

No. 17-6105

IN THE SUPREME COURT OF THE UNITED STATES

ANTONIO TURNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court plainly erred in determining that petitioner's conviction for attempted felonious assault, in violation of Ohio Rev. Code Ann. §§ 2903.11(A)(1) and 2923.02 (LexisNexis Supp. 2009), was a "crime of violence" under advisory Sentencing Guidelines § 2K2.1(a).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is not published in the Federal Reporter but is reprinted at 698 Fed. Appx. 803.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 2017. The petition for a writ of certiorari was filed on September 19, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Ohio, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1), and unlicensed firearm dealing, in violation of 18 U.S.C. 922(a)(1)(A). Pet. App. A2-A3. He was sentenced to 120 months of imprisonment, to be followed by three years of supervised release. 6/18/16 Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A7.

1. On July 31, 2014, petitioner sold two firearms to an informant working with the Bureau of Alcohol, Tobacco, and Firearms (ATF) and an undercover ATF agent. Pet. App. A1-A2. Petitioner had been connected to the informant and the undercover agent through Juan Luis Hernandez, a self-proclaimed intermediary for underground firearm sales. Ibid. Hernandez introduced the informant to petitioner, and, after exchanging greetings, petitioner lifted his shirt to reveal a .380 caliber pistol. Id. at 2. Petitioner then retrieved a .40 caliber pistol from a nearby backpack and gave it to Hernandez. Ibid. Hernandez placed the firearms in the backpack and walked with the informant to a car where the undercover agent was waiting. Ibid. The informant and agent then purchased the guns for \$200. Ibid. Afterward, Hernandez told the informant that petitioner had two more weapons to sell and that Hernandez would contact the informant once he

received them. Ibid. On August 5, 2014, Hernandez sold the undercover team another of petitioner's firearms, a gun with an obliterated serial number. Ibid. Agents then arrested petitioner. Id. at 3.

2. Petitioner pleaded guilty to possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1), and unlicensed firearm dealing, in violation of 18 U.S.C. 922(a)(1)(A). Pet. App. A3.

a. The district court concluded that petitioner qualified for an enhanced sentence under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), and sentenced petitioner to 180 months of imprisonment, the statutory minimum. Pet. App. A3.¹

b. The court of appeals vacated petitioner's sentence and remanded to the district court to determine whether petitioner qualified for an enhanced sentence under the ACCA in light of this Court's decision in Johnson v. United States, 135 S. Ct. 2551 (2015). Pet. App. A3. On remand, the government conceded that petitioner was not subject to an enhanced sentence under the ACCA. Ibid.

¹ The default statutory maximum sentence for being a felon in possession of a firearm is ten years of imprisonment. 18 U.S.C. 924(a)(2). But under the ACCA, a defendant with "three previous convictions * * * for a violent felony or a serious drug offense, or both, committed on occasions different from one another," is subject to a term of imprisonment of 15 years to life. 18 U.S.C. 924(e)(1).

c. At petitioner's resentencing, the district court concluded that petitioner's base offense level was 24 under advisory Sentencing Guidelines § 2K2.1(a)(2) because petitioner had two prior felony convictions for a "crime of violence": a conviction for domestic violence, in violation of Ohio Rev. Code Ann. § 2919.25 (LexisNexis 2006), and a conviction for attempted felonious assault, in violation of Ohio Rev. Code Ann. §§ 2903.11(A)(1) and 2923.02 (LexisNexis Supp. 2009). Presentence Investigation Report (PSR) ¶ 31 (July 7, 2016); see Pet. App. A6. The court also imposed a four-level enhancement because petitioner had "engaged in the trafficking of firearms," Sentencing Guidelines § 2K2.1(b)(5) (2015), and a three-level reduction for acceptance of responsibility, Sentencing Guidelines § 3E1.1 (2015). PSR ¶¶ 32, 38, 39. Combined with petitioner's criminal-history category of VI, the resulting offense level of 25 yielded an advisory Guidelines range of 110 to 137 months of imprisonment. PSR ¶ 98. The court sentenced petitioner to 120 months of imprisonment. Pet. App. A3.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. A1-A7. As relevant here, the court reviewed for plain error petitioner's claim that his conviction for felonious assault was not a "crime of violence," as petitioner did not raise that

claim at sentencing. Id. at A6.² The court concluded that petitioner could not establish plain error because the Sixth Circuit had “already held that one can ‘[c]ause serious physical harm to another’ under Ohio’s felonious assault statute ‘only by knowingly using force capable of causing physical pain or injury, i.e., violent physical force.’” Id. at A6-A7 (quoting United States v. Anderson, 695 F.3d 390, 400-401 (6th Cir. 2012)); see 18 U.S.C. 924(e) (1) (B) (i). The court further explained that, although Anderson involved the definition of a “violent felony” under the ACCA, that definition mirrors the definition of a “crime of violence” under the Guidelines. Pet. App. A7; compare 18 U.S.C. 924(e) (1) (B) (i), with Sentencing Guidelines § 4B1.2(a) (1). Finally, the court noted that a defendant might be able to raise a “debatable question” about the correctness of Anderson but that the district court’s reliance on Anderson could not generate plain error. Pet. App. A7.

ARGUMENT

Petitioner renews his claim (Pet. 8-10) that Ohio felonious assault is not a “crime of violence” for purposes of advisory Sentencing Guidelines § 2K2.1. The court of appeals correctly determined that the district court did not plainly err in so

² Petitioner also argued that the district court erroneously applied a four-level enhancement under Sentencing Guidelines § 2K2.1(b) (5), see Pet. App. A3-A6, but he does not press that claim in this Court.

classifying petitioner's prior conviction, and that determination does not conflict with any decision of another court of appeals. Moreover, because this case involves an application of the advisory Sentencing Guidelines, this Court's review is especially unwarranted.

1. The court of appeals correctly determined that petitioner failed to establish that the district court's classification of Ohio felonious assault as a crime of violence was reversible plain error. To establish reversible plain error under Federal Rule of Criminal Procedure 52(b), a defendant must demonstrate that (1) the district court committed an "error"; (2) the error was "plain," meaning "clear" or "obvious"; (3) the error "affect[ed] [his] substantial rights"; and (4) the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." United States v. Olano, 507 U.S. 725, 732-736 (1993) (citation omitted). "Meeting all four prongs is difficult, 'as it should be.'" Puckett v. United States, 556 U.S. 129, 135 (2009) (quoting United States v. Dominguez Benitez, 542 U.S. 74, 83 n.9 (2004)).

Petitioner has not demonstrated an error, much less a clear or obvious one. The Sentencing Guidelines define a "crime of violence" to include an offense under state law that is punishable by imprisonment for a term exceeding one year and that "has as an element the use, attempted use, or threatened use of physical force

against the person of another.” Sentencing Guidelines § 4B1.2(a)(1); see Sentencing Guidelines § 2K2.1 comment. (n.1). In Curtis Johnson v. United States, 559 U.S. 133 (2010), this Court defined “physical force” under analogous language in the ACCA to “mean[] violent force -- that is, force capable of causing physical pain or injury to another person.” Id. at 140 (emphasis omitted). The Court also confirmed that, in evaluating the elements of a state offense, a federal sentencing court must look to the “interpretation of state law” by the state’s courts. Id. at 138.

Ohio law defines felonious assault to include knowingly “[c]aus[ing] serious physical harm to another or to another’s unborn.” Ohio Rev. Code Ann. § 2903.11(A)(1). It further defines the phrase “serious physical harm” to mean:

- (a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;
- (b) Any physical harm that carries a substantial risk of death;
- (c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;
- (d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement; [or]
- (e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.

Id. § 2901.01(A)(5).

Petitioner contends (Pet. 8-9) that Ohio felonious assault does not require the use of violent force against the person of another -- and therefore is not a crime of violence -- because the term "serious physical harm" includes "[a]ny mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment." Ohio Rev. Code Ann. § 2901.01(A)(5)(a). Because the statute covers mental harm, petitioner contends (Pet. 9), "Ohio's felonious assault statute can be satisfied without any physical force at all."

That contention is incorrect. Ohio case law establishes that, in order to cause the type of mental harm contemplated by Ohio Rev. Code Ann. § 2901.01(A)(5)(a), a defendant must use physical force against another person -- for example, by sexually abusing a child or murdering a child's parent in his or her presence, thereby causing severe mental trauma. See, e.g., State v. Setty, No. CA2013-06-49, 2014 WL 2526073, at *19 (Ohio Ct. App. June 2, 2014) (defendant's "physical and sexual abuse of the children caused them to suffer from the mental condition PTSD"); State v. Carpenter, No. 94709, 2011 WL 285837, at *2-*3 (Ohio Ct. App. Jan. 20, 2011) (defendant beat victim, flushed her psychiatric medications down the toilet, "and physically, verbally and/or emotionally abused her * * * , causing her to have a mental breakdown, a mental condition that necessitated hospitalization"); State v. Cooper, 743 N.E.2d 427, 433-434 (Ohio Ct. App. 2000)

(defendant repeatedly neglected children's educational and medical needs, physically and sexually abused the children, and failed to protect the children from being physically and sexually abused by others, causing them to suffer mental illness); State v. Elliott, 663 N.E.2d 412, 414-418 (Ohio Ct. App. 1995) (defendant killed his wife and left her corpse in a place where his young son would likely find his mother's body, causing the boy to suffer mental illness); see also Walter v. Kelly, 653 Fed. Appx. 378, 388-390 (6th Cir. 2016) (murder of parent in front of child).

The force applied by a defendant in those situations, either to the victim or to a third party, is violent and physical, regardless of whether the subsequent harm is mental. Petitioner cites no contrary decision applying the Ohio felonious assault statute (and its requirement of "serious physical harm") to conduct that did not involve violent physical force. The Sixth Circuit thus correctly concluded in its earlier decision that the Ohio offense of felonious assault is a "violent felony" under the similar elements clause of the ACCA. See United States v. Anderson, 695 F.3d 390, 400 (6th Cir. 2012). And the court of appeals thus correctly followed Anderson in the decision below. Pet. App. A6-A7.

As the decision below noted, some judges on the Sixth Circuit have expressed doubts about whether Anderson was correctly decided. Pet. App. A7; see Williams v. United States, 875 F.3d

803, 805 (6th Cir. 2017) (concluding that defendant's postconviction motion "rises or falls with Anderson" and that the motion was properly denied because Anderson is binding precedent); id. at 807 (Moore, J., concurring) (agreeing but concluding that Anderson should "fall" and recommending en banc review). But even if uncertainty existed about the best reading of Ohio law, the court of appeals reviewed petitioner's claim for plain error only. Pet. App. A6-A7. And petitioner cannot demonstrate that any error in classifying Ohio felonious assault as a crime of violence was "clear or obvious, rather than subject to reasonable dispute." Puckett, 556 U.S. at 135.

2. Petitioner contends (Pet. 9-10) that the courts of appeals "are currently split as to how to resolve the legal question of whether causing physical harm satisfies the identical ACCA's force clause." Petitioner, however, does not identify any relevant difference in methodologies among the Second, Fourth, Sixth, and Eighth Circuits. Instead, he merely identifies cases (ibid.) in which courts have reached different outcomes under the elements clause in light of the individual state offenses at issue. See United States v. Garcia-Longoria, 819 F.3d 1063, 1065-1066 (8th Cir. 2016) (Nebraska offense of assaulting a police officer, in violation of Neb. Rev. Stat. § 28-931(1) (2006), is a crime of violence); United States v. Vargas-Duran, 356 F.3d 598, 605-606 (5th Cir.) (en banc) (Texas offense of "intoxication assault," in

violation of Tex. Penal Code Ann. § 49.07 (West 1994), is not a crime of violence), cert. denied, 543 U.S. 995 (2004); Chrzanoski v. Ashcroft, 327 F.3d 188, 193-197 (2d Cir. 2003) (Connecticut third-degree assault, in violation of Conn. Gen. Stat. Ann. § 53a-61 (West 1994), is not a crime of violence).

The only two cited decisions in which the offense at issue was found not to be a crime of violence raise arguments that petitioner does not make here. The Eighth Circuit's decision in Vargas-Duran, for example, suggests that the elements clause does not cover offenses committed recklessly, see 356 F.3d at 603-604 -- a suggestion that has subsequently been undercut by by this Court's interpretation of a similar provision in Voisine v. United States, 136 S. Ct. 2272 (2016) -- but the Ohio felonious assault statute applies only to "knowing[]" behavior. Ohio Rev. Code Ann. § 2903.11(A)(1). And the Second Circuit's decision in Chrzanoski suggests that a defendant can cause bodily injury without the use of physical force, see 327 F.3d at 195-196 -- a distinction rejected by this Court's subsequent interpretation of a similar provision in United States v. Castleman, 134 S. Ct. 1405 (2014), and on which petitioner does not rely here. Neither decision provides guidance on whether Ohio felonious assault is a crime of violence, let alone conflicts with the decision of the court of appeals in this case.

3. Finally, this case does not merit review because it involves a claimed error in application of the advisory Sentencing Guidelines. This Court does not ordinarily review decisions interpreting the Guidelines because the United States Sentencing Commission (Commission) can amend the Guidelines and accompanying commentary to eliminate a conflict or correct an error. See Braxton v. United States, 500 U.S. 344, 347-349 (1991). As the Court has noted, the Commission is charged by Congress with “periodically review[ing] the work of the courts” and making “whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest.” Id. at 348; see United States v. Booker, 543 U.S. 220, 263-265 (2005).

Indeed, the Commission has done so with respect to other aspects of the “crime of violence” definition at issue here: In August 2016, the Commission amended Sentencing Guidelines § 4B1.2(a) to eliminate the provision’s residual clause and to expand the Guidelines’ list of enumerated offenses. See 81 Fed. Reg. 4741, 4742-4743 (Jan. 27, 2016). The recent amendments to Section 4B1.2 demonstrate the Commission’s continuing attention to the Guidelines in general and the definition of a crime of violence in particular. No reason exists for this Court to deviate from its usual practice of declining to review questions of Guidelines interpretation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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