

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LARON HAWKINS,

Defendant.

8:13CR343

MEMORANDUM AND ORDER

This matter is before the court on the defendant's motion to vacate, set aside or correct his sentence under [28 U.S.C. § 2255](#), [Filing No. 38](#). This is Hawkins's first § 2255 motion. The court held a hearing on the motion on June 22, 2016.

I. BACKGROUND

Hawkins entered a plea of guilty to a charge of being a felon in possession of a firearm, in violation of [18 U.S.C. § 922\(g\)](#) and was sentenced to a term of imprisonment of 75 months, concurrent to the 12 month sentence he received in Case No. 8:11CR400 for a violation of supervised release. [Filing No. 35](#), Judgment. His sentence was enhanced under [U.S.S.G. §§ 2K2.1](#) and 4B1.2(a)(2) for a felony conviction for a crime of violence, that is, burglary. See [Filing No. 33](#), Presentence Investigation Report (sealed) ("PSR") at 5.

The record shows that, in the PSR, the Probation Office calculated the defendant's base offense level to be 20 under [U.S.S.G. § 2K2.1\(a\)\(4\)\(A\)](#) for committing the offense subsequent to sustaining one felony conviction of either a crime of violence, burglary, plus a two-level increase for possession of a stolen weapon under [U.S.S.G. 2K2.1\(b\)\(4\)](#), less three levels for acceptance of responsibility under [U.S.S.G. § 3E1.1](#),

for a total offense level of 19. [Filing No. 33](#), PSR at 5. Based on the assessment of 13 criminal history points, he was found to have a criminal history category of VI, resulting in a sentencing range of 63 to 78 months. *Id.* at 4-11, 15. He was also charged with a violation of supervised release in Case No. 8:11CR400 and was sentenced to a concurrent term of 12 months for the violation. *United States v. Hawkins*, No. 8:11CR400, Filing No. 66, Amended Judgment.

Absent the enhancement for committing the offense after a conviction for a violent felony, the defendant's Guidelines total offense level would have been 13 (representing a base offense level of 14 under [U.S.S.G. 2K2.1\(a\)\(6\)](#), plus 2 for a stolen weapon under [U.S.S.G. 2K2.1\(b\)\(4\)](#), less 3 for acceptance of responsibility under U.S.S.G. 3E1.1) resulting in a Guidelines sentencing range at criminal history category VI of 33 to 41 months. The defendant has been in custody since October 2, 2013, and has served close to 33 months. [Filing No. 9](#), arrest warrant returned executed (restricted).

The defendant seeks relief under [Johnson v. United States](#), 135 S. Ct. 2551 (2015). In *Johnson*, the Supreme Court held that imposing an increased sentence pursuant to the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii), violates due process under the Fifth Amendment. [Johnson](#), 135 S. Ct. at 2563. The ACCA provides three definitions of a "violent felony." 18 U.S.C. § 924(e)(2)(B). It refers to any offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i) (the "elements clause" or "force clause"). It also covers any offense that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves

conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B)(ii). The first 9 words of that subsection are called the “enumerated crimes clause,” and the last 13 are called the “residual clause.” See *id.* The Supreme Court found the residual clause unconstitutionally vague, but did not invalidate the elements clause or the enumerated crimes of the ACCA's definition of a violent felony. *Johnson*, 135 S. Ct. at 2563. The Guidelines definition of a crime of violence contains the same definitions. U.S.S.G. § 4B1.2(a)(1) & (2). The decision in *Johnson* was given retroactive effect on collateral review by the Supreme Court. *Welch v. United States*, 136 S. Ct. 1257, 1265 (April 18, 2016).

Hawkins contends that he was sentenced improperly under the Guidelines career-offender provisions, arguing that his conviction for burglary no longer qualifies, post-*Johnson*, as a “crime of violence” under either the residual or the force clauses, and also does not equate to the enumerated offense of generic burglary under this court's precedent.¹ The government has conceded that *Johnson* applies to both ACCA and Guidelines sentences pending on direct appeal, and to initial collateral attacks on ACCA-enhanced sentences. See [Filing No. 41](#), Government Brief at 3-4. The government argues, however, that the *Johnson* decision is not retroactive with respect to a collateral challenge to a Guidelines-enhanced sentence. *Id.* at 4. It contends that “*Johnson* is retroactive in ACCA cases because the defendant is subjected to a punishment that the law does not allow” and is “not retroactive in Guidelines cases

¹ See, e.g., *United States v. Cornejo-Lopez*, No. 8:15CR46, 2015 WL 7274060, at *7 (D. Neb. Nov. 17, 2015) (burglary does not qualify as a predicate offense under the enumerated crimes clause); *United States v. Richards*, No. 8:13CR371, 2014 WL 6686783, at *11 (D. Neb. Nov. 26, 2014) (attempted burglary does not qualify as a predicate offense under the enumerated crimes clause).

because in every Guidelines case the sentence imposed was within the statutory maximum and the possibility exists that at resentencing the same sentence could be imposed as a reasonable sentence under [18 U.S.C. § 3553\(a\)](#)." *Id.* Thus, it argues that "the rule announced in *Johnson* is procedural when applied to collateral attacks of Guideline sentences and therefore not retroactive." *Id.* Alternatively, if the court finds *Johnson* applicable to a challenged Guidelines sentence, the government seeks to reopen the sentencing for a determination of whether burglary is a crime of violence as an enumerated crime under the Guidelines provision. It argues for application of the modified categorical approach to determine whether Hawkin's conviction for burglary matched the elements of the generic crime.²

II. LAW

The court must first determine whether the *Johnson* holding is applicable to the Guidelines career-offender provision, which is identical to the ACCA provision that was invalidated in *Johnson*, and if so, whether the new substantive rule announced in *Johnson* can be retroactively applied on collateral review in a case involving a challenge to a Guidelines-enhanced sentence. Second, the court must determine whether a conviction for burglary under Nebraska law is a crime of violence.

A. Section 2255 standards

Under [28 U.S.C. § 2255](#), a court may grant relief to a federal prisoner who moves to vacate, set aside or correct his sentence on any of the following grounds: (1) that the sentence was imposed in violation of the Constitution or laws of the United States; (2)

² As discussed *infra* at 13-15, that argument is foreclosed by the Supreme Court's decision in *Mathis v. United States*, No. 15-6092, 2016 WL 3434400, at *3 (June 23, 2016).

that the court was without jurisdiction to impose such sentence; (3) that the sentence was in excess of the maximum authorized by law; or (4) that the sentence is otherwise subject to collateral attack. [28 U.S.C. § 2255\(a\)](#). [28 U.S.C. § 2255](#) provides a person in federal custody with a limited opportunity to collaterally attack the constitutionality, jurisdictional basis, or legality of his sentence. See [United States v. Addonizio](#), [442 U.S. 178, 185 \(1979\)](#). Relief is reserved for violations of constitutional rights and for a narrow range of injuries which were outside a direct appeal and which, if untreated, would result in a miscarriage of justice. See [Poor Thunder v. United States](#), [810 F.2d 817, 821–22 \(8th Cir.1987\)](#).

The harmless error standard of review applies to § 2255 motions. [United States v. Clay](#), [720 F.3d 1021, 1027 n.5 \(8th Cir. 2013\)](#). Under that standard, a constitutional error does not require reversal of conviction unless the petitioner can show that the error was of such magnitude as to have a substantial and injurious effect or influence on the guilty plea or the jury's verdict. [Brecht v. Abrahamson](#), [507 U.S. 619, 637 \(1993\)](#). “When a defendant is sentenced under an incorrect Guidelines range—whether or not the defendant's ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error” and can be relied upon by a defendant to show an effect on his substantial rights. [Molina-Martinez v. United States](#), [136 S. Ct. 1338, 1345, 1349 \(2016\)](#) (involving an unpreserved error on direct appeal); see [United States v. Robinson](#), [No. 15-1697, 2016 WL 3407698, at *2 \(8th Cir. June 21, 2016\)](#) (finding a reasonable probability that absent the error the defendant would have received a

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