

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

March 28, 2016

Elisabeth A. Shumaker
Clerk of Court

In re: BILLY TRINKLE,

Movant.

No. 16-3052
(D.C. Nos. 2:10-CV-02451-JWL &
2:07-CR-20168-JWL-DJW-15)
(D. Kan.)

ORDER

Before **HARTZ**, **MATHESON**, and **BACHARACH**, Circuit Judges.

In 2009 Billy Trinkle was convicted of conspiracy to manufacture, to possess with intent to distribute, and to distribute more than 50 grams of cocaine base, and use of a communication facility in commission of a drug trafficking crime. His sentence was enhanced under the career offender guideline, U.S.S.G. § 4B1.1, based on prior Kansas convictions for criminal threat and attempted aggravated battery. In 2010 he filed a motion for relief under 28 U.S.C § 2255 claiming his criminal threat conviction did not qualify as a “crime of violence” under the guideline, i.e., a crime that “has as an element the use, attempted use, or threatened use of physical force against the person of another” under U.S.S.G. § 4B1.2(a)(1), as interpreted in *Johnson v. United States*, 559 U.S. 133, 130 S. Ct. 1265, 1271 (2010). The district court denied relief and we denied Mr. Trinkle a certificate of appealability. See *United States v. Trinkle*, 509 F. App’x 700 (10th Cir. 2013).

Mr. Trinkle now seeks authorization to file a second or successive motion under 28 U.S.C. § 2255 again challenging his career-offender enhancement, this time as contrary to *Johnson v. United States*, ___ U.S. ___, 135 S. Ct. 2551 (2015), which voided a component of the definition of a “violent felony” used for sentence enhancement in the Armed Career Criminal Act (ACCA). Specifically, *Johnson* held that a “residual clause” in the statutory definition—covering any crime that “involves conduct that presents a serious potential risk of physical injury to another,” 18 U.S.C. § 924(e)(2)(B)—violated the constitutional prohibition of vague criminal laws. *Johnson*, 135 S. Ct. at 2563. The career-offender guideline contains a similar residual clause, see U.S.S.G. § 4B1.2(a)(2), but it was not relied on as the basis for finding the requisite prior crimes of violence in Mr. Trinkle’s case. Because *Johnson* has no application to Mr. Trinkle’s sentence, we deny authorization.

To obtain authorization, Mr. Trinkle must make a prima facie showing that his proposed § 2255 motion relies on “(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found [him] guilty of the [challenged] offense,” or “(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” 28 U.S.C. § 2255(h); see also *id.* § 2244(b)(3)(C). Mr. Trinkle contends *Johnson*’s holding striking down the residual clause in the ACCA satisfies the second prong of this test. Actually, the circuits are split on whether the Supreme Court has made *Johnson* retroactive to cases on collateral review (with this circuit rejecting that proposition, see *In re Gieswein*,

802 F.3d 1143, 1148-49 (10th Cir. 2015)), and the Supreme Court has recently granted certiorari to decide the question in *Welch v. United States*, ___ U.S. ___, 136 S. Ct. 790 (Jan. 8, 2016) (15-6148). But we need not await a decision in *Welch* to resolve the instant motion for authorization, which is deficient for a distinct reason that will not be affected by *Welch*'s determination of *Johnson*'s retroactivity *vel non*.

The sentencing transcript shows that the district court found that Mr. Trinkle was a career offender because his prior convictions for attempted aggravated battery and criminal threat qualified as crimes of violence under the offense-element test in § 4B1.2(a)(1), not the residual clause in § 4B1.2(a)(2):

I'm overruling the defendant's objection to the applicability of the Career Offender Guideline. . . . The issue really that we have had to deal with is whether he did have the two prior convictions for crimes of violence. He had the 1997 conviction for the attempted aggravated battery and the 2000 conviction for . . . making a terroristic threat. Section 4B1.2(a) defines the meaning of the term crime of violence, and I think the applicable provision is 4B1.2(a)(1). That provides, "The term 'crime of violence' means any offense under federal or state law punishable for a term exceeding one year that, one, has as an element the use, attempted use, or threatened use of physical force against the person of another.["]

Here all three of those convictions qualify. The attempted aggravated battery clearly involved the threatened use of physical force, and the criminal threat was a threatened use of physical force. . . .

These were intentional torts, and to me they clearly fit under Prong No. 1 [i.e., § 4B1.2(a)(1)].

Dist. Ct. No. 07-20168-15, doc. 1211 at 42-44; *see also United States v. Trinkle*, 2011 WL 484189, at *2 n.2 (D. Kan. Feb. 7, 2011) (noting, in connection with Mr. Trinkle's prior challenge to the career-offender enhancement, that "th[e] 'residual clause' definition [in U.S.S.G § 4B1.2(a)(2)] is not at issue here").

Johnson did not address, either directly or by implication, the constitutionality of the offense-element test in the ACCA or the career-offender guideline. Thus, even if (1) *Johnson*'s voiding of the ACCA's residual clause were deemed controlling with respect to its counterpart in U.S.S.G. § 4B1.2(a)(2),¹ and (2) the Supreme Court makes *Johnson* retroactively applicable to cases on collateral review in *Welch*, Mr. Trinkle would not benefit, because his sentence was enhanced on a basis that does not implicate *Johnson*'s holding about the constitutional deficiency of the residual clause.²

We therefore deny authorization for Mr. Trinkle's proposed second or successive § 2255 motion. This denial of authorization "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court

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

ELISABETH A. SHUMAKER, Clerk

¹ This court recently relied on *Johnson* to hold the residual clause in U.S.S.G. § 4B1.2(a)(2) void for vagueness. See *United States v. Madrid*, 805 F.3d 1204, 1210-12 (10th Cir. 2015). We need not decide here whether a second or successive challenge to the guideline's residual clause could be authorized on the basis of *Johnson*'s retroactivity or whether the Supreme Court would need to extend *Johnson* to the guideline context and then make that holding retroactive to satisfy the requirements in § 2255(h)(2).

² We note Mr. Trinkle contends that enhancement on the basis of § 4B1.2(a)(1) was also erroneous—but this contention has nothing to do with *Johnson*, and Mr. Trinkle has not offered any basis for authorizing a second or successive claim challenging the application of § 4B1.2(a)(1).