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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

United States v. Tavares, 843 F.3d 1 (1st Cir. 2016)

This case is the latest in a series of First Circuit decisions to explore the meaning of "crime of violence" – this time in the context of the federal sentencing guidelines. Given the similarity between the language of the sentencing guidelines and the definition of "crime of violence" at 18 U.S.C. § 16 (which is incorporated into immigration law both as an aggravated felony at 8 U.S.C. § 1101(a)(43)(F) and in the crime of domestic violence ground of deportability at 8 U.S.C. § 1227(a)(2)(E)), this decision has great relevance to immigration law.

Mr. Tavares appealed both his conviction and his sentence. After addressing and rejecting his challenge to the admission of certain expert testimony, the First Circuit turned to his attack on his sentence. Mr. Tavares argued that the trial court improperly increased his sentence under U.S.S. G. § 4B1.2(a) for having two Massachusetts convictions – Resisting Arrest and Assault and Battery with a Dangerous Weapon (ABDW) – for "crimes of violence." Under this provision, crime of violence is defined in relevant part as "any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that . . . has as an element the use, attempted use, or threatened use of physical force against the person of another."[1] "Physical force" means "violent force" or "force capable of causing physical pain or injury to another person" under the Supreme Court decision in *Johnson v. United States*, 559 U.S. 133 (2010).

[1]All parties agreed that the second prong of the crime of violence definition – "is burglary of a dwelling, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another" – was inapplicable to this case, as neither offense fell within the enumerated crimes and the final clause is unconstitutionally vague under *Johnson v. United States*, 135 S. Ct. 2551 (2015). Note that while 18 U.S.C. § 16(b) includes similar language regarding the risk of harm, the First Circuit has not addressed whether it is similarly unconstitutionally vague. The issue has been argued before the Supreme Court in *Lynch v. Dimaya*, No. 15-498, and a decision is forthcoming. Thus the *Tavares* decision doesn't address whether a particular offense could be a crime of violence under 18 U.S.C. § 16(b), only § 16(a).

- Resisting Arrest

Mass. Gen. Laws ch. 268, § 32B(a) defines Resisting Arrest as follows: "A person commits the crime of resisting arrest if he knowingly prevents or attempts to prevent a police officer, acting under color of his official authority, from effecting an arrest of the actor or another, by: (1) using or threatening to use physical force or violence against the police officer or another; or (2) using any other means which creates a substantial risk of causing bodily injury to such police officer or another."

The parties agreed that subsection 2 of the Resisting Arrest statute could not be a crime of violence under the sentencing guidelines,[2] and so the Court focused its attention on subsection 1. While recognizing that "Tavares makes a plausible point that one might read 'physical force or violence' in the Resisting Arrest statute as suggesting that 'physical force' meaning something other than violence," the Court concluded that it was bound by prior decisions in *United States v. Almenas*, 553 F.3d 27 (1st Cir. 2009) and *United States v. Weekes*, 611 F.3d 68 (1st Cir. 2010). Those decisions held that subsection 1 is a crime of violence under the sentencing guidelines. The Court concluded, under *Almenas* and *Weekes*, that "physical force or violence" in Resisting Arrest always requires the use or threatened use of violent force and therefore it matches the definition of crime of violence in the sentencing guidelines.

- ABDW

ABDW punishes two forms of conduct with a dangerous weapon: "the intentional and unjustified use of force upon the person of another, however slight, or the intentional commission of a wanton or reckless act causing physical or bodily injury to another."

Mr. Tavares argued that ABDW could not be a crime of violence for several reasons. First, he argued that the intentional form of ABDW does not require violent force, because it involves only a "slight" touching. Second, he argued that reckless ABDW cannot be a crime of violence because the level of intent is insufficient to constitute a crime of violence. Third, he argued that if the Court were to agree with either of the first two arguments, ABDW cannot be a crime of violence because the offense is indivisible. An offense is divisible where a jury would be required to decide, unanimously and beyond a reasonable doubt, between two or more separate offenses. *Mathis v. United States*, 136 S.Ct. 2243 (2016).

The Court rejected the first and third argument and remanded with respect to the second argument. The First Circuit concluded, relying on its decision in *United States v. Whindleton*, 797 F.3d 105 (1st Cir. 2015), that because ABDW involves the use of a dangerous weapon, it inherently requires the attempted or threatened use of violent force. The Court so held, notwithstanding contrary language in *United States v. Fish*, 758 F.3d 1 (1st Cir. 2014), which the Court categorized as dicta.

The Court then concluded that ABDW is a divisible offense, despite a Massachusetts Appeals Court decision stating that a jury need not be unanimous as to the reckless or intentional forms of assault and battery. *See Commonwealth v. Mistretta*, 84 Mass. App. Ct. 906 (2013). The Court found that it was not bound by an intermediate state court decision and further that it was

[2] As discussed in note 1, because it is unaddressed in this decision, subsection 2 might still be considered a crime of violence for immigration purposes under subsection (b) of 18 U.S.C. § 16.

required to guess at how the Supreme Judicial Court would answer the question.[3] The First Circuit ultimately concluded that the SJC would find ABDW to be a divisible offense and therefore the First Circuit treated ABDW as divisible.

Finally, the Court declined to decide whether reckless ABDW can be a crime of violence under the sentencing guidelines and instead remanded the issue to the district court. In so remanding, however, the Court made the significant observation that the First Circuit's decision in *Fish*, holding that reckless ABDW could not be a crime of violence, had been called into question by the recent Supreme Court decision in *Voisine v. United States*, 136 S.Ct. 2272 (2016). *See* IIU June 2016 Case Notes.

Practice Tip

While some issues remain open for litigation, criminal defense counsel should assume that both Resisting Arrest and ABDW will be treated as crimes of violence under immigration law. As a result, a sentence of imprisonment of one year or more, suspended or imposed, is likely to make both offenses aggravated felonies. ABDW is similarly likely to be treated as a crime of domestic violence if the complaining witness was a "family or household member" under Mass. Gen. Laws ch. 209A.

Immigration counsel, however, should continue to argue that subsection 2 of Resisting Arrest and reckless ABDW cannot be crimes of violence.

Board of Immigration Appeals

Matter of Alvarado, 26 I&N Dec. 895 (BIA 2016)

Under 8 U.S.C. § 1101(a)(43)(S), an aggravated felony includes "an offense relating to . . . perjury" with a sentence of imprisonment of one year or more, suspended or imposed. In this decision, the Board of Immigration Appeals altered the definition of "perjury," rejecting it's holding in *Matter of Martinez-Recinos*, 23 I&N Dec. 175 (BIA 2001) that simply relied on 18 U.S.C. § 1621 for the generic definition, and instead expanded the generic definition. Ultimately, the Board concluded: "[T]he generic definition of the term 'perjury' . . . requires than an offender make a material false statement knowingly or willfully while under oath or affirmation where an oath is authorized or required by law." The Board then held that Mr. Alvarado's conviction under 118(a) of the California Penal Code was an offense "relating to" the generic definition of perjury, even though it covered both oral and written statements.

Practice Tip

Massachusetts defines perjury as follows: "Whoever, being lawfully required to depose the truth in a judicial proceeding or in a proceeding in a course of justice, wilfully swears or affirms falsely in a matter material to the issue or point in question, or whoever, being required by law to take an oath or affirmation, wilfully swears or affirms falsely in a matter relative to which such oath or affirmation is required, shall be guilty of perjury." Mass. Gen. Laws ch. 268, § 1. It

[3] This method conflicts with the divisibility discussion in *Mathis v. United States*, 136 S.Ct. 2243, 2256–57 (2016), which holds that where state law and court records are unclear as to whether an offense is divisible or not, the offense is not divisible.

mirrors the generic definition offered by the Board and therefore defense counsel should assume that in combination with a sentence of imprisonment of one year or more, suspended or imposed, it would be treated as an aggravated felony.