

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-6535

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

TIMOTHY TYRONE HORTON,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. James C. Fox, Senior District Judge. (5:08-cr-00060-F-1; 5:13-cv-00100-F)

Submitted: October 28, 2016

Decided: November 4, 2016

Before AGEE and THACKER, Circuit Judges, and DAVIS, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Timothy Tyrone Horton, Appellant Pro Se. Jennifer P. May-Parker, Assistant United States Attorney, Seth Morgan Wood, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Timothy Tyrone Horton seeks to appeal the district court's order accepting the recommendation of the magistrate judge and denying relief on his 28 U.S.C. § 2255 (2012) motion. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B) (2012). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2012). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. Slack v. McDaniel, 529 U.S. 473, 484 (2000); see Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the motion states a debatable claim of the denial of a constitutional right. Slack, 529 U.S. at 484-85.

On appeal, Horton contends that his Armed Career Criminal Act ("ACCA") enhancement was improperly based on his North Carolina convictions for common law robbery. Following the district court's order denying relief on this issue, we decided United States v. Gardner, 823 F.3d 793, 803-04 (4th Cir. 2016),

holding that North Carolina common law robbery is not categorically a crime of violence for ACCA purposes. Our opinion in Gardner was not extant when the district court previously ruled on the issue.

After Horton filed this appeal, however, he sought and received resentencing in the district court without the ACCA enhancement. Horton was resentenced to 120 months of imprisonment as noted in his amended criminal judgment filed on September 30, 2016. Thus, Horton's appeal is moot. Accordingly, we deny a certificate of appealability and dismiss the appeal as moot. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED