon, petitioner filed a second motion to alter or amend his § 2255 motion to add a claim under Johnson v. United States, 135 S. Ct. 2551, that two of the three prior offenses used to make him a career offender no longer qualified as crimes of violence under the sentencing guidelines. Dkt. #6.

The government responded to the motions to amend or alter and for post conviction relief, but then obtained court permission to withdraw its response and submit a new one representing the Department of Justice's corrected guidance on the effects of Johnson. In its revised response, dkt. # 17, it stated that it did not oppose petitioner's motion to alter or amend to the extent that petitioner was asking for a chance to argue that the Johnson case applied to his sentence, but it continued to take the position that petitioner's motion was untimely.

In addition, the government presented copies of court records from the Circuit Court of Cook County, Illinois, showing that a grand jury had charged petitioner on two counts

of aggravated battery. In one document, the grand jury charged that petitioner, "in committing a battery, other than by discharge of a firearm, intentionally or knowingly caused bodily harm to James Cooper, to wit: Lonzo Stanley threw James Cooper to the ground, knowing James Cooper to be a peace officer." Dkt. #17-1. In the second, the grand jury charged that petitioner, "in committing a battery, other than by discharge of a firearm, intentionally or knowingly caused bodily harm to Victor Alcazar, to wit: Lonzo Stanley struck Victor Alcazar in the head with his elbow, knowing Victor Alcazar to be a peace officer." Id. Another document showed that petitioner had been sentenced and committed to the Illinois Department of Corrections to serve a two-and-one-half year sentence for the offense of aggravated battery. Dkt. #17-3.

OPINION

Petitioner's motion raises a claim related to the residual clause in the firearms sentencing statute, 18 U.S.C. § 924 (e)(2)(B), which sets out the definition of "violent felony," as including

> any offense under federal or state law that is punishable by a term of imprisonment for more than one year . . . that—
>
> > (i) has as an element the use, attempted use or threatened use of physical force against the person of another; or
> >
> > (ii) is burglary, arson, or extortion, involves use of explosives, or

> otherwise involves *conduct that presents a serious potential risk of physical injury to another*; . . . .

(The italicized portion is referred to as the residual clause.) Under § 924(e)(1), this subsection applies only to persons found guilty of violating 18 U.S.C. § 922(g). However, when the sentencing commission made the decision to assign higher sentences to persons who qualified as career offenders, it imported into the guidelines the definition used in § 924(e)(B), although it used the term "crime of violence" instead of "violent felony." U.S.S.G. § 4B1.2. As in § 924(e)(1), the commission set out the qualifications for a career offender in U.S.S.G. § 4B1.1: a defendant would be classified as a career offender if he was at least 18, was facing sentencing on a felony that was either a crime of violence or a controlled substances offense and had been convicted of at least two such crimes in the past.

Until 2008, sentencing courts tended to read the residual clause as including any crime that posed a serious risk of harm to the victim. Thus, crimes involving such offenses as drunk driving, walking away from a place of lawful confinement, or fleeing and eluding an officer were treated as predicate crimes of violence for the purpose of determining career offender status. In 2008, however, the Supreme Court decided in Begay, 553 U.S. at 142, that the residual clause did not include the crime of drunk driving. Dangerous as it is, drunk driving does not involve "purposeful, violent, and aggressive conduct" of the type the statute was intended to cover. Id. at 144-45. Rather, the Court held, the specific examples of

crimes listed in § 924(e)(2)(B), such as burglary, arson, etc., were to be read "as limiting the crimes that clause (ii) covers to crimes that are roughly similar, in kind as well as in degree of risk posed, to the examples themselves." Id. at 143. In successive cases, the Court wrestled with that directive, deciding in Sykes v. United States, 131 S. Ct. 2267 (2011), for instance, that "fleeing and eluding an officer" was conduct similar to the examples in the statute. However, in Johnson v. United States, 135 S. Ct. 2551, the Court abandoned the attempt to discern the meaning of the residual clause, id. at 2556, deciding that the clause was unconstitutional because it was too vague to give ordinary people fair notice of the conduct it punishes, or so standardless as to invite arbitrary enforcement. Id. In other words, it violated "'the first essential of due process.'" Id. at 2257 (quoting Connally v. General Construction Co., 269 U.S. 385, 391 (1926)).

Petitioner bases his post conviction motion on the decision in Johnson, saying that it establishes that his own sentence is unconstitutional and must be overturned because he did not have the necessary two predicate sentences necessary for career offender status. In doing so, he ignores the inconvenient fact that once Begay was decided in 2008, he was presumed to know that he could challenge his sentence on the ground that it was based on crimes that did not quality as crimes of violence. A number of persons in his position did raise such claims. E.g., United States v. Hampton, 675 F.3d 720 (7th Cir. 2012) (holding that defendant's predicate crime of aggravated battery for making "insulting or provoking"

physical contact with peace officer was not crime of violence); United States v. Evans, 576 F.3d 766 (7th Cir. 2009) (holding that making insulting or provoking contact with pregnant woman was not crime of violence under sentencing guidelines). Johnson made it plain that *no* crime would constitute a violent felony under § 924(e)(2)(B) unless it was spelled out in the statute, but Begay made it clear that a crime would not qualify if it did not involve "purposeful, violent, and aggressive conduct." Begay, 553 U.S. at 144-45.

Once Begay was decided, petitioner had a year in which to bring a postconviction motion under 28 U.S.C. § 2255(f), which provides that a one-year period of limitation applies to a motion brought under § 2255. Subsection (3) applies to petitioner: it allows a convicted person to challenge his conviction within a year of "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." Because petitioner did not file his post conviction motion by April 16, 2009, which would have been one year after Begay was decided, he lost his opportunity to challenge his 2004 classification as a career offender.

But even if petitioner had brought a timely motion, he could not have prevailed. Conceding that his controlled substance offense can be counted for career offender purposes, he raises a plausible challenge to his 1994 conviction for unlawful use of a weapon by a felon. However, his challenge to his 1998 conviction for aggravated battery of a peace officer

fares less well.

Petitioner starts with his 1994 conviction for unlawful use of a weapon by felon, making a reasonable argument that this crime would not have constituted a crime of violence under § 4B1.1. In light of Begay, it appears that petitioner is correct, and the government does not argue otherwise. The probation officer stated in the presentence report prepared for petitioner's 2004 sentencing in this court that petitioner had been arrested after officers saw him walking out of a building with a loaded .25 caliber semi-automatic pistol in his hand. Nothing in the report suggested that petitioner had fired the gun, threatened to do so before he was arrested or used or attempted to use the pistol as a weapon. In short, it cannot be said that petitioner's actions constituted a crime of violence under subsection (a)(1) or (2) of § 4B1.2 or that he could be said to have been acting purposefully, violently or aggressively.

Petitioner's 1998 conviction for aggravated battery of a peace officer under 720 ILCS 5/12-4(b)(6) presents a slightly more complex question. Petitioner contends that this conviction should not count as a crime of violence under the guidelines because the statute under which he was convicted applied to both violent and non-violent conduct and it is not possible to tell from reading the statute how his conduct was charged.

In 1998, when petitioner was convicted, 720 ILCS 5/12-4(b)(6) read in relevant part as follows:

> Aggravated Battery.
>
> (a) A person who, in committing a battery, intentionally or knowingly causes great bodily harm, or permanent disability or disfigurement commits aggravated battery.
>
> (b) In committing a battery, a person commits aggravated battery if he or she:
>
> * * * **
>
> (6) Knows the individual harmed to be a peace officer, a person summoned and directed by a peace officer, a correctional institution employee, or a fireman while such officer, employee or fireman is engaged in the execution of any official duties including arrest or attempted arrest, or to prevent the officer, employee or fireman from performing official duties, or in retaliation for the officer, employee or fireman performing official duties, and the battery is committed other than by the discharge of a firearm . . . .

1997 Ill. Legis. Serv. P.A. 90-115 (H.B. 1548).

On its face, the statute makes a battery "aggravated" only if the victim is within a protected group; it does not say that the batterer must knowingly cause bodily harm to that person. However, a look at the Illinois statute defining "battery," 720 ILCS 5/12-3, shows that it is bifurcated: a person can commit battery if, acting knowingly and without legal justification, he causes bodily harm to an individual *or* if he makes physical contact of an insulting or provoking contact.

Reading 720 ILCS 5/12-4-(b)(6) together with 720 ILCS 5/12-3 and in light of Begay, 554 U.S. 137, it follows that a person who commits battery against a peace officer will have committed a crime of violence for sentencing guideline purposes only if he acted knowingly

and without legal justification and caused bodily harm to an individual. However, determining whether a particular offender was charged with knowingly causing bodily harm to the peace officer cannot always be determined merely from reading the statute.

When a bifurcated statute is involved, the law provides the sentencing court some help in determining the nature of the offense. The court may refer to a limited range of documents: charging papers, a written plea agreement, a transcript of the plea colloquy and "any explicit factual finding by the trial judge to which the defendant assented." Shepard v. United States, 544 U.S. 13 (2005) (identifying documents that may be relied upon in determining whether prior convictions for burglary involved burglary of building, in which case burglary was covered under § 924(e), whereas burglary of automobile or boat was not, because it posed less risk of harm to persons); United States v. Woods, 576 F.3d 400 (7th Cir. 2009) (when statute covers more than one offense, proper to consult documents such as charging documents to consider whether defendant's crime is crime of violence under U.S.S.G. § 4B1.1).

When the government filed its Amended Response to Petitioner's Request to Alter or Amend, dkt. #17, it attached copies of the indictments returned by a grand jury in Cook County on June 14, 1998, as well as a copy of the Order of Sentence and Commitment to the Illinois Department of Corrections. Dkt. #17-3. In the first indictment, dkt. #17-1, the grand jury charged that petitioner "intentionally or knowingly caused bodily harm" to a

person he knew to be a peace officer by throwing him to the ground; in the second, id., the grand jury charged that petitioner "intentionally or knowingly caused bodily harm" to a person he knew to be a peace officer by striking him in the head with his elbow. These documents show that petitioner was charged in both instances with *knowingly causing bodily harm to a peace officer* and not with the lesser offense of making physical contact of an insulting or provoking nature with a peace officer. Further, the commitment order indicates that petitioner was sentenced to two-and-one-half years for the offense of aggravated battery. Dkt. #17-3.

Petitioner argues that the commitment order does not show whether he was actually found guilty of the "causing bodily harm" part of the statute or whether the charges against him were bargained down to the lesser offense of making physical contact of an insulting or provoking nature. However, under Shepard, 544 U.S. 13, the charging documents are sufficient to demonstrate that he pleaded guilty to the crime of intentionally or knowingly causing bodily harm to a person he knew to be a peace officer. The commitment order does not suggest that the charges were reduced. Thus, even if petitioner had filed a timely motion for post conviction relief, it is unlikely that he could have prevailed on his claim that he was improperly classified as a career offender.

I conclude therefore that petitioner has no viable claim of relief under 28 U.S.C. § 2255.

Under Rule 11 of the Rules Governing Section 2255 Proceedings, the court must issue or deny a certificate of appealability when entering a final order adverse to a petitioner. To obtain a certificate of appealability, the applicant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Tennard v. Dretke, 542 U.S. 274, 282 (2004). This means that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (internal quotations and citations omitted). The question in this case is not entirely straightforward. I cannot find that petitioner Defendant has failed to make a substantial showing of a denial of a constitutional right. Accordingly, a certificate of appealability will issue.

ORDER

IT IS ORDERED that petitioner Lonzo Stanley's motion for post conviction relief, dkt. #1, is DENIED, as are his first and second motions to alter or amend judgment, dkts.

##5 and 6. Further, it is ordered that a certificate of appealability shall issue.

Entered this 9th day of November, 2015.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge