

United States v. Vereen

United States Court of Appeals for the Fourth Circuit

July 28, 2017, Submitted; August 14, 2017, Decided

No. 15-4678

Reporter

2017 U.S. App. LEXIS 15040 *; 2017 WL 3475060

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. OMAR RAMONE VEREEN, Defendant - Appellant.

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: [*1] Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. W. Earl Britt, Senior District Judge. (5:14-cr-00179-FL-1).

Disposition: AFFIRMED.

Core Terms

assault, violent crime, intent to kill, recklessness, convicted, residuary clause, deadly weapon, plain error, mens rea

Case Summary

Overview

HOLDINGS: [1]-The trial court properly calculated defendant's Guidelines range because his prior conviction in North Carolina for assault with a deadly weapon with intent to kill under [N.C. Gen. Stat. § 14-32\(c\) \(2015\)](#) qualified as a crime of violence under [U.S. Sentencing Guidelines Manual §§ 2K2.1\(a\)\(4\)\(A\)](#) and [4B1.2\(a\) \(2014\)](#) and the *Armed Career Criminal Act*, 18 U.S.C.S. § 924(e)(2)(B)(ii) (2012), and the term "use" of force, within the meaning of 18 U.S.C.S. § 921(a)(33)(A)(ii), involved a mens rea more culpable than recklessness.

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

[HN1](#)  Plain Error, Definition of Plain Error

To establish plain error, a defendant must demonstrate that (1) the district court committed an error; (2) the error was plain; (3) the error affected his substantial rights; and (4) the error seriously affected the fairness, integrity, or public reputation of judicial proceedings.

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

[HN2](#) Plain Error, Definition of Plain Error

An error is plain if it is clear or obvious.

Criminal Law & Procedure > Criminal Offenses > Classification of Offenses > Felonies

Criminal Law & Procedure > ... > Departures From Guidelines > Upward Departures > Weapons Violations

[HN3](#) Classification of Offenses, Felonies

If a defendant has been previously convicted of a "crime of violence" as defined in [U.S. Sentencing Guidelines Manual § 4B1.2\(a\) \(2014\)](#), then the Guidelines require an increase in the base offense level for the crime of possessing a firearm or ammunition as a felon. [U.S. Sentencing Guidelines Manual § 2K2.1\(a\)\(4\)\(A\) \(2014\)](#).

Criminal Law & Procedure > Criminal Offenses > Acts & Mental States > Mens Rea

Criminal Law & Procedure > ... > Departures From Guidelines > Upward Departures > Weapons Violations

[HN4](#) Acts & Mental States, Mens Rea

[U.S. Sentencing Guidelines Manual § 4B1.2\(a\) \(2014\)](#) defines a "crime of violence" as an offense punishable by imprisonment for a term exceeding one year that (1) has an element the use, attempted use, or threatened use of physical force against the person of another; or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another. The first clause is known as the "force clause." This clause applies to crimes that involve violent force—that is, force capable of causing physical pain or injury to another person, as opposed to intellectual force or emotional force. Additionally, an offense involves a "use" of force only when the offense requires a mens rea more culpable than recklessness.

Criminal Law & Procedure > ... > Departures From Guidelines > Upward Departures > Weapons Violations

[HN5](#) Upward Departures, Weapons Violations

To determine whether a particular crime meets the force clause criteria of [U.S. Sentencing Guidelines Manual § 4B1.2\(a\)\(1\) \(2014\)](#), courts generally employ a categorical approach. Under the categorical approach, courts focus on the elements, rather than the facts, of the prior offense, asking whether the full range of conduct covered by the offense, including the most innocent conduct, would qualify as a crime of violence.

Criminal Law & Procedure > ... > Assault & Battery > Aggravated Offenses > Elements

[HN6](#) Aggravated Offenses, Elements

The elements of assault with a deadly weapon with intent to kill are (1) an assault; (2) with a deadly weapon; (3) with the intent to kill. [N.C. Gen. Stat. § 14-32\(c\) \(2015\)](#).

Criminal Law & Procedure > Criminal Offenses > Acts & Mental States > Mens Rea

Criminal Law & Procedure > ... > Departures From Guidelines > Upward Departures > Weapons Violations

[HN7](#) Acts & Mental States, Mens Rea

For conduct to constitute a "use" of force within the meaning of *18 U.S.C.S. § 921(a)(33)(A)(ii)*, the conduct must involve a mens rea more culpable than recklessness.

Criminal Law & Procedure > ... > Assault & Battery > Aggravated Offenses > Elements

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

[HN8](#) Aggravated Offenses, Elements

Assault with a deadly weapon with intent to kill under [N.C. Gen. Stat. § 14-32\(c\) \(2015\)](#) has, as an element, specific intent to kill.

Criminal Law & Procedure > ... > Assault & Battery > Aggravated Offenses > Elements

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Elements of Offense

[HN9](#) Aggravated Offenses, Elements

The North Carolina pattern jury instructions for assault with a deadly weapon with intent to kill state that the jury must find that the defendant had the specific intent to kill. N.C. Pattern Instructions Crim. No. 208.25.

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Negligence

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Recklessness

[HN10](#) Mens Rea, Negligence

Proving specific intent requires more than showing the disregard of risk required to demonstrate recklessness or criminal negligence.

Criminal Law & Procedure > ... > Sentencing Guidelines > Adjustments & Enhancements > Armed Career Criminals

Criminal Law & Procedure > ... > Assault & Battery > Aggravated Offenses > Elements

[HN11](#) Adjustments & Enhancements, Armed Career Criminals

Assault with a deadly weapon with intent to kill under [N.C. Gen. Stat. § 14-32\(c\) \(2015\)](#) or similar state offenses are crimes of violence under the *Armed Career Criminal Act*, 18 U.S.C.S. § 924(e)(2)(B)(ii) (2012).

Counsel: Thomas P. McNamara, Federal Public Defender, Stephen C. Gordon, Assistant Federal Public Defender, Raleigh, North Carolina, for Appellant.

John Stuart Bruce, Acting United States Attorney, Jennifer P. May-Parker, Barbara D. Kocher, Assistant United States Attorneys, Raleigh, North Carolina, for Appellee.

Judges: Before KING, DIAZ, and FLOYD, Circuit Judges.

Opinion

PER CURIAM:

Omar Ramone Vereen pled guilty to possession of a firearm and ammunition by a felon, in violation of 18 U.S.C. § 922(g)(1) (2012); possession with intent to distribute cocaine base and marijuana, in violation of 21 U.S.C. § 841(a)(1) (2012); and possession of a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c) (2012). The district court sentenced Vereen to 106 months' imprisonment. On appeal, Vereen argues that the district court plainly erred in calculating his Sentencing Guidelines range because the district court incorrectly concluded that his prior conviction for North Carolina assault with a deadly weapon with intent to kill (AWDWIK) is a crime of violence for purposes [*2] of [U.S. Sentencing Guidelines Manual §§ 2K2.1\(a\)\(4\)\(A\), 4B1.2\(a\)](#) (2014). We affirm.

[HN1](#)  To establish plain error, Vereen must demonstrate that (1) the district court committed an error; (2) the error was plain; (3) the error affected his substantial rights; and (4) the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." [Puckett v. United States, 556 U.S. 129, 135, 129 S. Ct. 1423, 173 L. Ed. 2d 266 \(2009\)](#) (internal quotation marks omitted). [HN2](#)  An error is plain if it is clear or obvious. [United States v. Olano, 507 U.S. 725, 734, 113 S. Ct. 1770, 123 L. Ed. 2d 508 \(1993\)](#).

[HN3](#)  If a defendant has been previously convicted of a "crime of violence" as defined in [USSG § 4B1.2\(a\)](#), then the Guidelines require an increase in the base offense level for the crime of possessing a firearm or ammunition as a felon. [USSG § 2K2.1\(a\)\(4\)\(A\)](#). [HN4](#)  [Guidelines § 4B1.2\(a\)](#) defines a "crime of violence" as an offense punishable by imprisonment for a term exceeding one year that "(1) has an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." The first clause is known as the "force clause." This clause applies to crimes that involve "violent force—that is, force capable of causing physical pain or injury to another person," as opposed to "intellectual [*3] force or emotional force." [Johnson v. United States, 559 U.S. 133, 138, 140, 130 S. Ct. 1265, 176 L. Ed. 2d 1 \(2010\)](#). Additionally, we have recognized in the context of similar force clauses that an offense involves a "use" of force only when the offense requires a mens rea more culpable than recklessness. See [United States v. McNeal, 818 F.3d 141, 154-56 \(4th Cir. 2016\)](#) (considering § 924(c)'s force clause); [Garcia v. Gonzales, 455 F.3d 465, 469 \(4th Cir. 2006\)](#) (considering 18 U.S.C. § 16 (2012)'s force clause).

[HN5](#)^[↑] To determine whether a particular crime meets the force clause criteria, we generally employ the categorical approach. *United States v. Montes-Flores*, 736 F.3d 357, 364 (4th Cir. 2013); see also *Descamps v. United States*, 133 S. Ct. 2276, 2285, 2293, 186 L. Ed. 2d 438 (2013). Under the categorical approach, we "focus[] on the elements, rather than the facts, of the prior offense," asking "whether the full range of conduct covered by [the offense], including the most innocent conduct, would qualify as a crime of violence." *United States v. Shell*, 789 F.3d 335, 338-39 (4th Cir. 2015) (alterations and internal quotation marks omitted).

[HN6](#)^[↑] The elements of AWDWIK are: "(1) an assault; (2) with a deadly weapon; (3) with the intent to kill." *State v. Garris*, 191 N.C. App. 276, 663 S.E.2d 340, 349 (N.C. Ct. App. 2008) (internal quotation marks omitted); see also *N.C. Gen. Stat. § 14-32(c)* (2015). Vereen does not dispute that AWDWIK involves violent force. Rather, citing our decision in *United States v. Vinson*, 805 F.3d 120 (4th Cir. 2015), Vereen argues that AWDWIK does not fall within *USSG § 4B1.2(a)*'s force clause because a conviction for AWDWIK may be obtained by proving a mens rea less culpable than recklessness, and thus, a person may be convicted of AWDWIK for conduct [\[*4\]](#) that does not involve a "use" of force.

In *Vinson*, we considered whether the defendant's prior conviction for North Carolina misdemeanor assault on a female categorically qualified as a "misdemeanor crime of domestic violence" under 18 U.S.C. § 922(g)(9). [805 F.3d at 124-26](#). The statutory definition of "misdemeanor crime of domestic violence" is similar to *USSG § 4B1.2(a)*'s definition of "crime of violence" in that both include a force clause. See 18 U.S.C. § 921(a)(33)(A)(ii) (2012). We observed that, [HN7](#)^[↑] for conduct to constitute a "use" of force within the meaning of § 921(a)(33)(A)(ii), the conduct must involve a mens rea more culpable than recklessness. *Vinson*, 805 F.3d at 125. Because North Carolina permits convictions for assault in cases where the defendant's conduct is criminally negligent—a standard less than recklessness—we concluded that North Carolina permits assault convictions "for conduct that does not amount to a use of force," and therefore, North Carolina assault on a female did not categorically qualify as a "misdemeanor crime of domestic violence." *Id.* at 126 (internal quotation marks omitted).

However, we did not consider in *Vinson* an assault offense with an intent to kill element, and North Carolina courts have repeatedly observed that [HN8](#)^[↑] AWDWIK "has, as an element, specific intent to kill." *State v. Coble*, 351 N.C. 448, 527 S.E.2d 45, 49 (N.C. 2000); see [\[*5\]](#) also *State v. Ferguson*, 261 N.C. 558, 135 S.E.2d 626, 628 (N.C. 1964); *State v. Irwin*, 55 N.C. App. 305, 285 S.E.2d 345, 349 (N.C. Ct. App. 1982); *State v. Christy*, 26 N.C. App. 57, 215 S.E.2d 154, 155 (N.C. Ct. App. 1975); cf. *State v. Daniel*, 333 N.C. 756, 429 S.E.2d 724, 729 (N.C. 1993). Further, [HN9](#)^[↑] the North Carolina pattern jury instructions for AWDWIK state that the jury must find "that the defendant had the specific intent to kill." N.C. Pattern Instructions—Crim. 208.25; see *Vinson*, 805 F.3d at 126 (citing pattern jury instructions). As North Carolina courts have recognized, [HN10](#)^[↑] proving specific intent requires more than showing the disregard of risk required to demonstrate recklessness or criminal negligence. See *State v. Rich*, 351 N.C. 386, 527 S.E.2d 299, 304 (N.C. 2000); *State v. Oakman*, 191 N.C. App. 796, 663 S.E.2d 453, 457 (N.C. Ct. App. 2008).

Although Vereen cites dicta from *State v. Jones*, 353 N.C. 159, 538 S.E.2d 917, 923 (N.C. 2000), that seems to support his position, we conclude that Vereen cannot demonstrate plain error. In light of the North Carolina precedent cited herein, Vereen cannot clearly show that a person may be convicted of AWDWIK through proof of a mens rea less culpable than recklessness, and therefore, he cannot establish that AWDWIK obviously encompasses conduct that does not involve a "use" of force. Thus, Vereen cannot demonstrate plain error in the conclusion that AWDWIK qualifies as a crime of violence under *USSG § 4B1.2(a)*'s force clause.*

* Furthermore, we conclude that Vereen cannot establish plain error in the conclusion that AWDWIK qualifies as a crime of violence under *USSG § 4B1.2(a)*'s residual clause. See *United States v. Mack*, 855 F.3d 581, 585 (4th Cir. 2017) (considering residual clause to determine whether offense is crime of violence). Although the residual clause was removed from the Guidelines in August 2016, the clause was in effect at the time of Vereen's sentencing hearing. Vereen argues that AWDWIK does not fall within the residual clause because the residual clause requires, at a minimum, a mens rea of recklessness. See *United States v. Martin*, 753 F.3d 485, 493 (4th Cir. 2014). However, Vereen has not clearly demonstrated that a person may be convicted of AWDWIK based on criminally negligent behavior. To the contrary, the North Carolina cases cited above explain that AWDWIK is a specific intent crime.

We also acknowledge that this court has repeatedly, albeit without discussion, accepted that [HN11](#) AWDWIK or similar state offenses are crimes of violence under the *Armed Career Criminal Act*, 18 U.S.C. § 924(e)(2)(B)(ii) (2012). See [United States v. Smith, 638 F. App'x 216, 219 \(4th Cir. 2016\)](#) (No. [*6] 15-4218) (malicious assault in a secret manner, which requires proof of assault with deadly weapon with intent to kill); [United States v. Townsend, 453 F. App'x 425, 427 \(4th Cir. 2011\)](#) (No. 11-4196) (assault with deadly weapon with intent to kill inflicting serious injury); [United States v. Callahan, 179 F. App'x 200, 201-02 \(4th Cir. 2006\)](#) (No. 04-4409) (assault with deadly weapon with intent to kill or inflict serious injury); [United States v. Williams, 187 F.3d 429, 430-31 \(4th Cir. 1999\)](#) (AWDWIK). Against this backdrop, we conclude that Vereen has not established plain error in the district court's calculation of his Guidelines range. See [United States v. Carthorne, 726 F.3d 503, 516 \(4th Cir. 2013\)](#).

Accordingly, we affirm the district court's judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

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