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Immigration Case Notes for Massachusetts Criminal Defense Attorneys
Feb - March - April 2014

February 2014:

U.S. Court of Appeals for the First Circuit

United States v. Fish, No. 12-1791, 2014 U.S. App. LEXIS 3696 (1st Cir. Feb. 26, 2014)

At issue in this case was whether the Massachusetts offenses of breaking and entering (daytime or nighttime) with intent to commit a felony ("B&E/felony"), M.G.L. ch. 266, §§ 16, 18, assault and battery with a dangerous weapon ("ABDW"), M.G.L. ch. 265, § 15A, and possession of burglarious tools, M.G.L. ch. 266, § 49, constitute "crimes of violence" as defined at 18 U.S.C. § 16. While *Fish* is a criminal appeal, this issue is of great importance to noncitizens because one category of aggravated felony (a ground of deportability that results in virtually certain deportation and permanent exile) is a crime of violence as defined at 18 U.S.C. § 16 with a sentence of imprisonment of one year or more, suspended or imposed. 8 U.S.C. § 1101(a)(43)(F).

Fish appealed his federal conviction for possession of body armor after having been convicted of a "crime of violence," a crime codified at 18 U.S.C. § 931. On appeal he argued that none of his prior convictions, listed above, constituted a crime of violence under 18 U.S.C. § 16. The court of appeals agreed and vacated his conviction.

18 U.S.C. §16 defines a crime of violence as:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

In order to determine whether a particular state offense matches this federal definition, the Court employed the categorical approach, looking to the statutory definition of the state offense "to determine whether the conduct criminalized by the statute, including the most innocent conduct," necessarily matches the elements of the federal "crime of violence."

Turning to the B&E/felony offenses, the Court concluded that the minimum conduct punishable under the Massachusetts statute did not create a substantial risk that physical force would be used against person or property. The Court of Appeals rejected the government's argument that the Court should look only to the "typical case" charged under the statute, which, according to the government, involved this risk of force. Instead, the Court emphasized that it would consider the minimum conduct, which included "nonviolent entries of rarely-occupied structures through unlocked doors or windows," when analyzing the offense under subsection (b). The government did not argue that the B&E/ felony statutes fell under subsection (a).

Similarly, the Court looked to the minimum conduct punishable under Massachusetts ABDW. The Court began by noting that subsection (a) does not cover Massachusetts ABDW, because ABDW does not have as an element the use of "violent force." Rather, ABDW criminalizes even the slightest touching with a dangerous weapon. The Court turned to subsection (b) and similarly concluded that ABDW covered conduct that would not satisfy that subsection. Applying the U.S. Supreme Court's holding in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), the Court concluded that to meet the definition under subsection (b) there must be a substantial risk that violent force will be intentionally used – reckless use of violent force is insufficient. Because Massachusetts ABDW criminalizes both intentional and reckless conduct, the Court held that the offense did not categorically match the definition of crime of violence at subsection (b). The Court again declined to accept the government's argument that reckless ABDW was not the "typical case" of ABDW and should be ignored. The Court may have left open the possibility that an ABDW conviction could still constitute a crime of violence, if the record of conviction (complaint, plea colloquy, etc.) established that the ABDW was intentional rather than reckless.

Finally, the Court looked to possession of burglarious tools and quickly concluded that it included neither an element of force under (a) or the substantial risk that violent force would be used under (b).

Note: The government has sought, and been granted, additional time to submit a request for rehearing en banc.

Practice Tips

- It is still safest, if possible, for criminal defense counsel to avoid a sentence of imprisonment of one year or more, suspended or imposed, on B&E, ABDW and possession of burglarious tools. This is due to the reasons discussed below and the risk that your client will end up in removal proceedings outside of the First Circuit, either because she is arrested in another jurisdiction or ICE transfers her to another jurisdiction. Immigration law is federal and only those immigration judges sitting in the First Circuit are bound to follow the *Fish* decision.

- A conviction for breaking and entering a *building* with a sentence of imprisonment of one year or more, suspended or imposed, remains an aggravated felony under a different provision of the aggravated felony statute. 8 U.S.C. § 1101(a)(43)(G) (theft offense or burglary offense with sentence of one year or more is aggravated felony); *see Taylor v. United States*, 495 U.S. 575, 599 (1990) (burglary defined as "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime").

- Arguably the decision in *Fish* means that Massachusetts ABDW can never be a crime of violence in the First Circuit, even if the record of conviction establishes that the offense involved intentional (rather than reckless) ABDW. There is a risk, however, that immigration officials will argue that a conviction for Massachusetts ABDW with a one year sentence of imprisonment (suspended or imposed) is an aggravated felony if the record of conviction (complaint, docket sheet, plea colloquy, jury verdict) shows that the offense involved intentional, rather than reckless, ABDW. Therefore, if defense counsel is required to resolve an ABDW case with a sentence of imprisonment of one year or more, defense counsel should make clear on the record that the level of intent was reckless. Or if that is not possible, keep the record vague as to the level of intent involved.

- Possession of burglarious tools should never be considered an aggravated felony, regardless of the sentence. To take the most conservative perspective, however, there is some risk that it could be considered an attempted theft offense. An attempted theft offense would become an aggravated felony if the client received a sentence of imprisonment of one year or more, suspended or imposed.

Massachusetts Appeals Court (unpublished)

Commonwealth v. Dwayne Person, 2014 Mass. App. Unpub. LEXIS 194 (Feb. 18, 2014)

In this unpublished decision, the Appeals Court declined to extend the reasoning in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), to the failure to advise regarding potential future sentence enhancements as a result of criminal convictions. The court found that such sentence enhancements were collateral to the original plea and further that counsel's performance did not fall measurably below that of an ordinary fallible lawyer in failing to advise.

Board of Immigration Appeals

Matter of Abdelghany, 26 I. & N. Dec. 254 (BIA 2014)

This decision from the Board of Immigration Appeals (BIA or the Board) is highly technical. For purposes of criminal defense counsel, here are the relevant points:

- Prior to April 1, 1997, there existed a generous form of discretionary relief from removal (i.e. a defense to deportation) for lawful permanent residents (LPRs – green card holders). This relief, known as a "212(c) waiver" after the former provision of the Immigration and Nationality Act, allowed an LPR to waive even certain aggravated felony convictions.

- There has long been confusion about who can still use the former 212(c) waiver.

- Under *Abdelghany*, an LPR who is subject to removal for a conviction (as the result of a guilty plea or a trial) that occurred prior to April 1, 1997 *may* be eligible to apply for 212(c). If you have a client who falls into this category, contact the IIU or an immigration attorney for assistance in determining eligibility.

- This decision is of most significance to LPR clients with aggravated felony convictions prior to April 1, 1997. Unless eligible for 212(c) relief, they would likely have no defense to deportation.

- An LPR cannot apply for both 212(c) relief and the current most common defense to deportation for LPRs, called cancellation of removal. And 212(c) cannot be used to defend against deportation based on convictions that occurred after April 1, 1997. Therefore, a client with an old aggravated felony conviction (which would bar most of the current defenses to deportation) who picks up a new criminal charge that would make him deportable (and could not be waived under 212(c)) would be left again with no defense to deportation.

Practice Tip

Defense counsel who have clients with aggravated felony convictions that pre-date April 1, 1997, should not assume that the client has no defense to deportation – or that additional criminal convictions could not carry additional severe immigration consequences. Instead, counsel should seek expert immigration assistance from the IIU or immigration counsel.

March 2014:

Massachusetts Appeals Court

Commonwealth v. Broomfield, 2014 Mass. App. Unpub. LEXIS 281 (March 6, 2014)

The defendant, Karl Broomfield, was a lawful permanent resident who had come to the U.S. as a child. In 2008, Broomfield pleaded guilty to two counts of distribution of a class D substance, school zone charges, and firearms charges. The distribution charges are aggravated felonies subjecting Mr. Bloomfield to virtually automatic deportation and permanent exile. After his guilty plea, he was deported.

Mr. Broomfield filed a motion to vacate his guilty plea under *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), alleging ineffective assistance of counsel based on the fact that his trial counsel had not asked about his immigration status, did not provide information about the immigration consequences, and had he known about the presumptively mandatory deportation, he would have gone to trial.

The trial judge denied Mr. Broomfield's motion without holding an evidentiary hearing and based his decision on the fact that Mr. Broomfield had received the statutory immigration warnings under M.G.L ch.278 §29D and that he did not have a substantial ground of defense to pursue at trial.

The appeals court reversed the decision and remanded the case for an evidentiary hearing. First, the appeals court reiterated the finding in *Commonwealth v. Clarke* that the statutory warnings are not an adequate substitute for trial counsel's duty to advise the defendant about possible immigration consequences. 460 Mass. 30, 48-49 n.20 (2011). A failure to ask about a defendant's immigration status is sufficient to show deficient performance. Second, in response to the Commonwealth's argument that the defendant's affidavits were self-serving and should not be credited, the appeals court agreed that the trial judge did not have to credit the affidavit and that the Commonwealth is entitled to test the veracity of the claims. However, the court held that because the defendant's affidavits provided a "substantial showing of both ineffective assistance…as well as prejudice…the appropriate course of action is for the judge to hold an evidentiary hearing, and to make findings and rulings."

April 2014:

Supreme Judicial Court

Silva v. Carmel, 468 Mass. 18 (2014)

In this case, the Court was asked to interpret the phrase "residing together in the same household" as used in M.G.L. ch. 209A, § 1 – the statute governing the issuance of abuse prevention orders. This interpretation is of great importance under immigration law, because the immigration statute imports state law when considering whether a criminal offense falls within the domestic violence ground of deportability under 8 U.S.C. § 1227(a)(2)(E). A non-citizen is deportable if convicted of a crime of violence "against a person who is protected from that individual's acts under the domestic or family violence laws of . . . any State." *Id.* Thus, a non-citizen convicted of an offense against a person protected under M.G.L. ch. 209A would be deportable for having a conviction for a crime of domestic violence.

The question in *Silva* was whether two women who resided together in a State-licensed residential facility, but had no marriage, blood, or romantic relationship were "household members" within the meaning of M.G.L. ch. 209A, § 1. The Court concluded they were not and that the abuse prevention order was improperly issued. After acknowledging that courts "have allowed individuals in various types of familiar relationships to seek protection from abuse," the Court concluded that the two were not household members because "there is no evidence that there was a socially interdependent relationship between the two." The women did not choose to live together, but instead resided in the home "solely" because they were each placed there by the Department of Developmental Services. The Court held that the phrase "residing together in the same household" must be interpreted in the context of the other definitions of "family or household members." Because the two women "are not family members, are not in a family-like relationship, with each other, did not marry or have a child, and were not involved in a significant dating relationship or engagement relationship," their relationship did not qualify them as "household members." This conclusion, the Court found, was consistent with the purpose of the statute "to prevent violence in the family setting," not "acquaintance or stranger violence."

Practice Tip

This decision narrows the scope of Massachusetts offenses that could be considered crimes of domestic violence under immigration law. While not the precise holding in this case, there are now strong arguments that crimes of violence involving roommates who have no romantic or familial relationship should not be considered crimes of domestic violence for immigration purposes. That being said, defense counsel should be very cautious when resolving assault cases where the alleged victim lives or lived with the defendant – regardless of the relationship. Defense counsel should consult with an immigration attorney or the IIU prior to resolving the case.

Board of Immigration Appeals

Matter of Sierra, 26 I & N Dec. 288 (BIA 2014)

The respondent, Siegfred Ara Sierra, was a lawful permanent resident of the U.S. In 2003, he was convicted of attempted possession of a stolen vehicle in violation of Nevada law. Subsequently, he was charged as being removable as an aggravated felon based on this conviction.[1] Mr. Sierra contested this finding and the Board ultimately found that the Nevada statute is not categorically an aggravated felony under 8 U.S.C §1101(a)(43)(G) (theft offenses) and (U)(attempt).

Under the Nevada statute, attempted possession of a stolen vehicle requires that the defendant have either knowledge that the vehicle was stolen or "reason to believe" the vehicle was stolen. Therefore, a person can be convicted of the offense if, under the circumstances, a reasonable person would know that it was a stolen vehicle.

Under federal immigration law, to be convicted of an aggravated felony theft offense, the state offense must match the generic definition of a "theft offense." The generic definition requires that the person intend to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent. *See Matter of Garcia-Madruga*, 24 I & N Dec. 436 (BIA 2008). Under Ninth Circuit case law, where "intent to deprive" is not an element of a receiving stolen property statute, such intent can be inferred if the required scienter is "knowledge." Thus, any receiving stolen property offense that requires the person to have knowledge that the property was stolen, could be an aggravated felony.

However, under the Nevada statute, a person need only have "reason to believe" the property was stolen to be convicted. The Board found that "no valid inference may be drawn that the offender intended to deprive the true owner of the rights and benefits of ownership where he was not actually aware of the stolen character of the item received, but merely should have been aware of that fact from the circumstances." *Matter of Sierra*, 26 I & N Dec. 288, 292 (BIA 2014). Therefore, the mental state of "reason to believe" is insufficient to establish that the offense was a theft offense within the aggravated felony definition. Because it was not clear from the record of conviction under which section of the statute Mr. Sierra had been convicted, the court held that he had not been convicted of an aggravated felony.

<u>Practice Tip</u>

In Massachusetts, M.G.L ch. 266 §60 (receiving stolen property) requires that the alleged offender have knowledge that the property was stolen. However, there are other theft offenses, such as receiving a stolen motor vehicle, M.G.L. ch. 266 §28, that only require a "reason to believe" mental state. For any theft offense in which the mental state can be knowledge OR reason to know/believe, if the defense attorney can make it clear on the record that the defendant pled to the later, you may provide some protection for clients against aggravated felonies or other immigration consequences.

[1] The decision does not indicate the length of Mr. Sierra's sentence, but in order to be an aggravated felony, he must have received a term of imprisonment, suspended or committed, of a year or more.