No. 17-1477

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Sep 21, 2017
DEBORAH S. HUNT, Clerk

ROBERT EUGENE SECORD,)
)
Petitioner-Appellant,)
)
v.) O R D E R
)
UNITED STATES OF AMERICA,)
)
Respondent-Appellee.)

Robert Eugene Secord, a federal prisoner proceeding through counsel, appeals the order of the district court denying his motion to vacate, set aside, or correct his sentence, filed pursuant to 28 U.S.C. § 2255. He applies for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b).

Pursuant to a plea agreement, Secord pleaded guilty to being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). Secord's presentence report calculated a guidelines range of 324 to 405 months based on a total offense level of 36 and category VI criminal history score. The presentence report determined that Secord was subject to a 180-month mandatory minimum sentence under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), based on his prior convictions for first-degree home invasion in violation of Michigan Compiled Laws § 750.110a(2), unarmed robbery in violation of Michigan Compiled Laws § 750.530, second-degree home invasion in violation of Michigan Compiled Laws § 750.110a(3), and breaking and entering a building with intent in violation of Michigan Compiled Laws § 750.110. At sentencing, the district court granted the government's motion for a three-level downward departure based on substantial assistance, *see* USSG § 5K1.1, which

reduced the guidelines range to 235 to 293 months. The district court sentenced Secord to a term of imprisonment of 240 months, to be followed by a five-year term of supervised release. We granted Secord's motion for voluntary dismissal of his appeal. *United States v. Secord*, No. 12-2143 (6th Cir. Dec. 21, 2012) (order). The district court reduced Secord's sentence, first to 204 months and later to 144 months, based on motions the government filed under Federal Rule of Criminal Procedure 35(b) because of the substantial assistance Secord provided to the government.

In 2016, Secord, proceeding pro se, filed the current motion, arguing that, in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), several of his prior convictions counted as predicate offenses for his ACCA designation could no longer be counted as such. He also contended that his sentence was improperly enhanced under USSG § 3C1.2 for reckless endangerment. The district court appointed Secord counsel to assist with his *Johnson* claim. The court denied both claims on the merits while also concluding that both claims failed for independent procedural reasons. The court declined to issue a COA for any of the issues raised.

Secord now seeks a COA from this court on the issue of whether, in light of *Johnson*, his prior convictions, specifically his convictions for home invasion and unarmed robbery, still qualify as ACCA predicate offenses. He has effectively abandoned his sentencing-enhancement claim by failing to address it in his COA application. *See Elzy v. United States*, 205 F.3d 882, 886 (6th Cir. 2000).

To obtain a COA from the denial on the merits of a motion to vacate, a petitioner must make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). To satisfy this standard, the petitioner must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Under the ACCA, a defendant who has three or more prior convictions for a "violent felony" or a "serious drug offense" qualifies as an armed career criminal and is subject to a

minimum term of fifteen years in prison. *See* 18 U.S.C. § 924(e)(1). An offense qualifies as a violent felony if it falls under one of the following three clauses in the ACCA: 1) the "elements" clause—"has as an element the use, attempted use, or threatened use of physical force against the person of another"; 2) the "enumerated offenses" clause—"is burglary, arson, or extortion, [or] involves [the] use of explosives"; or 3) the "residual" clause—"involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e). In *Johnson*, the Supreme Court held that the residual clause was unconstitutionally vague. *Johnson*, 135 S. Ct. at 2563.

Reasonable jurists would not dispute the district court's denial of Secord's *Johnson* claim. The district court concluded that Secord's convictions were violent felonies even after *Johnson*. Specifically, the court found that Secord's prior convictions for first and second-degree home invasion qualified as generic burglary under the enumerated-offenses clause, and that his conviction for unarmed robbery qualified under the elements clause.

To determine whether a prior conviction qualifies as a violent felony, we start with the categorical approach, comparing "the elements of the crime of conviction with the elements of the 'generic' version of the listed offense—i.e., the offense as commonly understood." *Mathis v. United States*, 136 S. Ct. 2243, 2247 (2016). A prior crime "qualifies as an ACCA predicate if, but only if, its elements are the same as, or narrower than, those of the generic offense." *Id*. Applying the categorical approach, we have found that the variants of home invasion under Michigan law qualify as generic burglary and, consequently, violent felonies for ACCA purposes. *See United States v. Quarles*, 850 F.3d 836, 837 (6th Cir. 2017) ("We affirm the district court's determination that Michigan's crime of third-degree home invasion is categorically equivalent to generic burglary."); *United States v. Gibbs*, 626 F.3d 344, 353 (6th Cir. 2010) ("[A] conviction for second-degree home invasion under Michigan law is the equivalent of the enumerated offense of burglary of a dwelling and therefore constitutes a 'crime of violence.'"); *United States v. Garcia-Serrano*, 107 F. App'x 495, 496 (6th Cir. 2004)

("Michigan's definition of home invasion-first degree includes all of the elements of burglary of a dwelling.").[1]

While acknowledging that we have found that home invasion under Michigan law equates to generic burglary, Secord contends that the district court's conclusion is still debatable among jurists of reason because there is a circuit split regarding language in Michigan's home invasion statute. While other courts may interpret the language of Michigan's home invasion statute differently, *Quarles* remains binding in this circuit. *See United States v. Elbe*, 774 F.3d 885, 891 (6th Cir. 2014). Secord's claim that his home invasion convictions are not violent felonies does not deserve encouragement to proceed further. *See Miller-El*, 537 U.S. at 327.

We have similarly found that unarmed robbery constitutes a crime of violence. In *United States v. Matthews*, _ F. App'x _, No. 15-2298, 2017 WL 1857265 (6th Cir. May 8, 2017), *petition for cert. filed*, (U.S. Sept. 7, 2017) (No. 17-5874), we determined that unarmed robbery under Michigan law is a crime of violence under the elements clause of the ACCA.[2] *Id.* at *5. Secord acknowledges *Matthews* as adverse authority but contends that reasonable jurists could still disagree about whether unarmed robbery constitutes a crime of violence given the dissenting opinion in *Matthews*. *See id.* at *5-7. Although *Matthews* is unpublished and has a dissent, Secord does not challenge the reasoning of the majority's opinion. The majority's opinion is also consistent with the conclusions of other circuits which have addressed this issue. *See United States v. Lamb*, 638 F. App'x 575, 577-78 (8th Cir. 2016), *vacated on other grounds*, *Lamb v. United States*, 137 S. Ct. 494 (2016); *United States v. Tirrell*, 120 F.3d 670, 680-81 (7th Cir. 1997). Secord's claim that his unarmed robbery offense is not a crime of violence does not deserve encouragement to proceed further. *See Miller-El*, 537 U.S. at 327.

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[1] These cases interpret the sentencing guidelines' definition of violent felony, but we have recognized that the guidelines' definition is "essentially the same" as the ACCA's definition. *Gibbs*, 626 F.3d at 352 n.6.

[2] The *Matthews* panel addressed the pre-2004 version of Michigan's unarmed robbery statute. *See Matthews*, 2017 WL 1857265, at *3 & n.1. Secord's unarmed robbery conviction is from 1996, and is therefore covered by *Matthews*.

Accordingly, Secord's application for a COA is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk