

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION**

UNITED STATES OF AMERICA)	
)	
)	Case No. 1:04CR00091
)	
v.)	OPINION AND ORDER
)	
KAD CARSON ELSWICK,)	By: James P. Jones
)	United States District Judge
Defendant.)	

Dennis H. Lee, Special Assistant United States Attorney, Abingdon, Virginia, for United States; Kad Carson Elswick, Pro Se Defendant.

The defendant has filed a Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C.A. § 2255 (West Supp. 2011), asserting that in light of *Begay v. United States*, 553 U.S. 137 (2008), his sentence was unlawfully enhanced under the Armed Career Criminal Act (“ACCA”), 18 U.S.C.A. § 924(e) (West Supp. 2011). Upon review of the record, I find that the government’s Motion to Dismiss must be granted in part and denied in part.

I

A grand jury of this court returned a multi-count Superseding Indictment on February 15, 2005, charging that the defendant, Kad Carson Elswick, had knowingly possessed with intent to distribute and distributed methamphetamine, in

violation of 21 U.S.C. § 841(a)(1) (West Supp. 2011) (Count One) and illegally possessed a firearm, in violation of 18 U.S.C.A. § 922(g) (West 2000) (Counts Two and Three).

Elswick advised that he wished to plead guilty. The court scheduled a hearing to consider the proposed guilty plea but Elswick did not appear. On September 20, 2005, the grand jury returned a Second Superseding Indictment, adding a charge that Elswick had failed to appear as required by his bond in violation of 18 U.S.C.A. § 3146(a)(1) (West 2000) (Count Four). Eventually Elswick was found and taken into custody. After a jury trial, he was found guilty on all four counts.

At sentencing on June 26, 2006, I adopted, without objection, the finding in the Presentence Investigation Report (“PSR”) that Elswick had prior convictions for crimes of violence that qualified him for an ACCA sentence enhancement. I sentenced Elswick to a total of 248 months imprisonment, consisting of concurrent sentences of 180 months as to Counts One and Two, followed by consecutive sentences of 60 months and eight months as to Counts Three and Four, respectively.

Elswick appealed his convictions and sentences on Counts One, Two, and Three. The United States Court of Appeals for the Fourth Circuit affirmed Elswick’s convictions on Count One and Two. *United States v. Elswick*, 306 F.

App'x 8 (4th Cir. 2008) (unpublished), *cert. denied*, 131 S. Ct. 259 (2010). However, the court determined that in light of *Watson v. United States*, 552 U.S. 74 (2007), the evidence at trial was insufficient to support a finding that Elswick had possessed a firearm in furtherance of a drug trafficking crime in violation of § 924(c). The court vacated the conviction on Count Three, and remanded the case for resentencing. 306 F. App'x at 10-14.

At the resentencing in April of 2009, Elswick's counsel challenged his ACCA designation under § 924(e), arguing that Elswick's prior burglary and escape convictions were not crimes of violence as defined in § 924(e)(2)(B). Based on the narrow scope of the Fourth Circuit's mandate on remand, however, I declined to address the ACCA issue. I resentenced Elswick to a total sentence of 188 months imprisonment, consisting of concurrent terms of 180 months as to Counts One and Two and eight months as to Count Four, to be served consecutively to the other sentences.

Elswick appealed again. The Fourth Circuit affirmed, agreeing that the mandate rule foreclosed this court's consideration of Elswick's designation as an armed career criminal. *United States v. Elswick*, 364 F. App'x 19 (4th Cir.) (unpublished), *cert. denied*, 131 S. Ct. 259 (2010).

Elswick then filed the present § 2255 motion. Relying on *Begay v. United States*, 553 U.S. 137 (2008), Elswick asserts the following grounds for relief: (1)

ineffective assistance by trial counsel and by counsel in his initial appeal for failing to challenge the ACCA designation; (2) actual innocence of the ACCA sentence enhancement; and (3) lack of jurisdiction to apply an ACCA enhancement based on the government's failure to file notice as required under 21 U.S.C.A. § 851(a). The government filed a Motion to Dismiss, and Elswick has responded, making the government's motion ripe for disposition.

II

A

To prove that counsel's representation was so defective as to require reversal of the conviction or sentence, a defendant must meet a two-prong standard, showing that counsel's defective performance resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). First, "the defendant must show that counsel's representation fell below an objective standard of reasonableness," considering circumstances as they existed at the time of the representation. *Id.* at 688. The defendant must overcome a strong presumption that counsel's performance was within the range of competence demanded of attorneys defending criminal cases. *Id.* at 689.

Second, to show prejudice, the defendant must demonstrate a "reasonable probability" that but for counsel's errors, the outcome would have been different.

Id. at 694-95. If it is clear that the defendant has not satisfied one prong of the *Strickland* test, the court need not inquire whether he has satisfied the other prong. *Id.* at 697. In a § 2255 motion, the defendant bears the burden of proving his claims by a preponderance of the evidence. *Miller v. United States*, 261 F.2d 546, 547 (4th Cir. 1958).

1. Application of the ACCA Enhancement to Elswick.

The ACCA imposes a 15-year mandatory minimum sentence when a defendant who is convicted of violating § 922(g) has three previous convictions for a violent felony or a serious drug offense or both. 18 U.S.C.A. § 924(e)(1). A “violent felony” under ACCA is defined as a crime “punishable by imprisonment for a term exceeding one year” that also

(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, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another

18 U.S.C.A. § 924(e)(2)(B).

The Presentence Investigation Report (“PSR”) found that Elswick’s convictions for Counts One, Two, and Four were properly grouped for sentencing under the Sentencing Guidelines and that his Base Offense Level for these counts was 14, with a two-level enhancement because the firearm possessed had been stolen and an additional two-level enhancement for obstruction of justice, bringing

the Adjusted Offense Level to 18. Based on three criminal history points, the PSR assigned Elswick to Criminal History Category II, resulting in an advisory guideline range of 30 to 37 months imprisonment.

The PSR also found that Elswick had three prior felony convictions in Virginia courts, including (1) a 1974 statutory burglary conviction, in which it was charged that Elswick had broken into Cars, Inc., a privately owned business, and had stolen property valued at less than \$100; (2) a 1976 escape conviction based upon the fact that Elswick had “escaped from a work detail in Roanoke County while serving a sentence at the Troutville Correctional Unit”; and (3) a 1977 escape conviction in which it was charged that Elswick had “escaped from the custody of the Patrick Henry Correctional Unit.” (PSR ¶¶ 35-37.) Elswick was sentenced to three years in prison for the burglary offense and to one year for each of the escape convictions. The PSR found that these convictions qualified as “violent felonies,” thus implicating an ACCA sentence enhancement under § 924(e).

Elswick’s counsel did not object to the PSR’s characterization of these prior offenses as violent felonies. The PSR classified Elswick as an armed career criminal and calculated Elswick’s Total Offense Level as 33 and his Criminal History Category as IV, resulting in a guideline range of 188 to 235 months imprisonment. At sentencing, I adopted and applied the PSR findings without

objection and imposed an ACCA-enhanced sentence totaling 188 months as to Counts One, Two, and Four.

2. Trial Counsel's Performance.

Elswick now argues that the various attorneys who represented him in the pretrial, trial, and sentencing proceedings should have argued that Elswick's prior convictions did not qualify as violent felonies for purposes of enhancement under § 924(e). I cannot find under *Strickland* that these attorneys were ineffective.

At the time of both of Elswick's sentencing proceedings in 2005 and 2006, settled law provided that Elswick's prior convictions qualified as predicate offenses for an ACCA enhancement. The Supreme Court had held that

a person has been convicted of burglary for purposes of a § 924(e) enhancement if he is convicted of any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.

Taylor v. United States, 495 U.S. 575, 599 (1990). Under then-controlling Fourth Circuit precedent, a defendant's prior felony escape convictions, without further inquiry into the details of the offense conduct, properly qualified as "violent felonies" for purposes of ACCA status. *United States v. Hairston*, 71 F.3d 115, 117-18 (4th Cir. 1995). In *Hairston*, the court of appeals found that felony escape, even when accomplished by stealth rather than by violence, met the ACCA violent felony requirement under § 924(e)(2)(B)(ii) because such an offense "involves

conduct that presents a serious potential risk of physical injury to another.” *Id.* at 117 (quoting 18 U.S.C.A. § 924(e)(2)(B)).

In light of this controlling precedent, Elswick’s trial counsel reasonably could have believed that an objection to the use of Elswick’s prior convictions for the ACCA enhancement would fail. Counsel cannot be deemed ineffective for failing to raise an objection or make a motion for which there is no obvious legal basis under controlling law. *See United States v. McNamara*, 74 F.3d 514, 517 (4th Cir. 1996). In *McNamara*, the court expressly rejected an argument that counsel has a constitutional duty to preserve for appeal arguments contrary to controlling law, based merely on undecided cases pending on appeal or on petitions for certiorari in which an issue might later be decided in the defendant’s favor. *Id.* at 516-17.

Because Elswick fails to demonstrate as required in *Strickland* that counsel performed deficiently under controlling precedent at the time of his trial and sentencing, I will grant the motion to dismiss as to any claims of ineffective assistance during these stages of the proceedings.

3. Appellate Counsel’s Performance.

The Supreme Court decided *Begay* on April 16, 2008, while Elswick’s first direct appeal was pending. In *Begay*, the Supreme Court revisited the proper definition of ACCA predicate offenses. 553 U.S. at 141-42. The *Begay* court held

that the phrase “presents a serious potential risk of physical injury” as used by ACCA refers to “purposeful, violent, and aggressive manner” similar in kind to those specific crimes listed in § 924(e)(2)(B)(ii). *Id.* at 144-45 (internal quotation marks and citation omitted). The Court expressly rejected the Fourth Circuit’s previous rule that any prior offense involving conduct posing a “potential risk of physical injury” to others could qualify as an ACCA prerequisite. *Id.* at 146-47.

Nine months after *Begay*, the Supreme Court held that a state statute criminalizing both escape from custody and failure to report delineated at least two separate crimes, the latter of which did not qualify as a crime of violence for purposes of an ACCA enhancement. *Chambers v. United States*, 555 U.S. 122 (2009); *see also United States v. Bethea*, 603 F.3d 254, 255-56 (4th Cir. 2010) (vacating defendant’s ACCA sentence based on *Chambers* for reconsideration of whether prior escape conviction was actually failure to report).

Elswick argues that one or more of his appellate counsel could have raised a challenge to Elswick’s ACCA enhancement under *Begay* and performed deficiently in failing to do so.¹ I agree.

¹ The record indicates that, for whatever reason, the court of appeals appointed Elswick at least three different and successive appellate attorneys during the pendency of his initial appeal.

The appellate decision in Elswick's case issued December 31, 2008, eight months after the decision in *Begay*.² Elswick has a viable argument that his escape convictions do not qualify as crimes of violence after *Begay* and *Chambers*. Elswick asserts that both of the escape convictions used to qualify him for ACCA status involved his walking away from a low security prison facility, and the government has offered at this point no evidence to contradict that characterization. Such convictions would fall under Virginia Code § 18.2-479, making it a crime to escape from jail or custody "without force or violence," and as such, do not qualify as crimes of violence under § 924(e)(2)(B).³

Third, the government fails to offer any strategic reason that the attorney or attorneys representing Elswick on appeal at the time the *Begay* decision issued or thereafter chose not to pursue a motion to add arguments under *Begay* to Elswick's appeal. Moreover, I cannot conceive of such a reason, especially in light of the significant impact that ACCA status had on Elswick's custody range. For these reasons, I find that Elswick's allegations satisfy the first prong under *Strickland*.

² The Fourth Circuit expressly recognized that arguments under *Begay* could have been added to his initial appeal. *Elswick*, 364 F. App'x at 22 n.2 ("Begay was issued on April 16, 2008; this court heard oral argument in Elswick's first appeal on October 31, 2008. Thus, Elswick could have raised this issue in a letter to the court pursuant to Fed. R. App. P. 28(j).").

³ Virginia Code Ann. § 18.2-478 defines a separate criminal offense of "escape from jail or custody by force or violence without setting fire to jail." Nothing in the record suggests that Elswick's convictions were for violations of that statute.

Furthermore, given the later decisions applying *Begay* to distinguish between types of escape convictions for ACCA purposes, I find a reasonable probability that a *Begay* challenge to Elswick's ACCA enhancement would have resulted in a different outcome on appeal and at the resentencing. Therefore, I find that Elswick has alleged facts which, if proven at an evidentiary hearing, state a constitutional claim of ineffective assistance under *Strickland*, namely, that at least one of his appellate attorneys performed deficiently in failing to add a claim under *Begay* to Elswick's appeal regarding use of his escape convictions to enhance his sentence under the ACCA.⁴ I will deny the government's motion as to this aspect of Claim (1).

B

A collateral attack under § 2255 may not substitute for an appeal. Claims regarding trial or sentencing errors that could have been, but were not, raised on direct appeal are barred from review under § 2255, unless the defendant shows cause for the default and actual prejudice or demonstrates actual innocence. *See Bousley v. United States*, 523 U.S. 614, 622 (1998). Attorney error can serve as cause for default, but only if it amounts to a violation of the defendant's

⁴ Because *Begay* did not overturn *Taylor*, Elswick has no viable claim under this decision that any of his attorneys was ineffective for failing to argue that his prior burglary conviction was improperly considered as a predicate offense for the ACCA enhancement. *See United States v. Hayes*, 383 F. App'x 309, 309-310 (4th Cir. 2010) (unpublished) (finding that *Begay* did not overrule *Taylor*).

constitutional right to effective assistance. *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000).

The court construes Claim (2) as alleging that the court erred in applying the ACCA enhancement to Elswick's sentence. Because Elswick could have raised this claim on appeal, and failed to do so, the claim is procedurally barred from review under § 2255 absent a showing of cause and prejudice or actual innocence.

As cause to excuse the defaults of Claim (2), Elswick asserts ineffective assistance of counsel. For the reasons stated in Section II-A, I find that Elswick stated a claim of ineffective assistance on appeal with regard to the lawfulness of the ACCA enhancement. This same showing, if proven, may also serve as cause and prejudice to excuse Elswick's default of Claim (2). Accordingly, I will deny the government's Motion to Dismiss as to Claim (2).

Elswick also could have raised Claim (3) on direct appeal, and because he failed to do so, it is procedurally barred from consideration under § 2255. *Bousley*, 523 U.S. at 622.

Even if Elswick could circumvent his procedural default of failing to raise Claim (3), however, this claim must be dismissed on its merits. Elswick asserts that his ACCA sentence is unlawful because the government failed to file a notice under 21 U.S.C.A. § 851 (West 1999) listing the prior convictions on which it intended to rely. The requirements of § 851, however, apply only to enhancements

applied under the drug trafficking statutes in Chapter 21 of the United States Code, and Elswick's sentence was not enhanced under these statutes. Moreover, Elswick received adequate notice of the government's intention to seek an ACCA enhancement, based on the citation of § 924(e) in the Superseding Indictment and the designation in Paragraphs 35-37 of the PSR of the prior convictions proposed as predicate offenses for an ACCA enhancement. *See United States v. O'Neal*, 180 F.3d 115, 125-26 (4th Cir. 1999) (finding that PSR list of predicate offenses constitutes sufficient notice of intent to apply ACCA enhancement under § 924(e)). For this reason, I will grant the Motion to Dismiss as to Claim (3).

III

For the foregoing reasons, the government's Motion to Dismiss (ECF No. 160) is GRANTED IN PART AND DENIED IN PART. It is denied as to Claims (1) and (2) of the § 2255 motion, but granted as to Claim (3). As to Claims (1) and (2), I will set the matter for an evidentiary hearing and appoint counsel to represent the defendant. To the extent practicable, the clerk shall arrange for the defendant to participate in the hearing by videoconferencing.

It is so **ORDERED**.

ENTER: February 21, 2012

/s/ James P. Jones
United States District Judge