The Commonwealth of Massachusetts

Committee for Public Counsel Services
Immigration Impact Unit
21 McGrath Highway, Somerville, MA 02143

TEL: 617-623-0591
FAX: 617-623-0936

ANTHONY J. BENEDETTI
CHIEF COUNSEL

WENDY S. WAYNE
DIRECTOR

Immigration Case Notes for Massachusetts Criminal Defense Attorneys March-April 2017

U.S. Court of Appeals for the First Circuit

United States v. Faust, 853 F.3d 39 (1st Cir. 2017)

Among several issues addressed in this case is the question of whether the defendant Todd Faust's Massachusetts convictions for resisting arrest and assault and battery on a police officer ("ABPO") were violent felonies under the Armed Career Criminal Act ("ACCA"). This issue 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).

1. Resisting Arrest

The Massachusetts crime of resisting arrest applies to a defendant who "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 first form of resisting arrest was previously found to be a categorical crime of violence under the ACCA "force clause," 18 U.S.C. § 924(c)(3)(A), and the second form was found to be a crime of violence under the "residual clause," § 924(c)(3)(B), but not the "force clause." Because the ACCA residual clause was found to be unconstitutionally vague in *Johnson v. United States*, 135 S. Ct. 2551 (2015),[1] the First Circuit recognized that the crime of resisting arrest encompasses conduct that no longer falls within the definition of a crime of violence.

Next, the First Circuit considered whether the two types of resisting arrest are divisible, and

[1] The issue of whether the equivalent of the ACCA "residual clause" in the definition of an aggravated felony crime of violence, 18 U.S.C. § 16(b), is unconstitutionally vague is currently before the Supreme Court. *See Dimaya v. Lynch*, 803 F.3d 110 (9th Cir. 2015), *cert granted*, *Lynch v. Dimaya*, 137 S. Ct. 31 (2016).

concluded that they are not. Because Massachusetts state law does not clarify whether resisting arrest is divisible, the First Circuit based its determination on (1) the fact that there is no difference in sentencing for both forms of resisting arrest; (2) the model charging language which describes both types of resisting arrest, and the use of this model language in Mr. Faust's indictment; (3) the inclusion of both types of resisting arrest in the jury instructions; and (4) the fact that Mr. Faust's plea colloquy did not specify under which version of the statute he was convicted. **Because the First Circuit found that the resisting arrest statute was both overbroad and indivisible, it held that Mr. Faust's conviction did not constitute a crime of violence under the ACCA "force clause."**

2. Assault and Battery on a Police Officer

The First Circuit then analyzed Mr. Faust's second conviction for ABPO. This conviction presented a more complex issue, given the existence of conflicting state and First Circuit case law concerning the divisibility of the Massachusetts crime of assault and battery. There are two categories of A&B: (1) intentional A&B (including both harmful and offensive forms); and (2) reckless A&B (necessarily resulting in injury to the victim). In this case, the government conceded that offensive ABPO is not a categorical crime of violence. The First Circuit did not reach the question of whether reckless or harmful ABPO are categorical crimes of violence, but instead focused on the issue of whether ABPO is divisible as between its reckless and intentional forms.

The First Circuit closely examined several cases addressing this question. First, it considered *Commonwealth v. Eberhart*, 461 Mass. 809 (2012), which the prosecution had offered as evidence of A&B's divisibility. The First Circuit concluded, however, that although *Eberhart* found A&B to be divisible under the Massachusetts sentencing enhancement statute, it did not state that any particular form of A&B must be found beyond a reasonable doubt by a jury or necessarily admitted by a defendant pleading guilty, as required by *Mathis v. United States*, 136 S. Ct. 2243 (2016). Therefore, the First Circuit concluded that this case was not dispositive as to the statute's divisibility under the ACCA.

Next, the Court examined its prior decision in *United States v. Tavares*, 843 F.3d 1 (1st Cir. 2016).[2] In *Tavares*, the First Circuit went against the Massachusetts Appeals Court case *Commonwealth v. Mistretta*, 84 Mass. App. Ct. 906 (2013) (per curiam), *rev. denied*, 466 Mass. 1108 (2013) and concluded that juror unanimity is required as to whether a defendant has been convicted of intentional or reckless A&B. The *Tavares* decision was based in part on *Commonwealth v. Santos*, 440 Mass. 281 (2003), which reasoned that a juror unanimity requirement attaches when different methods of committing an offense are "substantively distinct or dissimilar," such as two different mens rea requirements. The *Tavares* court therefore employed an "informed prophesy approach" to predict that the SJC would require juror unanimity for an A&B conviction.

Mr. Faust objected to the First Circuit's holding in *Tavares*, a sentencing guidelines case, and argued that the due process and Sixth Amendment implications of the ACCA require that the First Circuit consider whether his conviction would have been found divisible based on state law

[2] See IIU Case Notes December, 2016 (https://www.publiccounsel.net/iiu/wp-content/uploads/sites/15/2017/03/case-notes-December-2016.pdf)

as it existed at the time of the conviction, rather than predicting how the highest Massachusetts court would rule in the future. Given that Mr. Faust was convicted prior to *Mistretta* and after *Santos*, however, the First Circuit declined to address this argument and upheld its determination in *Tavares* that the intentional and reckless versions of A&B are divisible.

Because the First Circuit determined that intentional A&B is not internally divisible between harmful and offensive crimes, it held that a conviction for intentional ABPO is not categorically a crime of violence under the ACCA force clause. The First Circuit then remanded the case for further assessment as to whether the approved *Shepard* documents identified under which version of the statute Mr. Fast was convicted, and if necessary whether reckless ABPO constitutes a crime of violence. The First Circuit concluded by emphasizing that where a statute is overbroad and divisible and the *Shepard* documents are ambiguous, a conviction cannot be found to constitute an ACCA predicate offense.

Practice Tip

Immigration attorneys should argue, based on *Faust*, that any Massachusetts conviction for resisting arrest cannot constitute a crime of violence under 18 U.S.C. § 16(a).

As for ABPO, defense counsel should continue to assume that immigration officials will argue that ABPO conviction qualifies as a crime of violence. If a conviction for ABPO is unavoidable, however, it is preferable that the record of conviction indicate that the defendant was convicted of offensive ABPO as opposed to its harmful or reckless forms.

For immigration attorneys representing clients convicted of ABPO or other aggravated A&B crimes, *Faust* may have opened up a possible argument that for convictions occurring prior to *Santos* (2003) or after *Mistretta* (2013), intentional and reckless A&B are not divisible, and therefore that any A&B or aggravated A&B conviction is overbroad.

United States v. Mulkern, 854 F.3d 87 (1st Cir. 2017)

This case also involved a question of whether the defendant's prior conviction, in this case under Maine's robbery statute, qualified as an ACCA predicate crime of violence. The parties agreed that the statute was divisible, but not under which section Mr. Mulkern was convicted, due to discrepancies in the *Shepard* documents. The prosecution argued that Mr. Mulkern had been convicted in violation of section C, which states that "A person is guilty of robbery if he commits or attempts to commit theft and at the time of his actions... He uses physical force on another with the intent enumerated in paragraph B…"

The First Circuit concluded that even if the prosecution was correct that Mr. Mulkern had been convicted under this section of the statute, such a conviction does not qualify as a crime of violence. This reasoning was primarily based on *Raymond v. State*, 467 A.2d 161 (Me. 1983), a Maine case holding that "any physical force… is sufficient force to convict of robbery." Because Maine robbery may therefore be committed using *de minimis* force, the First Circuit held that it is not a crime of violence. The First Circuit rejected the government's argument based on Massachusetts case law that a robbery crime requires "force and violence," and adamantly noted that its opinion in *Mulkern* has no bearing ("zero, none, zip") on the level of required force to

sustain a robbery conviction in Massachusetts.

Board of Immigration Appeals

Matter of Flores-Abarca, 26 I&N Dec. 922 (BIA 2017)

The Respondent, Mr. Flores-Abarca, was charged as removable for having entered the U.S. without inspection. Mr. Flores-Abarca applied for relief in the form of cancellation of removal for certain nonpermanent residents, but was found to be ineligible because he had been convicted in Oklahoma of "unlawful[ly] transport[ing] a loaded pistol, rifle or shotgun in a landborne motor vehicle over a public highway or roadway." The Immigration Judge held that this conviction qualified as a firearms offense as defined in 8 U.S.C. 1227(a)(2)(C).

The Immigration and Nationality Act provides that cancellation of removal under 8 U.S.C. 1229b(b) is unavailable to anyone who has been "convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, carry any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18, United States Code)." Mr. Flores-Abarca argued that because the transportation of firearms is not explicitly included in the list of prohibited types of conduct in 8 U.S.C. 1227(a)(2)(C), his conviction did not constitute a firearms offense triggering immigration consequences.

The BIA disagreed. Based on the wording and legislative history of 8 U.S.C. 1227(a)(2)(C), the BIA held that the federal statute applies broadly to all forms of firearms offenses. Moreover, the BIA concluded that because the Oklahoma statute in question requires the willful and knowing transportation of a firearm, a defendant convicted of such a crime necessarily had constructive possession of the firearm, which is prohibited conduct under 8 U.S.C. 1227(a)(2)(C).

Practice Tip

Defense counsel should assume that an offense involving a firearm, no matter the specific conduct, will be characterized as a firearms offense under 8 U.S.C. § 1227(a)(2)(C). It should be noted, however, that to meet the definition of a firearms offense under immigration law, a conviction must have involved a firearm as defined in 18 U.S.C. § 921(a) and the firearm must be an element of the offense (i.e. ABDW where the weapon is a firearm is not a firearms offense under 8 U.S.C. 1227(a)(2)(C)). If a state statute defines firearm more broadly than § 921(a) or does not include it as an element, a conviction may not be a categorical firearms offense under 8 U.S.C. § 1227(a)(2)(C).

Matter of Jimenez-Cedillo, 27 I&N Dec. 1 (BIA 2017)

The respondent, Mr. Jimenez-Cedillo, was ordered deported based on having entered the U.S. without inspection and having been convicted of a crime involving moral turpitude ("CIMT"). The conviction in question was in violation of section 3-324(b) of the Maryland Criminal Law, which penalizes anyone who "with the intent to commit a violation of… § 3-307 of this subtitle… knowingly solicit[s] a minor, or a law enforcement officer posing as a minor, to engage in activities that would be unlawful for the person to engage in under… § 3-307 of this

subtitle…" Using the categorical approach, the BIA considered whether a conviction under § 3-324(b) necessarily involves morally turpitudinous conduct.

While acknowledging that CIMTs must generally require both "reprehensible conduct and a culpable mental state," the BIA found that the five subsections of § 3-307(a), some of which are strict liability crimes, are nonetheless categorical CIMTs. First, the BIA addressed § 3-307(a)(1) and (2), which require explicit or implicit lack of consent from the victim. The BIA stated that all crimes encompassed by these subsections are clearly CIMTs. Next, the BIA addressed § 3-307(a)(3), (4), and (5), which criminalize sexual conduct when either the victim is below age 14 and the perpetrator is at least four years older (§ 3-307(a)(3)) or when the victim is below age 16 and the perpetrator is at least 21 years old (§ 3-307(a)(4) and (5)). In *Matter of Silva-Trevino*, 26 I&N Dec. 826 (BIA 2016), the BIA had previously established that sexual offenses involving a minor under age 16 are morally turpitudinous where the perpetrator knew or should have known the victim's age. In *Matter of Jimenez-Cedillo*, the BIA clarified that a sexual offenses against a minor requiring that a victim be particularly young (in this case under age 14) or that there be a significant age differential between the victim and defendant (in this case six years) are CIMTs even if the statute contains no mens rea requirement.

Practice Tip

Despite the fact that the generic federal definition of CIMT requires a *mens rea* of recklessness or greater, this decision concludes that no *mens rea* was necessary for the offense to be a CIMT. The decision contributes to the ongoing difficulties of determining when a state offense will be considered a CIMT.

Matter of Wu, 27 I&N Dec. 8 (BIA 2017)

In this case, applying the categorical approach, the Board of Immigration Appeals (BIA) concluded that a conviction under section 245(a)(1) of the California Penal Code, which criminalizes "an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury," is categorically a crime involving moral turpitude ("CIMT").

The BIA acknowledges that generally simple assault and battery (encompassing mere offensive touching) that is committed with general intent is not considered a CIMT. However, where the Board finds that there are aggravating factors and increased mental state, assault statutes may be turpitudinous.

The *mens rea* requirement for the California statute in question in this case is "aware[ness] of facts that would lead a reasonable person to realize that his or her act by its nature would directly and probably result in the application of force to someone." Looking to California state law, the BIA found that a conviction for this crime requires a more culpable *mens rea* than recklessness or negligence, and therefore brings this crime within the scope of the definition of a CIMT. The Board holds that as to intent, whether conduct is morally turpitudinous, the result should be no different for a person who willfully commits such dangerous conduct with knowledge of all the facts that make it dangerous than it is for one who commits the conduct with the knowledge that

it is dangerous." Moreover, the BIA noted that the aggravating factor of the required use of a deadly weapon or high level of force results in the statute requiring sufficiently reprehensible conduct to constitute a CIMT.

Practice Tip

The Massachusetts ABDW statute has long been considered a CIMT. Although arguments exist that the reckless version of ABDW does not provide sufficient *mens rea*, Matter of Wu suggests that Massachusetts ABDW will continue to be treated as a CIMT.