

June 1, 2010

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUITElisabeth A. Shumaker
Clerk of Court

In re: VAUDA VIRGLE SHIPP, JR.,

Petitioner,

No. 10-5056
(D.C. No. 4:04-CR-00214-CVE-1)
(N.D. Okla.)

ORDER

Before **HENRY, EBEL**, and **O'BRIEN**, Circuit Judges.

Vauda Virgle Shipp, Jr. seeks a writ of mandamus directing the district court to resentence him in accordance with our remand order in *United States v. Shipp*, 589 F.3d 1084 (10th Cir. 2009). He has also filed a motion for bail pending appeal under 18 U.S.C. § 3143(b) and § 3145(c).

On May 19, 2010, the district court on remand resentedenced Shipp to 180 months' imprisonment under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), for his conviction under § 922(g) of being a felon in possession of a firearm. Shipp argues the new sentence was imposed in contravention of our remand order. In his earlier case, we reversed the district court's denial of habeas relief and directed it to resentence Shipp without the armed career criminal classification based on the Supreme Court's decision in *Chambers v. United States*, 129 S. Ct. 687 (2009), that a conviction such as

Shipp's 1987 conviction for escape cannot serve as a predicate offense under the ACCA. Shipp's new sentence under the ACCA is based, in part, on a 1969 burglary conviction that, although referenced in the presentence report, was not designated as a predicate offense for purposes of his original classification as an armed career criminal. Shipp has appealed his new sentence in case no. 10-5069.

"[A] writ of mandamus is a drastic remedy, and is to be invoked only in extraordinary circumstances." *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1186 (10th Cir. 2009) (internal quotation marks omitted). Shipp correctly notes that a writ of mandamus may be appropriately used "to confine an inferior court to a lawful exercise of its prescribed jurisdiction." *Id.* (internal quotation marks omitted). If a district court were to wholly disregard this court's mandate, such action might justify use of the writ. Importantly, however, a writ of mandamus may not issue so long as the party seeking the writ has "other adequate means to attain the relief he desires." *Id.* at 1187. Here, Shipp has other adequate means, as demonstrated by his appeal of the new sentence. Thus, he is not entitled to mandamus relief.

As for his request for bail pending appeal, we agree with the government that Shipp has failed to show by clear and convincing evidence that he is not a flight risk or a danger to any other person or the community, as required under § 3143(b). Nor has he demonstrated exceptional reasons why his detention is not appropriate, as required under § 3145(c). We thus conclude he is not entitled to

be released during the pendency of his appeal. *See United States v. Affleck*, 765 F.2d 944, 946 (10th Cir. 1985) (explaining that the defendant bears the burden to show he is eligible for bail pending appeal).

The petition for a writ of mandamus and the motion for bail are both DENIED. Mr. Shipp's motion to consolidate this case with case no. 10-5069 is DENIED as moot. His motion to proceed *in forma pauperis* is GRANTED.

Entered for the Court,

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", followed by a long horizontal flourish.

ELISABETH A. SHUMAKER, Clerk