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Immigration Case Notes for Massachusetts Criminal Defense Attorneys
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U.S. Court of Appeals for the First Circuit (unpublished)

Mejia v. Holder, No. 13-2202, 2014 U.S. App. LEXIS 11956 (June 25, 2014)

Mr. Mejia challenged the determination of the Immigration Judge and the Board of Immigration Appeals (BIA) that he was ineligible for relief from removal because his conviction for shoplifting under M.G.L. ch. 266, § 30A constituted a “crime involving moral turpitude” (CIMT). Though the First Circuit ultimately declined to answer the question, instead remanding the case to the BIA to engage in the appropriate legal analysis, the decision provides support for the argument that shoplifting under Massachusetts law is not always a CIMT.

The appeals court laid out the method for determining whether an offense constitutes a CIMT. The first step requires an analysis of the particular statute at issue. If it is clear from the face of the statute that all the conduct it proscribes fits the definition of moral turpitude, the analysis ends. This is called the categorical approach. If the statute punishes multiple offenses and only some of those offenses would constitute a CIMT, then the reviewing court may “look to the record of conviction – the indictment, plea, verdict, and sentence, to determine the nature of the [] conviction.” This second step is called the modified categorical approach.

After laying out this framework, the court of appeals noted that in order for a theft offense to be a CIMT, the offense must involve the intent to permanently deprive the owner, citing *Patel v. Holder*, 707 F.3d 77 (1st Cir. 2013). The court then stated: “The question faced by the BIA was whether the Massachusetts shoplifting statute of conviction requires an intent to permanently deprive a victim of property.” The court observed that at least one subsection of the Massachusetts shoplifting statute expressly requires the intent to permanently deprive (“any person who intentionally removes a shopping cart . . . with the intention of permanently depriving the merchant . . .”). It would have been “appropriate” for the BIA to apply the modified categorical approach under these circumstances, the court held, supporting the argument that not all convictions for shoplifting under M.G.L. ch. 266, § 30A would constitute CIMTs. Because the BIA never looked at the Massachusetts statute, instead merely citing a BIA decision that examined a Pennsylvania shoplifting statute, the First Circuit remanded the case to the BIA to engage in the appropriate analysis.

Practice Tip

This decision provides support for immigration attorneys arguing that a conviction for Massachusetts shoplifting is not always a CIMT – and perhaps only a CIMT if the client is convicted of stealing a shopping cart. *However*, there are significant reasons for criminal defense attorneys to be cautious:

First, there is BIA case law to support the position that even where the statute itself does not expressly require an intent to permanently deprive, if such intent can be assumed from the elements of the offense, that's enough to constitute a CIMT. *In re Jurado-Delgado*, 24 I. & N. Dec. 29 (BIA 2006) (“A conviction for retail theft under Pennsylvania law requires proof that the person took merchandise offered for sale by a store without paying for it and with the intention of depriving the store owner of the goods. Under these circumstances, we find that the nature of the offense is such that it is reasonable to assume that the taking is with the intention of retaining the merchandise permanently.”). This case law is arguably undermined by more recent Supreme Court and federal appeals court decisions, but it remains the law in the BIA.

Second, the BIA takes the position that where a noncitizen has the burden to show eligibility for some benefit (e.g. a defense to deportation or an application for lawful permanent resident status), he must prove that his offense is *not* a CIMT. This may be difficult where the noncitizen is convicted under a statute that covers both CIMTs and non-CIMTs. Again, this case law may be undermined, but it remains the current law.

Finally, immigration courts across the country have consistently treated shoplifting as a CIMT (regardless of the particular terms of the statute) and our indigent clients are likely to be in removal proceedings without legal representation, so that they may not be able to make the necessary legal arguments that their shoplifting conviction is not a CIMT.

Massachusetts Appeals Court (unpublished)

Commonwealth v. Correia, No. 12-P-1358, 2014 Mass. App. Unpub. LEXIS 697 (June 3, 2014)

The Massachusetts appeals court reversed the grant of a motion to withdraw a November 1, 1996 guilty plea based on *Padilla v. Kentucky*. In so holding, the court found that the right to be advised of immigration consequences made retroactive by *Commonwealth v. Sylvain*, 466 Mass. 422 (2013) to April 1, 1997, did not extend any earlier. With little explanation, the court rejected the argument that the right should be extended back to September 30, 1996, the effective date of amendments to the aggravated felony definition by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Mr. Correia's November 1996 plea to two years in the House of Correction, six months to serve, for burglary and assault and battery with dangerous weapon, constituted an aggravated felony under these September 1996 amendments, and therefore made him deportable and barred him from virtually all defenses to deportation.

Commonwealth v. Garcia, No. 13-P-12, 2014 Mass. App. Unpub. LEXIS 701 (June 4, 2014)

The appeals court affirmed the grant of a motion for new trial based on ineffective assistance under *Padilla*. In 2004, Mr. Garcia, a lawful permanent resident, pled guilty to assault and battery by means of a dangerous weapon and indecent assault and battery on a person fourteen or

over and was sentenced to 365 days in jail, 264 days suspended. Such a disposition gave him an aggravated felony conviction, 8 U.S.C. § 1101(a)(43)(F), which made him both deportable and ineligible for virtually all defenses to deportation. He moved to vacate that plea and the trial court allowed the motion without a hearing. The Commonwealth appealed.

On appeal, the Commonwealth conceded that defense counsel had failed to give Mr. Garcia accurate advice and agreed that no evidentiary hearing was required to resolve this motion, but argued that Mr. Garcia had not established prejudice. The appeals court disagreed, concluding that Mr. Garcia had established prejudice in two of the three areas outlined in *Commonwealth v. Clarke*, 460 Mass. 30 (2011): he had established a reasonable probability that he could have negotiated a sentence of one day less to avoid the most severe immigration consequences and he had shown special circumstances to corroborate the fact that he would have rolled the dice and gone to trial had he known of the consequences. Specifically, the court pointed to his seven years as a lawful permanent resident, his family ties (his mother, sister, and girlfriend), and his steady employment history as a laborer for Unistress. Note that while not the basis of the decision, the court noted that Mr. Garcia now has two U.S. citizen children and is engaged to his then-girlfriend, all of whom depend upon him for financial support. The court also quoted a recent decision from the Immigration Judge in Mr. Garcia's removal proceedings that recognized his ties to the community.

Practice Tip

While not necessarily relevant to the legal question at issue – whether at the time of the plea Mr. Garcia would have made a different decision had he known of the immigration consequences – the appeals court clearly found his current circumstances and family ties to be a factor in this decision. Post-conviction counsel should consider introducing evidence of positive equities, even where not directly relevant to the legal issues at hand.

Commonwealth v. Martinez, No. 13-P-1282, 2014 Mass. App. Unpub. LEXIS 774 (June 23, 2014)

The court affirmed the denial of a motion for new trial, concluding that the immigration consequences were unclear and the defendant had failed to show prejudice because the defendant lacked lawful permanent resident status. Mr. Martinez accepted CWOs in 1999 for assault and battery and violating a restraining order and in 2000 for leaving the scene of property damage. According to the court, the record was unclear regarding Mr. Martinez' immigration status and failed to establish that Mr. Martinez was a lawful permanent resident. Therefore the court concluded that the immigration consequences of these convictions were unclear – convictions alone would not lead to his deportation. Moreover, though these convictions made him ineligible for cancellation of removal (a path to lawful status available for some noncitizens without legal permanent resident status), defense counsel was not required to advise Mr. Martinez of this fact because Mr. Martinez was not eligible for cancellation at the time of his plea (he did not yet have the necessary years of residence in the U.S.). Even if there were deficient performance, the court found that Mr. Martinez has failed to establish prejudice.

Practice Tip

Padilla motions for noncitizens who lack lawful permanent resident status are particularly difficult. Nevertheless, these clients may be able to articulate a viable *Padilla* motion, because

the immigration consequences of criminal dispositions for undocumented and out of status clients may well be clear and very severe. It is unclear what evidence was in the record regarding Mr. Martinez' potential cancellation claim. Such a claim is very difficult to win, but if Mr. Martinez had a viable cancellation of removal claim, convictions that would bar such a claim have clear consequences that he would have been rational to avoid. To be eligible for cancellation, Mr. Martinez would have had to show (a) ten years physical presence in the U.S., (b) ten years good moral character, (c) that he had not been convicted of a crime that made him deportable or inadmissible, and (d) that he had a lawful permanent resident or U.S. citizen spouse, parent, or child who would suffer "exceptional and extremely unusual hardship" if he were deported. 8 U.S.C. § 1229b(b). The convictions in this case permanently barred him from cancellation of removal, even if he eventually accrued ten years presence and even if he had a family member who would suffer exceptional hardship if he were deported. With a client in these circumstances, presenting compelling evidence of the family member's hardship and the client's desire to remain eligible for cancellation so that he might provide for the this family member should make for a viable claim under *Padilla*. In this case, it was "clear" that at least the restraining order violation would bar Mr. Martinez from cancellation of removal and if he had an otherwise compelling cancellation claim (even assuming he still needed a few years residence to become eligible), such an argument should satisfy the requirements of *Padilla* and its Massachusetts progeny.