UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

UNITED STATES OF AMERICA	)	
	)	
	)	Case No. 2:01CR10045
	)	
v.	)	**OPINION AND ORDER**
	)	
WILLIAM BOGGS,	)	By: James P. Jones
	)	United States District Judge
Defendant.	)	

Eric M. Hurt, Assistant United States Attorney, Abingdon, Virginia, for United States of America; Gray Robinson, Bristol, Virginia, for Defendant.

In this sentencing, I find that the defendant has the necessary predicate convictions for an enhanced sentence as an armed career criminal.

I

The defendant, William Boggs, pleaded guilty in this court to count one of an indictment charging that between May 2001 and June 11, 2001, he possessed a firearm after having been previously convicted of a felony and while he was an unlawful user of a controlled substance, in violation of 18 U.S.C.A. §§ 922(g)(1), (3) (West 2000). The case was referred to a probation officer for preparation of a presentence investigation report ("PSR"). In his report, the probation officer found that Boggs had

at least three previous convictions for violent felonies, committed on occasions different from one another, and thus was subject to an enhanced sentence under the Armed Career Criminal Act of 1984 ("ACCA"), 18 U.S.C.A. § 924(e) (West 2000).

The defendant filed a timely objection to the PSR, contending that he was not subject to the ACCA. This objection was argued at a sentencing hearing on January 10, 2002, and I took the issue under advisement.[1] This opinion resolves the matter.

II

The ACCA provides in pertinent part as follows:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be . . . imprisoned not less than fifteen years . . . .

18 U.S.C.A. § 924(e). The PSR identifies four predicate convictions of violent felonies: (1) in 1979 in Colorado for second degree burglary; (2) in 1979 in Colorado for escape; (3) in 1986 in Colorado for escape; and (4) in 1989 in Virginia for

[1] Resolution of the question makes a substantial difference in the defendant's sentence. Under the ACCA he faces a mandatory minimum sentence of fifteen years (180 months). If the ACCA is not applicable, the defendant's guideline range is seventy-seven to ninety-six months imprisonment.

unlawfully causing bodily injury. The defendant disputes that the three Colorado convictions fall within the ACCA.

The ACCA defines "violent felony" as:

> [A]ny 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, 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). "[W]hen determining whether a particular crime is a violent felony, a sentencing court's inquiry is limited to the elements of the previous criminal convictions; the court is not free to look at the underlying facts of a particular case to see if the conduct was, in fact, violent." *United States v. Woods*, 233 F.3d 482, 485 (4th Cir. 2000) (citing *Taylor v. United States*, 495 U.S. 575 (1990)).

Boggs's first conviction under examination was for second degree burglary in 1979 in Colorado. With respect to this crime, "an offense constitutes 'burglary' for purposes of a § 924(e) sentence enhancement if either its statutory definition substantially corresponds to 'generic' burglary, or the charging papers and jury instructions actually required the jury to find all the elements of generic burglary in order to convict the defendant." *Taylor*, 495 U.S. at 602. "Generic burglary" in this

context means "an unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 598.

The information to which Boggs pleaded guilty in 1979 recites that he was charged with the felony of second degree burglary, in violation of section 18-4-203. That state statute defines the crime as follows:

> A person commits second degree burglary, if the person knowingly breaks an entrance into, enters unlawfully in, or remains unlawfully after a lawful or unlawful entry in a building or occupied structure with intent to commit therein a crime against another person or property.

Colo. Rev. Stat. Ann. § 18-4-203 (1999). The statute was the same in 1979. *See People ex rel. Russel v. Hall*, 620 P.2d 34, 35 n.1 (Colo. 1980).

It is thus clear that Boggs was convicted of "generic burglary" in 1979 and that the conviction is a proper predicate offense under the ACCA.[2]

The other two convictions under question are those for escapes in Colorado, one in 1979 and the other in 1986. The charging papers show that in both cases Boggs was convicted of a felony violation of section 18-8-208, which punishes a person under custody or confinement who "knowingly escapes from said custody or confinement."

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[2] The information charging Boggs was amended by handwriting to delete the word "dwelling" and insert what appears to be the word "building." (Gov't Ex. 1.) Regardless of whether the object of the burglary was a dwelling or not, the statute under which Boggs was convicted itself meets the definition of generic burglary, which is all that is required under *Taylor*.

Colo. Rev. Stat. Ann. § 18-8-208 (1999). The statute has been substantially the same since at least 1973. *See People v. Wines*, 597 P.2d 1056, 1057 (Colo. Ct. App. 1979).

Applying the categorical approach to the crime of escape, rather than the underlying facts of Boggs' escapes, I find that the crime meets the "otherwise" language of § 924(e)(2)(B). *See United States v. Hairston*, 71 F.3d 115, 118 (4th Cir. 1995) (holding that conviction for escape was ACCA predicate because even an escape by stealth may be unintentionally interrupted and provoke violence.).

III

For these reasons, I find that all of the designated convictions are available for use in enhancing the defendant's sentence under § 924(e). Accordingly, it is **ORDERED** that the defendant's objection to the PSR is denied.

ENTER: January 23, 2002

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United States District Judge