No. 16-6024

In the United States Court of Appeals For the Tenth Circuit

UNITED STATES OF AMERICA, PLAINTIFF - APPELLEE,
v.
BRITT JARRIEL HAMMONS, DEFENDANT - APPELLANT.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE HONORABLE STEPHEN P. FRIOT
DISTRICT JUDGE
D.C. No. CR-04-172-F, CIV-15-912-F

APPELLANT'S REPLY BRIEF
DIGITALLY SUBMITTED
ORAL ARGUMENT IS REQUESTED

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SUMMARY OF ARGUMENT

In his opening and supplemental briefs, Mr. Hammons argued he is entitled to relief under *Johnson v. United States*, 135 S.Ct. 2551 (2015) because his three convictions for Use of a Vehicle to Facilitate the Intentional Discharge of a Firearm do not qualify as a violent felony under the Armed Career Criminal Act ("ACCA") without use of the now void residual clause. The Government submits Mr. Hammons' convictions remain violent felonies under the "force clause" of the ACCA. *See* 18 U.S.C. § 924(e)(2)(B)(i). The Government is incorrect. Oklahoma's offense of Use of a Vehicle to Facilitate the Intentional Discharge of a Firearm under Title 21, Oklahoma Statutes, Section 645(B) can be committed without the intentional use, attempted use, or threatened use of violent physical force required. Under the categorical approach, the offense reaches conduct outside the scope of the force clause. Accordingly, it is categorically not a violent felony. As such, Mr. Hammons is entitled to relief because he is currently serving a sentence in excess of the ten (10) year statutory maximum for Title 18, United States Code, Section 922(g) violations without application of the ACCA.

A. ARGUMENT

1. The Government does not raise any procedural impediments preventing the Court from addressing the merits of Mr. Hammons' claim

As a preliminary matter, review of the Government's Response brief confirms the Court may address Mr. Hammons' *Johnson* claim directly on the merits. *See* Gov. Resp. Br. at 4-22. The Government does not argue any procedural obstacles prevent review of Mr. Hammons' claim his convictions fail to qualify as violent felonies. The Government also does not argue Mr. Hammons' sentence can survive if the Court determines the convictions fail to qualify as violent felonies without the residual clause. Additionally, there is no argument Mr. Hammons' convictions qualify as an enumerated offense listed in Section 924(e)(2)(B)(ii) of Title 18 of the United States Code. As a result, the dispositive issue for the Court is whether Oklahoma's offense of Use of a Vehicle to Facilitate the Intentional Discharge of a Firearm under Title 21, Oklahoma Statutes, Section 645(B) is a violent felony under the force clause of the ACCA. It is not.

2. Oklahoma's Offense of Use of a Vehicle to Facilitate the Intentional Discharge of a Firearm under Title 21, Oklahoma Statutes, Section 645(B) does not require the offender to intentionally use force as required by the Armed Career Criminal Act

Mr. Hammons agrees the Court's analysis must rely upon state court law as established through the relevant statutory framework and accompanying case law. Oklahoma's offense of Use of a Vehicle to Facilitate the Intentional Discharge of a Firearm under Title 21, Oklahoma Statutes, Section 645(B) requires the offender to "use any vehicle to facilitate the intentional discharge of any kind firearm, crossbow or other weapon in conscious disregard for the safety of any other person or persons [.]" Okla. Stat. tit. 21, § 645(B) (1992). The plain language of the statute places the intent requirement on the phrase "use any vehicle." *Burleson v. Saffle* holds the offense also requires "the specific intent to discharge a weapon in conscious disregard for the safety of another person or persons." 2002 OK CR 15, ¶ 7, 46 P.3d 150, 153. But of course, *Burleson* also explains a Section 652(B) violation does not require an "intent to kill." The element of "use of the vehicle" is not defined by Oklahoma law, and it is given ordinary meaning. *See* OUJI-CR 4-5 Notes ("[T]he terms used in this instruction are understandable to a jury and [] further definition is not necessary."). Plainly then, a defendant may be convicted under the statute by operating a motor vehicle from which another individual discharges a firearm in conscious disregard of

the safety of others. *Burleson*, 2002 OK CR 15, ¶ 7, 46 P.3d 150, 153 (explaining Section 652(B) requires the specific intent to discharge a weapon in conscious disregard for the safety of others, but does not require the defendant to have the required specific intent). The driver (and soon to be convicted defendant) need not be aware another individual plans to intentionally fire a weapon with conscious disregard. The Government argues this distinction is immaterial because the ACCA requires "the offense" to have the use of force as an element; not that the offender commit the offense without the requisite use, attempted use, or threatened use of force. Gov. Resp. Br. at 10-13. The Government incorrectly casts the argument as "relative-culpability," yet offers no binding precedent refuting Mr. Hammons' argument. *See* Gov. Resp. Br. at 12 (citing *United States v. Smith*, 33 Fed. Appx. 462 (10th Cir 2002) (unpublished); and *United States v. Gloss*, 661 F.3d 317 (6th Cir. 2011)).

3. The offense does not have the required mental state necessary under Supreme Court and Tenth Circuit precedent interpreting 18 U.S.C. § 924(e)(2)(i)

Even if the ACCA permitted an offense to qualify as a violent felony if it permitted a conviction without the offender actually employing any force (or even knowledge of force to be employed), the statute fails to qualify for another wholly separate reason. Section 652(B) permits a conviction with the mental state of

conscious disregard. *See* OKLA. STAT. tit. 21, § 652(B) (". . . in *conscious disregard* for the safety of any other person or persons. . .") (emphasis added). This fails to meet the required mental state necessary for the use of force under Title 18, United States Code, Section 924(e)(2)(B)(i). The Government offers arguments to the contrary – none of which is persuasive.

The Court has already established a mens rea of recklessness does not satisfy the physical force requirement of a similar statute. *United States v. Zuniga-Soto*, 527 F.3d 1110, 1122-23 (10th Cir. 2008). *See also United States v. Duran*, 696 F.3d 1089, 1095 (10th Cir. 2012) (holding that "aggravated assault under Texas law with a mens rea no higher than recklessness . . . is not categorically a crime of violence" under career offender guidelines). The Government attempts to argue *Zuniga-Soto* and *Leocal v. United States*, 543 U.S. 1 (2004) do not control because those decisions did not address the "attempted use" and "threatened use" of force clauses of the statute). Gov. Resp. Br. at 17. Yet, the Government provides no argument why the Court should not apply its holding to the attempted / threatened use clauses. The statute in this case does not involve the attempted or threatened use of force; it involves discharging a firearm in the conscious disregard of others.

Both the District Court and the Government relied on *United States v. Hernandez*, 568 F.3d 827 (10th Cir. 2009) to conclude Use of a Vehicle to Facilitate

the Intentional Discharge of a Firearm contains the requisite violent physical force. *See Order of the District Court*, Vol. 1 at 87. But *Hernandez* deals with an entirely different statute with a dispositive difference. *Hernandez*, 568 F.3d at 830. The Texas statute at issue required the discharge of a firearm "at or in the direction of" an individual. *Id*. at 830 (discussing Tex. Penal Code Ann. § 22.05). Oklahoma's offense does not require the discharge of the firearm to be "at or in the direction" of an individual, instead requiring the firearm to be discharged with "conscious disregard for the safety of any other person or persons." This, then, clearly covers the situation in which an occupant of a motor vehicle intentionally discharges the weapon for any purpose in conscious disregard of others. For example, one can easily imagine individuals firing handguns in the air in a celebratory manner while driving around. While certainly within the elements of the Oklahoma offense, this manner of committing the crime fails to contain as an element, the use, attempted used, or threatened use of physical force.

The Government also places great weight on the United States Supreme Court's recent decision in *Voisine v. United States*, 136 S.Ct. 2271 (June 27, 2016). Gov. Resp. Br. at 18-19. Yet, *Voisine* is clearly inapplicable to Mr. Hammons' case. At issue in *Voisine* was whether a misdemeanor offense of domestic abuse with a mens rea requirement of recklessness was sufficient to prohibit possession of firearms

under Title 18, United States Code, Section 922(g)(9). Of course, Mr. Hammons was not convicted under Section 922(g)(9); rather he was prosecuted under Section 922(g)(1). Nor is Section 922(g)(9) applicable to the issue. The Supreme Court interprets the two statutes entirely differently. *Compare Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010) ("'physical force' means violence force – that is, force capable of causing physical pain or injury to another person") *with Voisine*, 136 S.Ct. at __ (describing the force requirement for misdemeanor crime of violence as "the active employment of force"). *See also Curtis Johnson*, 559 U.S. at 143-44 (noting the different between 18 U.S.C. § 924(e)(2)(B)(ii) and 18 U.S.C. § 922(g)(9)). Applying *Voisine* to the ACCA would also run contrary to *United States v. Castleman*, 134 S.Ct. 1405 (2014). *Castleman* noted the hesitation "to apply the [ACCA] to 'crimes which, though dangerous, are not typically committed by those whom one normally labels 'armed career criminals.'" 134 S.Ct. at 1412 (*quoting Begay v. United States*, 553 U.S. 137, 146 (2008)). *See also Curtis Johnson*, 559 U.S. at 143-44 (noting its holding requiring "violence physical force" in Section 924(e)(2)(B)(i) does not concern Section 922(g)(9) and misdemeanor crimes of domestic violence). In short, *Voisine*'s holding in the context of misdemeanor domestic violence offenses has no bearing on whether the ACCA permits a mental state of recklessness or conscious disregard. *Bennett v. United States*, No. 1:16-cv-

251-GZS, 2016 WL 3676145 (D. Me. July 6, 2016) (rejecting argument *Voisine* applies to ACCA's required mental state).

CONCLUSION

For the reasons in Mr. Hammons' opening brief and this reply, the Court should reverse the district court's order denying relief and remand with instructions to vacate Mr. Hammons sentence.

Respectfully submitted,

s/ Kyle E. Wackenheim

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CERTIFICATE OF SERVICE

I, Kyle Wackenheim, hereby certify that on Monday, August 15, 2016, I electronically transmitted the attached document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants: Timothy W. Ogilvie, Assistant United States Attorney, via the ECF System.

s/ Kyle Wackenheim
KYLE WACKENHEIM

CERTIFICATE OF COMPLIANCE

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☒ I relied on my word processor to obtain the count and it is: WordPerfect X6.

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s/ Kyle Wackenheim
KYLE WACKENHEIM

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s/ Kyle Wackenheim
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