IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE	)	
	)	
v.	)	I.D. # 1212002650
	)	
DAVID C. DAVIS,	)	
	)	
Defendant.	)	

Date Submitted: March 21, 2016
Date Decided: April 26, 2016

ORDER DENYING DAVID C. DAVIS'S MOTION FOR POSTCONVICTION RELIEF

This 26th day of April, 2016, upon consideration of Defendant's Motion for Postconviction Relief (the "Motion") under Superior Court Criminal Rule 61 ("Rule 61") and the record in this case, it appears to the Court that:

1. David C. Davis pleaded guilty on March 20, 2014 to one count of Reckless Endangering First Degree and one count of Arson Third Degree. In the plea agreement he signed, Davis agreed he was a habitual offender under 11 *Del. C.* §4214(a) because he previously was convicted of several felonies, specifically Aggravated Menacing in 2010, Assault Second in 2003, Conspiracy Second in 2003, Escape Second in 2002, Burglary Second in 1982, and an unspecified Class E felony in 1981. The State filed its motion to declare Davis a habitual offender on

March 24, 2014, which this Court granted by order dated June 6, 2014.[1] Davis was sentenced on that date to (i) ten years at Level V for the Reckless Endangering charge and (ii) one year at Level V, suspended for diminishing levels of partial confinement and probation for the Arson charge.[2] Five years of the sentence on the Reckless Endangering charge was minimum mandatory time under Section 4214(a) because Davis is a habitual offender and Reckless Endangering is a violent felony under 11 *Del. C.* § 4201(c).[3]

2. Davis did not directly appeal his sentence to the Delaware Supreme Court. He did, however, file a number of motions to modify his sentence under Superior Court Criminal Rule 35 ("Rule 35"). The first such motion was filed on July 1, 2014 and was denied by the Court on July 17, 2014.[4] Davis's second Rule 35 motion was filed on September 21, 2015 and denied on October 1, 2015.[5] Davis appealed the order denying his second Rule 35 motion. On January 28,

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[1] D.I. 19.
[2] *State v. Davis*, ID No. 1212002650 at 1-2 (Del. Super. June 10, 2014) (ORDER) (Sentencing).
[3] *See* 11 *Del. C.* § 4214(a) ("Notwithstanding any provision of this title to the contrary, any person sentenced pursuant to this subsection shall receive a minimum sentence which shall not be less than the statutory maximum penalty provided elsewhere in this title for the fourth or subsequent felony which forms the basis of the State's petition to have the person declared a habitual criminal except that this minimum provision shall apply only when the fourth or subsequent felony is a Title 11 violent felony, as defined in § 4201(c) of this title."); *see also,* 11 *Del. C.* §§ 604 (Reckless Endangering is a Class E Felony); 4201(c) (Reckless Endangering First Degree is a violent felony); 4205(b)(5) (five year maximum penalty for a Class E Felony).
[4] D.I. 21, 22.
[5] D.I. 35, 36.

2016, the Delaware Supreme Court entered an order affirming this Court's order denying Davis's motion to modify his sentence.[6]

3. Davis also filed a motion for postconviction relief on August 15, 2014.[7] This Court summarily denied that motion on December 23, 2014, reasoning that Davis's claims of ineffective assistance of counsel were meritless and, in any event, failed to establish prejudice.[8] Davis did not appeal the order denying his first postconviction motion. He filed his current Motion on March 21, 2016. In it, Davis contends, in essence, that his status as a habitual offender and his sentence under 11 *Del. C.* § 4214(a) were illegal under the United States Supreme Court's decision in *Johnson v. United States*.[9] Davis argues that the decision in *Johnson* constitutes a "newly developed fact" that satisfies the procedural requirements of Rule 61, which otherwise would bar the Motion as untimely and repetitive.[10]

4. The Motion, although styled as one for post-conviction relief, actually seeks to modify or reduce Davis's sentence on the theory that the sentence is

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[6] D.I. 43.
[7] D.I. 23.
[8] D.I. 29.
[9] 135 S. Ct. 2551 (2015).
[10] *See* Super. Ct. Crim. R. 61(i)(1) (barring motions filed more than one year after judgment of conviction is final unless the motion satisfies the exceptions contained in Rule 61(i)(5) or (d)(2)(i)-(ii)); 61(i)(2) (no second or subsequent motion permitted unless the motion satisfies the exceptions contained in Rule 61(d)(2)(i)-(ii)).

illegal. Such a motion does not fall under Rule 61, but rather under Rule 35.[11] In light of Davis's status as a self-represented litigant, I will treat his Motion as a motion under Rule 35(a) and resolve the merits of his argument.

5. Although a motion to reduce or modify a sentence under Rule 35(b) must be filed within 90 days after the sentence is imposed, the 90-day bar does not apply to motions alleging a sentence is illegal.[12] Davis argues that his classification as a habitual offender, and the sentence imposed under the habitual offender statute, is unconstitutional under *Johnson v. United States*. Davis appears to contend that his classification as a habitual offender should be reevaluated because, he posits, some of the felonies for which he previously was convicted were not violent felonies.[13]

6. Davis misunderstands both the reach and the reasoning of *Johnson*, as well as the statute under which he was sentenced. In *Johnson*, the United States Supreme Court held unconstitutional a portion of the Armed Career Criminal Act ("ACCA"), which imposed increased sentences on a person convicted of illegally possessing a firearm if that person previously had been convicted of three or more violent felonies. At issue in *Johnson* was the ACCA's definition of a violent felony as, among other things, an act involving "conduct that presents a serious

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[11] *Compare* Super. Ct. Crim. R. 35 ("Correction or reduction of sentence"), *with* Super. Ct. Crim. R. 61(a) ("This rule governs the procedure on an application . . . seeking to set aside a judgment of conviction or a sentence of death . . . .").
[12] Super. Ct. Crim. R. 35(a).
[13] Opening Br. in Support of Motion ("Opening Br.") at 2-5.

potential risk of physical injury to another."[14] This "residual clause" definition of a violent felony was, the Court concluded, unconstitutionally vague under the Fifth Amendment because it failed to give ordinary people fair notice of the conduct it punished and was so standardless that it invited arbitrary enforcement.[15] The Court in *Johnson* overruled previous United States Supreme Court precedent that had adopted a "categorical approach" for courts to use in determining whether a particular felony fell within the residual clause of the ACCA. Under the categorical approach jettisoned in *Johnson*, a reviewing Court charged with applying the ACCA's residual clause was required to imagine "the kind of conduct that the crime involve[d] in 'the ordinary case,' and to judge whether that abstraction present[ed] a serious potential risk of physical injury."[16] In *Johnson*, the Court held that this categorical approach invited arbitrary enforcement of the ACCA and that the residual clause denied fair notice to defendants of the conduct punished by the act.[17]

7. Davis contends that Delaware's habitual offender statute, Section 4214, "codified" the ACCA. Confusingly, he then seems to argue that three of the felony convictions forming the basis of his habitual offender status should be re-

[14] 135 S. Ct. at 2555-56 (citing 18 U.S.C. § 924(e)(B)).
[15] 135 S. Ct. at 2557.
[16] *Id.*
[17] *Id.*

evaluated under the categorical approach rejected in *Johnson*.[18] Neither argument makes sense under Section 4214, particularly the subsection of that statute under which Davis was sentenced. This is true for two reasons.[19]

8. First, Davis was not sentenced as a habitual offender under the portion of Section 4214 that imposes increased sentences for defendants convicted of a certain number and type of violent felony.[20] Rather, Section 4214(a), which formed the basis for Davis's enhanced sentence, designates as a habitual offender any person who has been convicted of four or more felonies, irrespective of whether the felonies are violent. Although the five year mandatory portion of Davis's sentence did attach because the charge on which he was sentenced was a violent felony under 11 *Del. C.* § 4201(c), Davis does not dispute that Reckless Endangering First Degree is a violent felony.[21]

9. Second, even if Davis is arguing that Section 4214(a) is unconstitutionally vague in its imposition of minimum mandatory sentences when the charge for which a habitual offender is sentenced is a violent felony, his reliance on *Johnson* is misplaced. Section 4214 did not codify the ACCA and, in fact, the statutes are entirely different. The language in the residual clause that was

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[18] Opening Br. at 5.
[19] There is a third reason, *i.e.* that the categorical approach Davis urges this Court to adopt was rejected in *Johnson*. In view of my decision here, however, that issue is moot.
[20] 11 *Del. C.* § 4214(b), (c).
[21] *See* Opening Br. at 5 (seeking reconsideration of whether Conspiracy Second, Escape Second, or Burglary Second are violent felonies).

declared unconstitutional in *Johnson* does not appear in Section 4214. Delaware's habitual offender statute does not require the sentencing court to make any judgment regarding whether a particular crime is "violent." Instead, the General Assembly delineated, in Section 4201(c), precisely what crimes constitute violent felonies. Unlike the residual clause in the ACCA, Section 4214 is not so indefinite that it runs the risk of arbitrary or inconsistent enforcement, nor does it fail to provide a defendant notice of the type of conduct that will be punished by the act.[22]

Accordingly, whether Davis's Motion is evaluated under Rule 61 or under Rule 35, it lacks merit. **NOW, THEREFORE, IT IS ORDERED** that Davis's second motion for postconviction relief is **DENIED**.

Abigail M. LeGrow, Judge

Original to Prothonotary
cc: Barzilai K. Axelrod, Deputy Attorney General
Investigative Services Office
David C. Davis, *pro se*, SBI # 164717

[22] *See Priest v. State*, 128 A.3d 993 (Del. 2015) (TABLE) (holding that *Johnson* does not support the claim that Delaware's habitual offender statute is unconstitutional); *State v. Chambers*, 2015 WL 9302840, at *2 (Del. Super. Dec. 16, 2015) ("Delaware's habitual offender statute is not unconstitutionally vague, because there is no judicial discretion that would encourage arbitrary and erratic outcomes, and a defendant has notice before he is determined to be a habitual offender that he has a felony conviction.").