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Immigration Case Notes for Massachusetts Criminal Defense Attorneys
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U.S. Supreme Court

Lee v. United States, No. 16-327, 2017 WL 2694701 (2017)

This case addresses the standard for vacating a federal conviction based on defense counsel's failure to provide sufficient warnings of immigration consequences resulting from a plea. Jae Lee is a lawful permanent resident from South Korea who immigrated to the U.S. with his family at age 13. Lee was charged with and pled guilty to possession of ecstasy with intent to distribute in violation of 21 U.S.C. § 841(a)(1), an aggravated felony which made him subject to mandatory deportation. At the time, Lee had lived in the U.S. for nearly three decades, had opened two restaurants, and was caring for his elderly parents. He had no ties to South Korea and had not visited the country since he left at age 13. When deciding whether or not to plead, Lee repeatedly inquired as to what the impact of a conviction would be on his immigration status, and his attorney assured him affirmatively that he would not be deported. Therefore, because Lee had very little chance of prevailing at trial, he took a plea deal resulting in less prison time than he otherwise would have faced. When asked by the judge at the time of his plea if he understood that he could face deportation, Lee again expressed worry and confusion but was told by his attorney that the judge's warning was simply standard practice.

Strickland v. Washington, 466 U.S. 668 (1984) established a two-pronged test for ineffective assistance of counsel claims: (1) deficient performance; and (2) prejudice. In Lee's case both parties agreed that his attorney's conduct constituted deficient performance, and the only issue before the Court was whether, given the slim chance Lee had of prevailing at trial, he had been prejudiced. Ultimately, the Supreme Court confirmed that where, as in Lee's case, counsel's deficient performance resulted in the defendant forfeiting his right to a proceeding, the essential question is whether there was a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). The question is not, as the government argued, whether going to trial would have led to a different outcome. The Court therefore rejected the government's argument that it adopt a *per se* rule that a defendant cannot have been prejudiced where no viable defense existed.

Given Lee's strong connections to the U.S., the Court found that it would not have been irrational for him to reject the plea offer in favor of trial. The Court noted several times that

deportation was the "determinative issue" in his case, and therefore concluded that where accepting the plea agreement would *certainly* lead to deportation and going to trial would *almost certainly* lead to deportation, "that almost could make all the difference." The Court therefore held that Lee had been sufficiently prejudiced as to satisfy both prongs of the *Strickland* test.

Practice Tip

For defense attorneys practicing in Massachusetts state courts: This case has little impact, because the SJC has already held that the second *Strickland* prong may be satisfied where there are "special circumstances that support the conclusion that the defendant placed, or would have placed, particular emphasis on immigration consequences in deciding whether to plead guilty." *Commonwealth v. Clark*, 460 Mass. 30, 47-48 (2011).

For defense attorneys practicing in federal court and for immigration counsel representing clients with federal convictions: This case opens up the possibility of vacating convictions where defense counsel's performance was deficient and where a noncitizen defendant would have insisted on going to trial, regardless of a lack of viable defenses and the near impossibility of avoiding deportation by going to trial rather than taking a plea deal.

U.S. Court of Appeals for the First Circuit

United States v. Starks, No. 15-2365, 2017 WL 2802755 (1st Cir. June 28, 2017)

In this case, the First Circuit held that the Massachusetts offenses of unarmed and armed robbery are not crimes 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 nearly 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 (Johnson I)*, 559 U.S. 133, 140 (2010). In *Starks*, the First Circuit only considered the ACCA force clause, as § 924(c)(3)(B) (the ACCA "residual clause") has been found unconstitutionally vague.

The First Circuit first addressed the question of whether unarmed robbery involves the requisite level of force as required under *Johnson I*. The court noted that Massachusetts recognizes two types unarmed robbery: robbery involving (1) "actual force," and (2) "constructive force." Because the government did not argue that the unarmed robbery statute is divisible, the court considered whether either type of force is overbroad, and focused on the "actual force" version. In answering this question, the First Circuit quoted the SJC's holding in *Commonwealth v. Jones*, that a purse-snatching where "the actual forced used [was] sufficient to produce awareness… [involved] the requisite degree of force… to make the crime robbery." 362 Mass. 83, 89 (1972). This broad definition of robbery that may be satisfied "without touching the victim, without awareness by the victim of the impending act, and without any intention to use force against the victim if the victim resists" is a departure from the common rule in other states that robbery requires some resistance by or injury to the victim. The First Circuit therefore concluded that Massachusetts unarmed robbery does not satisfy the force clause of the ACCA.

Next, the First Circuit considered the Massachusetts armed robbery statute. The major difference between armed and unarmed robbery is that a defendant convicted of armed robbery must have been armed with a dangerous weapon in the commission of a robbery; however, the defendant is not required to have used or displayed the weapon. The First Circuit therefore found that the added element of a dangerous weapon does not meaningfully change the level of required force under the statute, and that armed robbery, like unarmed robbery, does not satisfy the force clause of the ACCA. The court differentiated this case from *United States v. Whindleton*, in which the First Circuit held that the Massachusetts offense of assault with a dangerous weapon is a crime of violence because the statute requires that the dangerous weapon be used in the commission of an assault. 797 F.3d 105 (1st Cir. 2015). In contrast, an armed robbery may be accomplished when, for example, a defendant has a knife in his pocket during a robbery yet never takes it out or makes the victim aware of its presence.

Finally, the First Circuit addressed its prior holding in *United States v. Luna* that the Massachusetts offense of armed robbery is a crime of violence under the force clause of the ACCA. 649 F.3d 91 (1st Cir. 2011). The court justified its departure from this prior holding by explaining that the defendant in Luna only raised a single argument regarding the "constructive force" version of armed robbery, and waived the argument brought by *Starks* that the "actual force" version of the statute is overbroad because it may involve only *de minimus* force. The court therefore concluded that its statement in *Luna* insinuating that armed robbery necessarily involves the requisite level of force required under the ACCA force clause was dicta that the court was not bound to follow.

Practice Tip

Defense counsel should still assume that armed or unarmed robbery may be charged as crimes of violence, given that the First Circuit and Supreme Court have yet to rule on whether 18 U.S.C. § 16(b), the residual clause of the Immigration and Nationality Act's definition of "crime of violence," which is more broad than the force clause, is void for vagueness. Therefore, a conviction for armed or unarmed robbery resulting in a sentence of one year or more, committed or suspended, may constitute an aggravated felony crime of violence. It is also important to note that whether or not robbery is a crime of violence, a robbery conviction resulting in a sentence of one year or more is an aggravated felony theft offense.

For immigration advocates representing clients whose Massachusetts robbery convictions are charged as either aggravated felony crimes of violence or crimes of domestic violence, *Starks* provides a strong defense against these categorizations.

Board of Immigration Appeals

Matter of Alday-Dominguez, 27 I. & N. Dec. 48 (BIA 2017)

The Board reinstated removal proceedings terminated by the Immigration Judge for a noncitizen convicted of receiving stolen property under section 496(a) of the California Penal Code. The immigration statutory provision at issue in this case is 8 U.S.C. § 1101(a)(43)(G), a subcategory of aggravated felonies which covers any "theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year" The Board and circuit

courts have required that a conviction for "theft" or "burglary" only qualifies as an aggravated felony under § 1101(a)(43)(G) if it necessarily involves conduct that would fall within the generic definitions of these crimes.

Mr. Alday-Dominguez had argued to the satisfaction of the Immigration Judge that because the California offense he was convicted of encompasses the receiving of stolen goods not obtained by means of common law theft, it is overbroad and therefore not an aggravated felony. The Board disagreed, finding that the term "receiving stolen property" under § 1101(a)(43)(G) is separate and distinct from "theft" and "burglary." The Board further explained that an offense may qualify as "receiving stolen property" regardless of whether the property was originally obtained by means of common law theft or, for example, false pretenses. Mr. Alday-Dominguez's removal proceedings were therefore reinstated due to his aggravated felony conviction and his case was remanded to determine whether he was eligible for any forms of relief.

Practice Tip

Based on this decision, defense counsel should continue to assume that the Massachusetts offense of receiving stolen goods, which includes receipt of embezzled property, is a generic "receipt of stolen property" offense and therefore constitutes an aggravated felony if a sentence of one year or more, committed or suspended, is imposed.

Matter of Deang, 27 I. & N. Dec. 57 (BIA 2017)

In a second case in which the Immigration Judge terminated proceedings based on a finding that the respondent's receipt of stolen property offense did not constitute an aggravated felony, the Board agreed with the Immigration Judge and denied the government's appeal. Here, the respondent, Mr. Deang, was convicted of receiving a stolen motor vehicle under section 32-4-5 of the South Dakota Codified Laws. The Board held that the South Dakota statute, which punishes receipt of a stolen motor vehicle that the defendant knows *or has reason to believe* is stolen, is overbroad because the mens rea requirement encompasses more than knowledge or belief. Therefore, Mr. Deang's conviction was not an aggravated felony.

In reaching this conclusion the Board surveyed state and federal statutes in 1994 when receipt of stolen property was added to the Immigration and Nationality Act's list of aggravated felonies as well as the Model Penal Code. The Board found that the majority of statutes required that the defendant intend to deprive the owner of the stolen property of the rights and benefits of ownership, and therefore required more than a "reason to believe" that the property was stolen.

Practice Tip

Defense counsel should assume that Massachusetts convictions for receiving stolen property or stolen motor vehicle resulting in sentences of one year or more are aggravated felony theft offenses. However, based on *Deang* immigration attorneys should argue that a Massachusetts conviction for receiving a stolen motor vehicle, which requires that the defendant knows or has "reason to know" the vehicle was stolen is not a categorical match for the generic crime of receiving stolen property under 8 U.S.C. § 1101(a)(43)(G). In particular, immigration counsel

should highlight footnote 9, which references the Massachusetts receipt of a stolen motor vehicle statute as an example of a statute requiring a lesser form of *mens rea* than knowledge.

Supreme Judicial Court

Penate v. Lopez, 477 Mass. 268 (2017)

In this case, the SJC addressed the question of whether a state Probate and Family Court or Juvenile Court judge may decline to make special findings in the case of a child under age 21 applying for Special Immigrant Juvenile Status (SIJ). To apply for SIJ, which provides undocumented youth with a path to citizenship, a juvenile below age 21[1] must obtain special findings from a "juvenile court" that (1) the child is dependent on a juvenile court, or under the custody of an agency or department of a state or an individual or entity appointed by the court or state; (2) reunification with one or both parents is not viable due to abuse, neglect, or abandonment; and (3) returning the child to his or her country of origin would not be in the child's best interest. The child must then submit these findings along with an I-360 application to the U.S. Citizenship and Immigration Service (USCIS) which ultimately determines whether the child meets all the requirements of eligibility for SIJ status. After obtaining SIJ status, a child can be considered for a green card.

This case involved two juveniles--Yosselin Penate and EG. Yosselin was living in the custody of an uncle and presented a motion for special findings against her mother in conjunction with her uncle's petition for guardianship. EG was living in the custody of her mother, and filed a motion for special findings against her father in conjunction with a paternity suit initiated by the Department of Revenue. In both cases the Probate and Family Court judges denied the motions. In Yosselin's case, the judge declined to make findings as to the first and third prongs and found that Yosselin's case did not satisfy the second prong because her primary motivation in moving for special findings was to be able to apply for SIJ and not that she could not be reunited with her mother. In EG's case, the judge completely declined to make special findings because EG was in her mother's custody.

The SJC's decision after reviewing these two cases contains two major holdings. First, the SJC declared that the Probate and Family Court judge may not decline to make special findings if requested by an immigrant child. This holding applies regardless of whether the judge suspects that the juvenile seeks a path to lawful status for reasons other than her abuse/abandonment/neglect. In short, "[t]he immigrant child's motivation is irrelevant to the judge's special findings." Additionally, a judge must make the special findings even if the judge believes that the child will not prevail in her application for SIJ status before USCIS, because, as the SJC noted, immigration "lies exclusively within the purview of the Federal government."

Second, the SJC took the opportunity to clarify that special findings must be limited to the parent with whom the child claims that reunification is not viable. So, for a child like EG who is in the

[1] In *Recinos v. Escobar*, 473 Mass. 734 (2015), the SJC addressed the issue of the SIJ statute defining "child" as anyone below age 21 while the Massachusetts probate and juvenile court jurisdiction ends at 18. The SJC held that the Massachusetts Probate and Family Court, under its broad equity power under M.G.L. c. 215 §6, has jurisdiction over youth up to age 21 for the "specific purpose of making the special findings necessary to apply for SIJ status pursuant to the INA." *See* IIU Practice Advisory on *Recinos v. Escobar* (https://www.publiccounsel.net/iiu/wp-content/uploads/sites/15/2014/08/Recinos-practice-advisory-1.pdf).

custody of her mother and moves for special findings regarding her father, the judge should only discuss the father in its findings. Finally, the SJC did not answer the question of whether the immigration statute requires a finding against one or both parents, as the state court's duty is solely to make special findings against either one or both parents as requested by a child.