United States Court of Appeals
For the Eighth Circuit

No. 17-2848

Gary Dean Mumford, Sr.

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from United States District Court
for the Southern District of Iowa - Des Moines

Submitted: October 19, 2018
Filed: June 21, 2019

Before WOLLMAN, ARNOLD, and BENTON, Circuit Judges.

WOLLMAN, Circuit Judge.

Gary Dean Mumford, Sr., appeals the district court's denial of his 28 U.S.C. § 2255 petition. He alleges that his first-degree robbery conviction no longer qualifies as a predicate offense under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), in the wake of Johnson v. United States, 135 S. Ct. 2551 (2015). We vacate his sentence and remand for resentencing.

I.

Mumford pleaded guilty in 2011 to possessing a firearm in relation to a crime of violence in violation of 18 U.S.C. § 924(c) and possessing a firearm as a convicted felon in violation of 18 U.S.C. § 922(g)(1). At his July 2012 sentencing, the district court determined that Mumford was an armed career criminal, in part because he had a prior conviction for first-degree robbery in violation of Iowa Code §§ 711.1 and 711.2 (1978). Mumford did not challenge his ACCA classification. The court granted a reduction from the mandatory minimums applicable to Mumford's convictions and imposed a 160-month sentence. We affirmed in United States v. Mumford, No. 12-2961 (8th Cir. Feb. 26, 2013) (unpublished per curiam—sealed).

The Supreme Court in Johnson invalidated the ACCA's residual clause and made its rule retroactive on collateral review in Welch v. United States, 136 S. Ct. 1257, 1264-65 (2016). Shortly thereafter, Mumford filed this § 2255 petition, claiming that he was no longer an armed career criminal because his robbery conviction had qualified as an ACCA predicate solely under the residual clause. The district court denied the petition, reasoning that Mumford's claim was barred by his plea agreement's waiver of post-conviction relief[1] and that his first-degree robbery conviction nonetheless required the use of physical force necessary under the ACCA's force clause. The court granted a certificate of appealability.

II.

At the outset, we reject the government's argument that Mumford procedurally defaulted his claim by failing to raise it on direct review. Mumford's claim relies on Johnson's new rule, and he can show the cause and actual prejudice necessary to raise

[1]On appeal, the government disclaims reliance on the waiver of post-conviction relief in Mumford's plea agreement.

it now. See Bousley v. United States, 523 U.S. 614, 618-21 (1998) (standard for excusing procedural default). Any argument that his robbery offense was not a predicate offense under the ACCA's force clause would have been futile pre-Johnson, see, e.g., United States v. Snyder, 871 F.3d 1122, 1127-28 (10th Cir. 2017) (explaining that initial § 2255 petition based on Johnson meets cause and prejudice requirements), and we decline the government's invitation to "fault [Mumford] for not making an argument that would have had no practical effect whatsoever given the then-viable residual clause." Chaney v. United States, 917 F.3d 895, 900 (6th Cir. 2019).

The ACCA mandates a fifteen-year minimum sentence for certain defendants with three prior violent felony or serious drug offense convictions. 18 U.S.C. § 924(e)(1). It defines a "violent felony" as "any crime punishable by imprisonment for a term exceeding 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, [or] involves the use of explosives." Id. § 924(e)(2)(B).[2] Because first-degree robbery is not an enumerated offense under the latter clause, we examine only the former. We define physical force under the ACCA as "*violent* force—that is, force capable of causing physical pain or injury to another person." Stokeling v. United States, 139 S. Ct. 544, 553 (2019) (quoting Curtis Johnson v. United States, 559 U.S. 133, 140 (2010). In determining whether a conviction requires such force,

> courts use a categorical approach that looks to the fact of conviction and the statutory elements of the prior offense. In cases where a statute describes alternate ways of committing a crime—only some of which satisfy the definition of a violent felony—[the statute is considered divisible, and] courts may use a modified categorical approach and

[2]Johnson invalidated the ACCA's residual clause, which had defined a violent felony as one that "otherwise involves conduct that presents a serious potential risk of physical injury to another." Id. § 924(e)(2)(B)(ii).

> examine a limited set of documents to determine whether a defendant was necessarily convicted of a violent felony. These materials include charging documents, jury instructions, plea agreements, transcripts of plea colloquies, or some comparable judicial record.

Headbird v. United States, 813 F.3d 1092, 1095-96 (8th Cir. 2016) (internal quotation marks and citations omitted).

An initial § 2255 petitioner must "show by a preponderance of the evidence that the residual clause led the sentencing court to apply the ACCA enhancement." Golinveaux v. United States, 915 F.3d 564, 567 (8th Cir. 2019) (quoting Walker v. United States, 900 F.3d 1012, 1015 (8th Cir. 2018)). "Whether a claimant meets this burden is usually a factual question for the district court, which reviews the record to determine whether the sentencing court specified which ACCA clause it used." Lofton v. United States, 920 F.3d 572, 574 (8th Cir. 2019). If, however, as here, the parties agree that the record is sufficiently developed and inconclusive as to which ACCA clause the sentencing court relied on, we may inquire into the relevant background legal environment at the time of sentencing to determine in the first instance whether the sentencing court more likely than not relied upon the residual clause in classifying Mumford's first-degree robbery conviction as a violent felony. Id. If it is equally likely that the court relied on the force clause, "solely or as an alternative basis for the enhancement," or if Mumford merely shows "that the residual clause offered the path of least analytical resistance," he will have failed to meet his burden. Id. at 575 (quoting Walker, 900 F.3d at 1015). Further, if the conviction qualifies as a violent felony under current law, any error by the sentencing court would be harmless because resentencing would not change the ACCA enhancement. See Lofton, 920 F.3d at 574-75.

Mumford's first-degree robbery conviction involves both Iowa Code § 711.1, defining robbery, and Iowa Code § 711.2, the first-degree enhancement. "[F]or the purposes of the ACCA, we are required to examine whether the elements of simple

robbery or the aggravating factors under first[-]degree . . . robbery necessarily require proof of violent force." United States v. Libby, 880 F.3d 1011, 1015 (8th Cir. 2018). When Mumford was convicted in 1982, one committed robbery in violation of § 711.1 "when, having the intent to commit a theft, the person . . . (1) Commits an assault upon another[;] (2) Threatens another with or purposely puts another in fear of immediate serious injury[; or] (3) Threatens to commit immediately any forcible felony," and those acts "assist or further the commission of the intended theft or the person's escape from the scene thereof." Applying the modified categorical approach to this divisible statute, see State v. Wilson, 523 N.W.2d 440, 441 (Iowa 1994); see also Golinveaux, 915 F.3d at 572 (Colloton, J., concurring) (explaining § 711.1 divisibility analysis), it is clear that Mumford was convicted of violating subsection (1) of the statute because the 1982 state trial court instructed the jury that "a person commits robbery, when, having the intent to commit a theft, he commits an assault to assist or further the commission of an intended theft." Jury Instr. 10.

Assault under § 711.1(1) is defined in Iowa Code § 708.1 (1977), subsection (2) of which prohibits, in part, "act[s] . . . intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive." At the time of Mumford's sentencing, this court had concluded that this subsection did not have an element of physical force. See United States v. Smith, 171 F.3d 617, 620 (8th Cir. 1999); cf. United States v. Larson, 13 Fed. Appx. 439, 439-440 (8th Cir. 2001) (per curiam). Although § 708.1 is divisible, see Smith, 171 F.3d at 620-21, the record is inconclusive regarding which subsection Mumford's conduct violated, so the sentencing court could not have concluded that his robbery conviction was a violent felony under the force clause. Because robbery as defined by §§ 711.1(1) and 708.1 does not necessarily require violent force, we conclude that the sentencing court more likely than not relied on the ACCA's residual clause in determining that robbery constituted a violent felony under the ACCA.

Current law dictates the same result. Under Iowa law, a robbery conviction based on assault under § 708.1(2) does not require the use, attempted use, or threatened use of physical force. In State v. Copenhaver, 844 N.W.2d 442, 451-52 (Iowa 2014), the Iowa Supreme Court upheld the robbery convictions—based on assaults under § 708.1(2)—of a man who entered a bank wearing a mask and demanded money in a forceful tone, but did not threaten anyone and only touched a teller's nose while gesturing. See also United States v. Gaines, 895 F.3d 1028, 1032 n.5 (8th Cir. 2018) (noting this court's conclusion in Smith that § 708.1(2) "did not have an element of physical force"); State v. Heard, 636 N.W.2d 227, 232 (Iowa 2001) (upholding robbery conviction based on assault under § 708.1(2) where defendant demanded money while in close proximity to bank teller, took the money, and told the teller to lie down, but did not use or threaten physical force); cf. United States v. Horse Looking, 828 F.3d 744, 747 (8th Cir. 2016) (citing Smith, 171 F.3d at 620) (concluding assault statute which could be violated by "[p]umping a fist in an angry manner" did not qualify under the force clause). Because the record does not establish which subsection Mumford's conduct violated—and at least § 708.1(2) does not require violent force—this court cannot conclude that his robbery conviction was a violent felony based on his violation of § 711.1(1). See United States v. Shockley, 816 F.3d 1058, 1063 (8th Cir. 2016).

We next consider § 711.2, which defined first-degree robbery at the time of Mumford's conviction as an aggravated offense committed "when, while perpetrating a robbery, the person purposely inflicts or attempts to inflict serious injury, or is armed with a dangerous weapon." Regardless of whether the statute is divisible, we conclude that the sentencing court more likely than not relied on the residual clause. If the statute is divisible, the state jury instructions indicate that Mumford was convicted for being "armed with a dangerous weapon" and not for "purposely inflict[ing] or attempt[ing] to inflict serious injury. See Jury Instr. 29.4. Under Iowa law, being armed with a dangerous weapon does not necessarily require the use, attempted use, or threatened use of force. Instead, § 711.2's text, taken with

§ 711.1(1), permits a first-degree robbery conviction if the defendant commits an insulting or offensive touching in the course of a robbery and carries a concealed and unmentioned weapon. In State v. Farni, 325 N.W.2d 107, 108 (Iowa 1982), the Iowa Supreme Court upheld the first-degree robbery conviction of a man who wore a gun under his sweatshirt while he robbed the victim even though he did not use or display the firearm during the altercation. In State v. Law, 306 N.W.2d 756, 760 (Iowa 1981), overruled on other grounds by State v. Wales, 325 N.W.2d 87 (Iowa 1982), the court explained that "[a] person who is 'armed' under the robbery statute" does not necessarily commit an assault because he "would not necessarily be pointing a firearm or displaying a dangerous weapon in a threatening manner." Similarly, State v. Sharkey, 311 N.W.2d 68, 72 (Iowa 1981), held that "[i]n section 711.2 the legislature expressed its intent to punish more severely those robberies where the robber is armed with a dangerous weapon regardless of whether the robber intends to use the weapon if the victim resists." And in State v. Ray, 516 N.W.2d 863, 865 (Iowa 1994), the court's definition of "armed" required only that the dangerous weapon was available for immediate use, not that the weapon was actually used. Iowa case law thus leads us to conclude that a defendant need only possess a dangerous weapon to violate § 711.2. In so concluding, we reject the government's argument that "armed" means "used" under relevant Iowa law.

For the same reasons, even if the statute is divisible, it is overbroad and encompasses conduct that does not necessarily involve the violent force required under the ACCA. Accordingly, applying either the categorical or modified categorical approach, we conclude that the sentencing court more likely than not relied on the residual clause in determining that Mumford's first-degree robbery conviction constituted a violent felony. Current law dictates the same result and thus the error in classification is not harmless.[3]

[3]In United States v. Langston, 800 F.3d 1004, 1005 (8th Cir. 2015) (per curiam), we determined that an Iowa going-armed-with-intent conviction no longer

Mumford had three qualifying violent felony convictions only under the ACCA's residual clause. We thus vacate his sentence, imposed in violation of the Constitution, see 28 U.S.C. § 2255(a), and remand to the district court for resentencing.

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qualified as a violent felony after Johnson. Other circuits have reached similar conclusions in analyzing statutes requiring only that the defendant be "armed" or possess a weapon. See, e.g., United States v. Bong, 913 F.3d 1252, 1266 (10th Cir. 2019) (Kansas aggravated robbery requiring merely that defendant is "armed" is not violent felony); United States v. Walton, 881 F.3d 768, 773 (9th Cir. 2018) (Alabama armed robbery); United States v. Starks, 861 F.3d 306, 322 (1st Cir. 2017) (Massachusetts armed robbery).