

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

ODELL DOBBS,

Defendant.

MEMORANDUM

08-cr-102-bbc

In 2008, defendant Odell Dobbs was charged in this court with drug offenses. He pleaded guilty, was convicted, appealed his conviction unsuccessfully and later filed a motion for post conviction relief under 28 U.S.C. § 2255 that was denied on February 4, 2011. He filed a second motion, labeled a Motion to Correct Errors, which this court re-characterized as a second motion for post conviction relief and denied because defendant had not obtained permission to file it from a panel of the Court of Appeals for the Seventh Circuit, as required under 28 U.S.C. § 2255(h).

On April 25, 2016, defendant wrote to the court “seeking guidance regarding constitutional relief that [he] may be entitled to in light of the recent U.S. Supreme Court decision in Johnson [v. United States], 135 S. Ct. 2551 (2016).” Dkt. #58, 08-cr-102-bbc. He asked the court to “issue *an order for review* by the public defenders office.” I did not respond to defendant’s request for guidance, but sent defendant’s file to the federal

defender's office for review. That office notified the court by email that it did not intend to file on defendant's behalf unless the court required it to do so.

In response to the federal defender's email, I have reviewed defendant's case. Nothing in the record of that case suggests any basis on which defendant could succeed on an application for post conviction relief under the Supreme Court's decision in Johnson. In that case, the petitioner contested the so-called "residual clause" in 18 U.S.C. § 924(e)(2)(B)(ii), which permitted a sentencing court to impose a sentence higher than the statutory maximum if it found that the defendant had been convicted previously of a crime or crimes that "involved conduct that presents a serious potential risk of physical injury to another." He argued that the residual clause was unconstitutionally vague and the Court agreed, saying, "[w]e are convinced that the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges." Id. at 2557.

Unlike petitioner Johnson, defendant did not have his sentence increased under 18 U.S.C. § 924(e)(2)(B)(ii), but under § 4B2.1 of the sentencing guidelines. That provision allows a court to find an offender a career offender under the guidelines if he is at least 18, is facing sentencing for a felony that is either a crime of violence or a controlled substance offense and has at least two prior felony convictions of either a crime of violence or a serious drug offense. When defendant was sentenced, the guidelines defined a "crime of violence" much as § 924(e)(2)(B) defined "serious felony" and they included a provision identical to the residual clause in § 924(e). U.S.S.G. § 4B1.2(1)(a). However, that provision played no

part in the determination of defendant's sentence as a career offender. His sentence was increased because he had a prior conviction for battery to a state peace officer (in addition to a prior conviction for a controlled substance offense, which he is not contesting).

Battery is a qualifying offense under the first provision in § 4B1.2(a), which defines crimes of violence as any offense that "has as an element the use, attempted use, or threatened use of physical force against the person as another." § 4B1.2(a)1). (The corresponding provision in § 924(e)(2)(B) is known as the "elements clause."). The decision in Johnson has no applicability to the constitutionality of that provision. It applied only to persons whose sentences were enhanced under the residual clause of § 924(e)(2)(B)(ii).

Entered this 13th day of October, 2016.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge