NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted May 4, 2023
Decided August 1, 2024

Before

ILANA DIAMOND ROVNER, *Circuit Judge*

JOHN Z. LEE, *Circuit Judge*

DORIS L. PRYOR, *Circuit Judge*

No. 22-2809

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

TERRANCE L. JOHNSON,
Defendant-Appellant.

Appeal from the United States District Court for the Central District of Illinois.

No. 21-cr-40021-001

Sara Darrow,
Chief Judge.

O R D E R

Terrance Johnson pleaded guilty to one count of possessing methamphetamine with intent to distribute, for which he was sentenced to 188 months' imprisonment. *See* 21 U.S.C. § 841(a)(1), (b)(1)(B). He filed a notice of appeal, but appointed counsel asserts that the appeal is frivolous and moves to withdraw, *see Anders v. California*, 386 U.S. 738 (1967), and Johnson has responded, *see* CIR. R. 51(b). (Although we received Johnson's response in April 2023, after his February deadline, we grant leave to file it instanter.) Counsel explains the nature of the case and addresses the potential issues that an appeal of this kind might be expected to involve. Because the analysis appears

thorough, we limit our discussion to the subjects that counsel's brief and Johnson's response explore, *see United States v. Bey*, 748 F.3d 774, 776 (7th Cir. 2014), except that we add a word about the plea colloquy.

Johnson sold meth to an informant in a 2020 controlled buy, fled during multiple arrest attempts, and was apprehended and indicted months after the offense. At Johnson's eventual change-of-plea hearing, the court questioned him to confirm that he understood the statutory sentencing range, the rights he would waive by pleading guilty, and the nature of the charge. The government confirmed that it would not seek statutory sentencing enhancements previously mentioned in the indictment (as distinct from enhancements under the advisory Guidelines) and then provided a factual basis for the charge. The court accepted the plea.

Later, at sentencing, the district court reconfirmed that no statutory enhancements were at issue and that the statutory range thus was 5 to 40 years' imprisonment. *See* 21 U.S.C. § 841(b)(1)(B). Johnson's advisory guidelines range was 188 to 235 months' imprisonment. To start, the court adopted the presentence investigation report's finding that Johnson distributed 35 to 50 grams of meth, yielding a base offense level of 28. *See* U.S.S.G. § 2D1.1(a)(5), (c)(6). The offense level jumped to 34 because Johnson's two Illinois robbery convictions made him a career offender and his meth crime carried a statutory maximum of 40 years. *See id.* § 4B1.1(a), (b)(2). Yet this offense level was reduced by 3 for acceptance of responsibility, *see id.* § 3E1.1, for a total of 31. Both the career-offender finding and Johnson's points from prior convictions independently placed him in criminal-history category VI. *See id.* § 4B1.1(b).

Johnson requested a below-range sentence of 180 months' imprisonment, arguing that his many prior convictions stemmed from an "attitude problem" and a tendency to "mouth off" to police. But the district court, weighing the sentencing factors under 18 U.S.C. § 3553(a), settled on 188 months, the bottom of the guidelines range. The "real conversation," the court explained, was about Johnson's history—"over a decade of almost uninterrupted and undeterred criminal behavior" punctuated by incarceration and mostly uncompleted terms of supervision. This rose far above a mere "attitude problem" and could not be blamed on police scrutiny. A "severe penalty," said the court, was needed to protect the public and deter Johnson more effectively. As mitigating factors, however, the court listed Johnson's various unresolved mental-health issues and his abandonment by both biological parents.

Turning to today's appeal and *Anders* brief, counsel does not tell us (as he should) whether he consulted Johnson to find out if he wants to withdraw his guilty plea. *See United States v. Konczak*, 683 F.3d 348, 349 (7th Cir. 2012); *United States v. Knox*,

287 F.3d 667, 671 (7th Cir. 2002). But this omission does not require us to deny the *Anders* motion. Because Johnson did not move in the district court to withdraw his plea, we would review only for plain error. *See United States v. Davenport*, 719 F.3d 616, 618 (7th Cir. 2013). And a challenge to the plea would be frivolous because the hearing transcript shows the court substantially complied with Rule 11 of the Federal Rules of Criminal Procedure. *See id.* While we note one omission—the court did not tell Johnson he had the right to compel the attendance of witnesses—this error would be considered harmless because it did not affect Johnson's substantial rights. *See* FED. R. CRIM. P. 11(b)(1)(E), (h). He would have known of his right of compulsory process because he often faced criminal charges and testified here that his attorney had fully discussed the case with him. *See United States v. Stoller*, 827 F.3d 591, 598 (7th Cir. 2016); *Davenport*, 719 F.3d at 618. Moreover, the court informed Johnson of his right to "call witnesses to testify," and there is no reason to think he was unaware that this included the power to *compel* testimony. *Cf. Davenport*, 719 F.3d at 618 (failure to inform defendant he could testify in own defense insubstantial because court told him he could call witnesses generally).

Counsel next considers the district court's § 3553(a) analysis, and we agree that a challenge to it would be frivolous. The court's explanation sufficiently explained how Johnson's long criminal history showed an elevated risk of future crime, thus warranting a "severe penalty" to deter him and protect the public. *See* 18 U.S.C. § 3553(a)(1), (2)(B)–(C); *United States v. Barr*, 960 F.3d 906, 914 (7th Cir. 2020). And the court considered Johnson's mitigating arguments—about his mental health and "attitude problem"—and found they did not outweigh the aggravating factors.

We also agree with counsel that a substantive challenge to Johnson's sentence would go nowhere. We presume within-range sentences to be reasonable and see nothing in the record to undermine that presumption here. *See United States v. Sunmola*, 887 F.3d 830, 841 (7th Cir. 2018).

Finally, in his Rule 51(b) response, Johnson questions his career-offender status under U.S.S.G. § 4B1.1. He highlights federal robbery statutes that expressly cover the taking of property by threats to bodily injure a person *or* damage property. *See, e.g.*, 18 U.S.C. § 1951. Those statutes fall outside the elements clause of the career-offender Guideline, which requires a person—not property—to be the recipient of the actual, attempted, or threatened force. *Bridges v. United States*, 991 F.3d 793, 802 (7th Cir. 2021). This same logic, he says, applies to Illinois robbery. *See* 720 ILCS 5/18-1(a).

But this argument would be frivolous because it is not plain that Illinois robbery can be based on the use or threat of force against only property. (Because Johnson did

not raise this contention in the district court, our review would be limited to plain error. *See United States v. Hyatt*, 28 F.4th 776, 781–82 (7th Cir. 2022).) Illinois decisions describe robbery in terms of force against persons. *See, e.g.*, *People v. Dennis*, 692 N.E.2d 325, 334 (Ill. 1998) ("gist" of robbery is "force or fear of violence directed at the victim in order to deprive him of his property"), *quoted in People v. Johnson*, 47 N.E.3d 1131, 1137 (Ill. App. Ct. 2015); *People v. Pierce*, 854 N.E.2d 311, 315 (Ill. App. Ct. 2006) ("[W]hen an article is stolen without a threat of violence to the person, the crime will be held to be theft from the person."), *j. aff'd*, 877 N.E.2d 4108 (Ill. 2007). We are aware of no Illinois robbery cases based on the use or threat of force solely against property. Indeed, the Eighth Circuit has rejected a similar argument about Illinois robbery. *See United States v. Martin*, 15 F.4th 878, 884 (8th Cir. 2021). Given this caselaw, we would not find plain error here.

We postponed resolution of counsel's motion to withdraw pending the court's then-forthcoming decisions in *United States v. Brown*, 74 F.4th 527 (7th Cir. 2023), *cert. denied*, 144 S. Ct. 1019 (2024), and *United States v. Carr*, 107 F.4th 636 (7th Cir. 2024), in order to determine whether those decisions might otherwise cast doubt on whether Illinois robbery constitutes a crimes of violence for purposes of the career-offender guideline. But neither those decisions, nor this court's recent decision in *United States v. Smith*, No. 23-1272, 2024 WL 3506195 (7th Cir. July 23, 2024), call into question whether Johnson was properly deemed a career offender based on his prior Illinois robbery convictions.

Therefore, we GRANT counsel's motion to withdraw and DISMISS the appeal. Johnson also has filed a motion for substitution of counsel, which we DISMISS as moot.