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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. Taylor, 848 F.3d 476 (1st Cir. 2017)

Among multiple issues addressed in this case was the question of whether the defendant Keyon Taylor’s conviction under a federal statute criminalizing assaulting, beating, or impeding certain officers or employees (18 U.S.C. § 111) constituted a crime of violence under the “force clause” of the Armed Career Criminal Act (ACCA). This question is relevant under immigration law because the force clause of the aggravated felony definition of “crime of violence” (18 U.S.C. § 16(a)) includes identical language to the ACCA (18 U.S.C. § 924(c)(3)(A)). To satisfy the definition of “force” under both the ACCA and 18 U.S.C. § 16, the force must be “violent,” i.e. “capable of causing pain or injury to another person.” *Johnson v. United States*, 559 U.S. 133, 140 (2010).

The statute of conviction in *Taylor* includes two alternative sections. 18 U.S.C. § 111(a) applies to anyone who (1) “forcibly assaults, resists, opposes, impedes, intimidates, or interferes” with certain officers or employees, or (2) “forcibly assaults or intimidates” certain former officers or employees. Section 111(b) applies to anyone who “in the commission of any acts described in subsection (a), uses a deadly or dangerous weapon... or inflicts bodily injury.” The First Circuit found that the statute is divisible as between sections (a) and (b) because of the structure and wording of the statute and the fact that subsection (b) carries more severe penalties. The First Circuit also stated that section (a) is internally divisible because it provides for separate penalties for simple assault and acts involving physical contact or the intent to commit another felony. Therefore, the Court applied the modified categorical approach and determined that Taylor was convicted under §111(b).

In reviewing § 111(b) to determine whether it qualified as a crime of violence, the First Circuit held that any conviction under this enhanced penalty provision of the statute constitutes a crime of violence. First, the Court considered the dangerous weapon means of satisfying the statute’s requirements and concluded, largely based on its prior opinion in *United States v. Whindleton*, 797 F.3d 105 (1st Cir. 2015), *cert dismissed*, 137 S.Ct. 23 (2015), and *cert denied*, 137 S.Ct. 179 (2016), that the requirement that an assault be committed by means of a dangerous weapon renders an otherwise overbroad statute a categorical crime of violence.

Next, the First Circuit considered the bodily injury means of satisfying the requirements of § 111(b). The Court concluded that when a defendant commits a forcible act that causes injury, that act necessarily involves a sufficient level of force to satisfy the definition of a crime of violence. The Court noted, however, that Mr. Taylor had not made any argument that the physical injury prong of § 111(b) is overbroad. Finally, the First Circuit rejected Mr. Taylor's argument that while § 111 requires intentional conduct, the use of a dangerous weapon in the commission of an assault may only require a *mens rea* of recklessness. The Court commented that the defendant had failed to demonstrate that there is more than a hypothetical possibility that the statute actually applies to the accidental use of a dangerous weapon.

Practice Tip

This case shows how determinations of whether convictions constitute aggravated felony crimes of violence are often not based on strict application of the elements-based categorical approach. Defense counsel should assume that aggravated forms of assault and battery will be charged as a crime of violence.

Despite the growing number of First Circuit cases concluding that aggravated assault and battery crimes are crimes of violence, immigration advocates should continue to argue that the required use of a dangerous weapon does not in itself render an overbroad assault and battery statute a categorical crime of violence. *See United States v. Fish*, 758 F.3d 1 (1st Cir. 2014). Additionally, immigration advocates should argue that the fact that an otherwise overbroad statute must result in physical injury does not permit adjudicators to infer the use of violent force. *See Whyte v. Lynch*, 807 F.3d 463 (1st Cir. 2015).

United States v. Delgado-Sánchez, 849 F.3d 1 (1st Cir. 2017)

The defendant, Oscar Delgado-Sánchez, was convicted of unlawful possession of a firearm under 18 U.S.C. § 922(g)(1) and subject to a sentencing enhancement for having previously been convicted of a "crime of violence." U.S.S.G. § 4A1.1(a). Like the ACCA's definition of "crime of violence," the sentencing guidelines include similar language to the aggravated felony definition of "crime of violence," and therefore cases interpreting U.S.S.G. § 4A1.1(a) are relevant for immigration purposes.

In *Delgado-Sanchez*, though the district court failed to clearly state which of the defendant's prior Puerto Rico convictions constituted a crime of violence, the First Circuit interpreted the district court's opinion as based on the defendant's conviction for discharging or pointing a firearm. P.R. Laws Ann. tit. 25, § 458n(a). The statute in question has two sections criminalizing (1) the discharging of a firearm in a public place, and (2) the aiming of a firearm at another person. The First Circuit, reviewing for plain error, found that the statute's wording and structure and the language in the model jury instructions support the conclusion that the statute is divisible.

The First Circuit then suggested that section (2) may constitute a crime of violence. The key question, the court reasoned, is whether any intentional aiming of a firearm at another person involves a threatened use of violent force, even if done in jest or without the other person's

awareness. The First Circuit suggested that threatened use of force could be interpreted in two different ways: either (1) “communicating intent to inflict harm,” or (2) creating a “thing that might well cause harm.” Because the defendant failed to present any case law showing that U.S.S.G. § 4A1.1(a) incorporates the first narrower definition, the First Circuit upheld the district court’s decision that a Puerto Rico conviction for pointing a firearm at another person is a crime of violence.

Practice Tip

This case shows how crimes involving threats are likely to be interpreted as crimes of violence triggering immigration consequences, even where no threat is necessarily perceived by the victim. Defense counsel should assume that aggravated assault crimes will be charged as crimes of violence. Immigration attorneys, however, should argue for adoption of the narrower definition of threat proposed by the First Circuit in interpreting the definition of crimes of violence in 18 U.S.C. § 16(a).