NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

GREGORY LOZADO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

APPENDIX A
TO
PETITION FOR WRIT OF CERTIORARI

FILED
United States Court of Appeals
Tenth Circuit

October 21, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

GREGORY LOZADO,

Defendant - Appellant.

No. 20-1420
(D.C. No. 1:13-CR-00151-PAB-1)
(D. Colo.)

ORDER AND JUDGMENT*

Before **HARTZ**, **KELLY**, and **CARSON**, Circuit Judges.

Defendant-Appellant Gregory Lozado was convicted of possessing ammunition as a previously convicted felon, 18 U.S.C. § 922(g)(1), and was sentenced to 235 months' imprisonment. We affirmed on direct appeal. United States v. Lozado, 776 F.3d 1119 (10th Cir. 2015). Mr. Lozado challenged his sentence in a 28 U.S.C. § 2255 motion, and we reversed the district court's denial of relief and remanded for resentencing. United States v. Lozado, 968 F.3d 1145, 1154–56 (10th Cir. 2020). On remand, the district court sentenced him to 108 months' imprisonment. Exercising jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), we affirm.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Background

The parties are familiar with the facts, and we need not restate them here. Suffice it to say that on remand the probation office calculated Mr. Lozado's applicable guideline range without application of the Armed Career Criminal Act (ACCA) as 100–120 months. 2 R. 5–7. Mr. Lozado objected to this calculation, arguing that a prior Colorado felony menacing conviction did not constitute a "crime of violence" as defined in U.S.S.G. § 4B1.2(a) and therefore could not support a sentencing enhancement under U.S.S.G. § 2K2.1(a)(2). 1 R. 32–33. He contended that the appropriate guideline range was 70–87 months, 1. R. 40, and sought a sentence of time served (78 months) based on his good behavior while incarcerated, family circumstances relating to the loss of his son, and the Covid-19 pandemic, 1 R. 46–59.

The district court, however, determined that Mr. Lozado's argument concerning the Colorado felony menacing statute was outside the scope of our remand. 3 R. 19. In the alternative, the district court rejected the argument on the merits. On appeal, Mr. Lozado challenges both points. First, he argues that the district court misunderstood the scope of its authority on remand, committed procedural error, and misunderstood the nature of his prior concession that Colorado felony menacing was a crime of violence. Second, he reiterates that Colorado felony menacing cannot constitute a "crime of violence" as defined in U.S.S.G. § 4B1.2(a) under the categorical approach. Therefore, he submits, Colorado felony menacing cannot support a sentencing enhancement under U.S.S.G. § 2K2.1(a)(2).

Discussion

It is unnecessary for us to reach Mr. Lozado's first argument because we reject his second. Under § 2K2.1(a)(2), a defendant's base offense level is increased to 24 if the defendant committed the offense "subsequent to sustaining at least two felony convictions of . . . a crime of violence." Relevant here, the elements clause of U.S.S.G. § 4B1.2(a)(1) defines a crime of violence to include "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." We review de novo whether a defendant's prior conviction constitutes a crime of violence under U.S.S.G. § 4B1.2. United States v. Wray, 776 F.3d 1182, 1184 (10th Cir. 2015).

We apply a categorical approach in determining whether an offense satisfies this definition. United States v. Kendall, 876 F.3d 1264, 1267 (10th Cir. 2017). Under this approach, we examine the elements, rather than the underlying facts, of the offense at issue. Id. If the statute is broader than § 4B1.2(a)'s definition of a crime of violence, it is not categorically a crime of violence. Id. at 1267–68.

The Colorado felony menacing statute under which Mr. Lozado was convicted provides that a person commits the offense of menacing if, "by any threat or physical action, he or she knowingly places or attempts to place another person in fear of

imminent serious bodily injury." Colo. Rev. Stat. § 18-3-206 (2000).[1] The offense is a felony if it is committed "(a) [b]y the use of a deadly weapon or any article used or fashioned in a manner to cause a person to reasonably believe that the article is a deadly weapon; or (b) [b]y the person representing verbally or otherwise that he or she is armed with a deadly weapon." Id.

We have repeatedly held that Colorado felony menacing is a crime of violence under U.S.S.G. § 4B1.2(a). In Damaso-Mendoza v. Holder, we adopted our reasoning in United States v. Herron, where we concluded that Colorado felony menacing constituted a violent felony under the ACCA. 653 F.3d 1245, 1249–50 (10th Cir. 2011) (discussing United States v. Herron, 432 F.3d 1127 (10th Cir. 2005)); see also United States v. Armijo, 651 F.3d 1226, 1231 (10th Cir. 2011) (reaching the same conclusion regarding an earlier version of Colorado's felony menacing statute). In Herron, we held that Colorado felony menacing is "undoubtedly" a violent felony because it requires that the defendant "knowingly place[] or attempt to place another person in fear of imminent serious bodily injury . . . by the use of a deadly weapon. 432 F.3d at 1138 (quoting Colo. Rev. Stat. § 18-3-206). We concluded that this easily constitutes threatened use of physical force against the person of another, rejecting the defendant's contention that the term "deadly weapon" was defined so broadly as to include conduct not covered by the ACCA's definition of violent felony. Id. And in Damaso-Mendoza, we emphasized in

[1] This statute was recently revised, see 2021 Colo. Legis. Serv. ch. 462, § 195 (West), but the revised version, not effective until March 1, 2022, id. § 803, does not apply in this case.

the context of § 4B1.2(a)(1) that the threatened use of physical force against another is the same whether the defendant possessed an actual or simulated deadly weapon, or simply represented to the victim that he possessed a deadly weapon. 653 F.3d at 1250; see also United States v. Villalobos-Varela, 440 F. App'x 665, 668–69 (10th Cir. 2011) (unpublished).

Mr. Lozado acknowledges these cases but argues that other decisions, such as United States v. Titties, 852 F.3d 1257 (10th Cir. 2017), require a different result. Aplt. Br. at 23–24; Aplt. Reply Br. at 10 n.2. In Titties, we held that an Oklahoma conviction for feloniously pointing a firearm did not qualify as an ACCA violent felony because the statute in that case covered conduct committed "for the purposes of whimsy, humor or prank." Id. at 1270 (quoting Okla. Stat. tit. 21, § 1289.16 (1995)). In supporting our decision, we discussed a case involving a New Mexico statute concerning the offense of "apprehension-causing aggravated assault," which we remarked satisfied the ACCA in part because the offense required that "the defendant acted purposefully or engaged in conscious wrongdoing." Id. at 1274.

Mr. Lozado also relies upon People v. Crump, where the Colorado Supreme Court explained that the mens rea element of felony menacing "is satisfied when the offender is aware that he is placing or attempting to place another person in fear of imminent serious bodily injury by the use of a deadly weapon, regardless of whether the offender had a conscious objective to cause such fear in the other person." 769 P.2d 496, 499 (Colo. 1989).

The formulations in these cases do not persuade us that they are exclusive when it comes to the categorical approach. As the Supreme Court has made clear, either knowing or purposeful conduct alone can satisfy the ACCA and the guidelines' use of force requirement. Borden v. United States, 141 S. Ct. 1817, 1826–28 (2021).[2] Offenses committed "knowingly" only require a person's "aware[ness] that his conduct is practically certain to cause the result." Colo. Rev. Stat. § 18-1-501(6). That is satisfied here.

Mr. Lozado also argues that he need not point to actually overbroad prosecutions as long as the plain language of the statute could apply. Aplt. Br. at 25–27. He contends that the statute's overbreadth is nonetheless illustrated by a March 2020, Washington Post story reporting the prosecution of a 10-year-old boy for felony menacing after he pointed a toy rifle at a man in a truck. Aplt. Br. at 24–25 (citing Katie Shepherd, A 10-year-old-boy pretending to play 'Fortnite' with a toy gun spooked a driver. Police charged him with a felony., Wash. Post (Mar. 3, 2020), https://www.washingtonpost.com/nation/2020/03/03/fortnite-toy-gun-arrest/). According to Mr. Lozado, this prosecution demonstrates that the statute can be violated without the defendant intending that the victim feel fear. Aplt. Br. at 24–25.

[2] The government argues that, under United States v. Bettcher, 911 F.3d 1040 (10th Cir. 2018), even reckless conduct can satisfy the use of force requirement. Aplee. Br. at 23. However, Bettcher is no longer good law, as the Supreme Court recently remanded the case for reconsideration in light of Borden. Bettcher v. United States, 141 S. Ct. 2780 (2021) (mem.). On remand, the government dismissed the appeal. We need not consider the government's argument here.

Based on our discussion above, this is not a case where the plain language of the statute proscribes the non-qualifying conduct that would remove it from the ambit of the ACCA or guidelines provision. See United States v. Cantu, 964 F.3d 924, 934 (10th Cir. 2020); Titties, 852 F.3d at 1274–75. Regardless, the district court correctly declined to rely upon the Washington Post article as an instance of overbroad prosecution not only on the basis that it was hearsay, but also because it lacked a specific indication of "what exactly the juvenile was adjudicated for." 3 R. 20; see also New England Mut. Life Ins. Co. v. Anderson, 888 F.2d 646, 650 (10th Cir. 1989).

Finally, the government argues that even if the district court erred in concluding that Colorado felony menacing is a crime of violence under § 4B1.2(a)(1), the offense still qualifies as a predicate offense under the career offender guideline's residual clause. Aplee. Br. at 27–32. We need not reach this argument in light of our disposition.

AFFIRMED.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge

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Christopher M. Wolpert
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Jane K. Castro
Chief Deputy Clerk

October 21, 2021

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RE: 20-1420, United States v. Lozado
Dist/Ag docket: 1:13-CR-00151-PAB-1

Dear Counsel:

Enclosed is a copy of the order and judgment issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. Rule 40(a)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. *See* Fed. R. App. P. Rules 35 and 40, and 10th Cir. R.35 and 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Anna Kathryn Edgar
Paul Farley

CMW/jjh