The Commonwealth of Massachusetts

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Immigration Case Notes for Massachusetts Criminal Defense Attorneys December 2015 & January 2016

U.S. Court of Appeals for the First Circuit

Whyte v. Lynch, 807 F.3d 463 (1st Cir. 2015)

This case examined whether a Connecticut assault statute that punishes a person who "with intent to cause physical injury to another person, [] causes such injury to such person or to a third person" constitutes a "crime of violence" as defined at 18 U.S.C. § 16. A "crime of violence" with a sentence of imprisonment of one year or more, suspended or imposed, constitutes an aggravated felony under immigration law. 8 U.S.C. § 1101(a)(43)(F). The Court concluded that because the offense did not require, as an element, the use or attempted use of "violent force," the offense could not be a crime of violence under § 16(a), even if there were no published cases where the crime had been committed without violent force.

The definition of "crime of violence" is as follows:

(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.

18 U.S.C. § 16. Because the Connecticut statute was not a felony, only § 16(a) could apply. The U.S. Supreme Court has concluded that to constitute "force" under § 16, the force must be "violent force – that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010). The First Circuit concluded that, while some degree of force might be necessary to commit assault under the Connecticut statute, use of "violent force" was not an element of the offense. As such, the appeals court distinguished its decision in *United States v. Nason*, 269 F.3d 10 (1st Cir. 2001), where the court found a similar statute to be a misdemeanor crime of domestic violence – a different statute, 18 U.S.C. § 922(g)(9), that requires only minimal force. *See United States v. Castleman*, 134 S. Ct. 1405 (2014).

The First Circuit rejected the government's argument that there was no "realistic probability" that the Connecticut statute would punish conduct that did not involve violent force, concluding that where the elements clearly covered such conduct, "common sense" dictates there is a "realistic probability" that the state may punish such behavior. The absence of case law was not probative, because state courts have "not generated available records or other evidence that might allow [the Court] to infer from mere observation or survey the elements of the offense in practice."

Castaňeda v. Souza**,** No. 13-1994, No. 13-2509, 2015 U.S. App. LEXIS (1st Cir. Dec. 23, 2015)

At issue before the First Circuit, sitting en banc, was when a non-citizen is subject to mandatory immigration detention under 8 U.S.C. § 1226(c). § 1226(c) provides that noncitizens convicted of certain crimes (two crimes involving moral turpitude, a single aggravated felony, a controlled substance offense, a firearms offense, certain national security offenses) must be detained without any opportunity for bond during their removal proceedings. The question before the Court was one of statutory construction – whether the mandatory detention provision applied only to persons that Department of Homeland Security (DHS) arrested "when released" from criminal custody.

This evenly split en banc decision left in place two district court decisions – *Gordon v. Johnson*, 991 F. Supp. 2d 258 (D. Mass. 2013) and *Castaňeda v. Souza*, 952 F. Supp. 2d 507 (D. Mass. 2013) – which held that in order for a noncitizen to be subject to mandatory detention during his deportation proceedings, DHS must detain that person "when [they are] released" from criminal custody. Further, neither Mr. Gordon nor Ms. Castaňeda were subject to mandatory detention, because DHS arrested both many years after they were released from criminal custody.

<u>U.S. District Court for the District of Massachusetts</u>

Mederos v. Commonwealth**,** No. 15-13623-FDS, 2016 U.S. Dist. LEXIS 10854 (D. Mass. Jan. 28, 2016)

Mr. Mederos, a noncitizen, was convicted in 2000 of indecent A&B on a child and sentenced to a three year term of imprisonment. While serving his sentence, an immigration judge ordered his removal and an ICE detainer lodged against him. The ICE detainer indicated that upon Mr. Mederos's release from state custody, he was to be taken into immigration custody and deported. Shortly before the date of his release from his criminal sentence, the Commonwealth moved to civilly commit Mr. Mederos as a sexually dangerous person. In January of 2003, he was committed to the Treatment Center at Bridgewater for the term of one day to his natural life.

Mr. Mederos has remained at Bridgewater for the last 13 years. He contends that the ICE detainer prevents him from participating in the final phase of treatment which involves release to a Community Transition House. However, without access to the transition house, he cannot be released from state custody. As the court notes, Mr. Mederos alleges that "he is in a perpetual state of limbo because he is civilly committed until he completes the sexual-offender treatment, but he cannot complete that treatment due to the ICE detainer. At the same time, he cannot be taken into ICE custody and removed from the United States, because he is civilly committed until he completes that treatment."

In an attempt to either lift the ICE detainer or effectuate his removal, Mr. Mederos has filed multiple petitions in state and federal court -- to no avail. His current claim was a request for declaratory relief, though the court construed it as a petition for a writ of habeas corpus. The request was dismissed on procedural grounds.

Practice Tip

This case is an extreme example of the negative impact ICE detainers can have on criminal defendants and provides strong incentive for defense attorneys to challenge detainers. For more information on challenging ICE detainers, please see the IIU practice advisory on our website at: https://www.publiccounsel.net/iiu/wp-content/uploads/sites/15/2015/11/Challenging-ICE-Detainers.Nov-2015.pdf.

Massachusetts Appeals Court

Commonwealth v. Nsubuga**,** 88 Mass. App. Ct. 788 (Dec. 2015)

In 2004, the legislature amended the immigration warnings required under G.L. c. 278, § 29D to include a specific warning that an admission to sufficient facts (as well as a finding of guilty) might carry immigration consequences. In this case, the court was asked to determine the effective date of this amendment. The Appeals Court concluded that the amendment was effective beginning ninety (90) days after enactment – or October 27, 2004 – and not thirty (30) days after enactment, because the statute did not include an emergency preamble and did not involve "powers of courts." As a result, Mr. Nsubuga, who admitted to sufficient facts on October 21, 2004, could not benefit from the amendment.

Board of Immigration Appeals

Matter of Calvillo Garcia, 26 I&N Dec. 697 (BIA 2015)

Certain convictions only become aggravated felonies if the noncitizen receives a "term of imprisonment" of at least one year. *See*, *e.g.* 8 U.S.C. §§ 1101(a)(43)(F) (crimes of violence), (G) (theft offenses). "Term of imprisonment" is defined as "the period of incarceration *or confinement* ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part." 8 U.S.C. § 1101(a)(48)(B) (emphasis added).

In this case, Mr. Calvillo Garcia was convicted of aggravated assault and sentenced to community supervision, but a condition of supervision was a requirement that he "serve an indeterminate term of confinement and treatment of not more than one (1) year or less than 180 days in a substance abuse treatment facility operated by the Texas Department of Criminal Justice . . . and obey all rules and regulations of the facility." Noting that individuals held at a substance abuse facility under Texas law are not permitted to leave until a professional determines a "release date," the BIA concluded that such a sentence constituted a period of "confinement" and was therefore a "term of imprisonment" under immigration law.

The BIA also left open, in a footnote, the question of whether house arrest might constitute a "term of imprisonment."

Practice Tip

While Massachusetts law does not have the same substance abuse treatment scheme, certain dispositions, like house arrest for more than one year, might raise similar issues. Criminal defense attorneys representing noncitizens who are considering a disposition involving any form of “confinement” of one year or more should consult with an immigration attorney or the IIU.