

No.

IN THE SUPREME COURT OF THE UNITED STATES

Term,

KYLE COSTELLO, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Was the Speedy Trial Act, 18 U.S.C. § 3161, triggered upon Costello's extradition to Pennsylvania from Texas pursuant to a state parole detainer where a Special Assistant United States Attorney, who worked simultaneously for the Berks County, Pennsylvania District Attorney's Office, was directly involved in coordinating Costello's extradition to Pennsylvania and keeping his colleagues at the United States Attorney's Office abreast of Costello's arrest, extradition and subsequent detention in Pennsylvania prior to Costello's federal indictment?
2. Was Costello's aggravated assault conviction under 18 Pa. C.S.A. § 2702(a)(3) a "crime of violence" under U.S.S.G. § 4B1.2(a)(1) where "bodily injury," a necessary element of section 2702(a)(3), does not require the employment of "violent force" as required by this Court's decision in Johnson v. United States, 559 U.S. 133 (2010)?

LIST OF PARTIES

In addition to the United States, KYLE COSTELLO was a party in these proceedings in the United States Court of Appeals for the Third Circuit in his capacity as appellant in 16-4092.

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
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The Petitioner KYLE COSTELLO respectfully prays that a writ of certiorari issue to review the non-precedential Opinion and judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled proceedings on January 12, 2018.

OPINIONS BELOW

The January 12, 2018, non-precedential opinion of the United States Court of Appeals for the Third Circuit United States v. Kyle Costello, No. 16-4092, 2018 WL 389190 (3d Cir. Jan. 12, 2018) is attached as Appendix A, *infra*.

UNITED STATES STATUTE AND SENTENCING GUIDELINE INVOLVED

The Speedy Trial Act, 18 U.S.C. § 3161, provides, in relevant part,

Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. . . .

18 U.S.C. § 3161(b).

The career offender provision of the Sentencing Guidelines imposes enhanced sentences for defendants who have “two prior felony convictions of either a crime of violence or a controlled substance offense.” U.S.S.G. § 4B1.1(a). A “crime of violence” is defined, in relevant part, as:

any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another

U.S.S.G. § 4B1.2(a)(1).

A. PROCEDURAL HISTORY

A grand jury sitting in the Eastern District of Pennsylvania returned an indictment charging Costello and co-defendant Matthew Hill (“Hill”) with conspiracy to commit bank robbery, armed bank robbery and carrying a firearm during and in relation to a crime of violence in connection with the robbery of a branch of the National Penn Bank located in Shillington, Pennsylvania on November 7, 2013. Costello went to trial¹ before the Honorable Lawrence F. Stengel and a jury, which found him guilty. Prior to trial, Costello filed a motion to dismiss the indictment alleging violations of the Speedy Trial Act, 18 U.S.C. § 3161. The District Court

¹Hill plead guilty.

denied the motion after a hearing.

Costello was sentenced to, *inter alia*, a total of 204 months' incarceration. Over objection, the District Court concluded that Costello qualified as a career offender under the Sentencing Guidelines which exposed him to a guideline range of 360 months' to life imprisonment. Costello's objection challenged whether an aggravated assault conviction under 18 Pa. C.S.A. § 2702(a)(3) constituted a "crime of violence" under U.S.S.G. § 4B1.2 (a)(1).

On appeal, Costello raised two issues. The first issue involved whether the Speedy Trial Act was triggered by the involvement of a Special Assistant United States Attorney who helped secure Costello's extradition from Texas to Pennsylvania pursuant to a state parole detainer. The second issue involved whether aggravated assault under 18 Pa. C.S.A. § 2702(a)(3) is a "crime of violence" under U.S.S.G. § 4B1.2(a)(1). The Court of Appeals rejected Costello's arguments and affirmed the judgment of conviction and sentence. Appendix A.

B. BASIS FOR FEDERAL JURISDICTION

This litigation began as a criminal prosecution against Costello for an alleged violation of the laws of the United States. The United States District Court for the Eastern District of Pennsylvania had jurisdiction over this prosecution. 18 U.S.C. § 3231.

The Court of Appeals for the Third Circuit had appellate jurisdiction to review the final judgment of the District Court in accordance with 18 U.S.C. § 3742(a)(1) and 28 U.S.C. § 1291.

This Court's jurisdiction is invoked pursuant to Title 28 U.S.C. § 1254(1).

C. FACTS

Taken in a light most favorable to the government, the evidence at trial fairly showed that on November 7, 2013, Costello, together with Hill, walked into a branch of the National Penn

Bank, pulled out a gun, and robbed the teller of \$4,314.00. Costello, who was on Pennsylvania state parole at the time of the robbery, was identified as one of the robbers by his parole agent, who saw Costello's image during a television broadcast publicizing the robbery. After Costello was identified in a photo spread by the teller, a warrant for his arrest was issued by the Cumru Township Police Department on November 21, 2013. Costello was ultimately arrested in Texas on December 20, 2013.

Costello was extradited back to Pennsylvania pursuant to a state parole detainer that had been lodged against him as a result of the robbery. Costello arrived in Pennsylvania on January 15, 2014 and was initially incarcerated at the State Correctional Institution at Huntington. The instant federal indictment was returned against Costello on March 6, 2014. At issue in this petition is whether the Speedy Trial Act, 18 U.S.C. § 3161, was triggered upon Costello's incarceration at SCI-Huntington based upon the knowledge and involvement of federal authorities prior to and after his return to Pennsylvania.

Costello moved to dismiss the indictment prior to trial on the ground that his rights under the Speedy Trial Act had been violated. Costello argued that he was, in effect, under federal arrest as of January 15, 2014, the date he was returned to SCI-Huntington from Texas on the state parole warrant. If so, Costello's rights under the Speedy Trial Act would have been violated given that more than 30 days had passed between his January 15, 2014 incarceration at SCI-Huntington and his federal indictment on March 6, 2014.

At the hearing on Costello's motion to dismiss, Special Assistant United States Attorney ("SAUSA") Jonathan Kurland, who served contemporaneously as an assistant District Attorney and later as Chief Deputy District Attorney for Berks County, Pennsylvania, testified that he had

been cross-designated as a Special Assistant United States Attorney prior to and at the time of Costello's arrest, extradition and federal indictment for this robbery. Kurland went on to testify that a Cumru Township Police Department arrest warrant had been sworn out in late-November 2013 against Costello for his involvement in the robbery of the National Penn Bank. Eventually, according to Kurland, a second warrant/detainer was lodged against Costello by the Pennsylvania Board of Probation and Parole for Costello's alleged violation of parole in a prior matter arising out of Lancaster County, Pennsylvania.

SAUSA Kurland testified that he learned on December 24, 2013 that Costello had been arrested in Texas. Costello, according to Kurland, contested extradition on the Cumru Township Police Department arrest warrant but not on the parole warrant issued by the Pennsylvania Board of Probation and Parole. The arrest warrant, according to Kurland, was withdrawn and Costello was brought back to Pennsylvania pursuant to the parole warrant. Kurland ultimately learned of Costello's return to, and incarceration at SCI—Huntington on February 24, 2014.

SAUSA Kurland testified that he spoke either to the assigned case agent, or his (Kurland's) colleagues at the United States Attorney's Office in November or December 2013 about their interest in bringing federal bank robbery charges against Costello. This communication would have been before Costello was actually arrested in Texas on December 20, 2013. Upon learning of Costello's return to Pennsylvania on February 24, 2014, Kurland was in email communication with at least two of his colleagues at the United States Attorney's Office, AUSA Salvatore Astolfi and Astolfi's supervisor, AUSA Kathy Stark, regarding their timetable for prosecuting Costello. Kurland, in his capacity as the Deputy District Attorney for Berks County, testified that he tried, but failed, to coordinate Costello's initial appearance before a

Pennsylvania state court district magistrate. Ultimately, Costello's initial state court appearance became unnecessary when he was indicted federally on March 6, 2014. The next day, March 7, 2014, Kurland, in his capacity as Deputy District Attorney, withdrew the state charges against Costello. Thus, the first time Costello ever appeared before a judge on charges stemming from the bank robbery was on May 13, 2014, when Costello made his initial appearance in front of a federal magistrate judge on the federal indictment.

The District Court denied Costello's motion to dismiss. The District Court ruled that because Costello had failed to show more than "mere cooperation or close contact between the federal government and the state," he failed to show the "collusion" necessary between federal and state authorities that would have triggered the Speedy Trial Act. In the District Court's view, Kurland's testimony at the hearing " . . . showed confusion and lack of communication between the state and federal government----the antithesis of collusion."

On appeal, Costello renewed his argument that his arrest and incarceration in Pennsylvania after his extradition from Texas on a state parole detainer was a "ruse" to avoid triggering the Speedy Trial Act. The Court of Appeals acknowledged that

[a] state arrest . . . may trigger the Speedy Trial Act "when the Government has knowledge that an individual is held by state authorities solely to answer to federal charges". . . . This is known as the "ruse" exception. . . . Under this exception, state proceedings may trigger the Speedy Trial Act upon a showing of "collusion or evidence that the detention was for the sole or primary purpose of preparing for [federal] criminal prosecution."

Appendix A-2 (citations omitted). In rejecting Costello's argument that his state arrest was nothing more than a ruse to avoid triggering Speedy Trial Action, the Court of Appeals found that "there simply is no evidence of collusion between federal and state law enforcement officials in this case, or that Costello was detained on the parole violation warrant for the purpose of

preparing a federal prosecution.” Id.

With respect to the second issue raised in this petition, the District Court, over objection, determined that Costello qualified as a career offender under U.S.S.G. § 4B1.1. The District Court found that Costello had two prior convictions that qualified as a “crime of violence” under U.S.S.G. § 4B1.2(a) (1). Costello argued that one of these convictions, which involved aggravated assault under 18 Pa. C.S.A. § 2702(a)(3), did not qualify as a “crime of violence” under this Court’s decision in Johnson v. United States, 559 U.S. 133 (2010), because the “physical force” necessary under U.S.S.G. § 4B1.2(a)(1) requires the employment of “violent force” which, in Costello’s view, is not necessary to meet the “bodily injury” threshold for an aggravated assault conviction under section 2702(a)(3). The Court of Appeals affirmed the District Court’s conclusion that aggravated assault under 18 Pa. C.S.A. § 2702(a)(3) is a “crime of violence” because the statute “contemplates the use of physical force as to impair one’s physical condition or produce ‘substantial pain.’” Appendix A-3.

D. REASONS FOR GRANTING THE WRIT

The Speedy Trial Act, 18 U.S.C. § 3161, was triggered upon Costello’s extradition to Pennsylvania from Texas pursuant to a state parole detainer because a Special Assistant United States Attorney, who worked simultaneously for the Berks County District Attorney’s Office and the U.S. Attorney’s Office that prosecuted Costello, was directly involved in coordinating Costello’s extradition to Pennsylvania and keeping his colleagues at the United States Attorney’s Office abreast of Costello’s arrest, extradition and subsequent detention in Pennsylvania prior to Costello’s federal indictment.

The Speedy Trial Act requires that, “[a]ny information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges.” 18 U.S.C. § 3161(b). If the government fails to comply with this thirty day time limit, the Speedy

Trial Act requires the dismissal of indictment, with or without prejudice. 18 U.S.C. § 3162(a)(1).

Although formal federal charges are generally required before the Speedy Trial Act is triggered, this rule is not absolute. United States v. Benitez, 34 F.3d 1489, 1494 (9th Cir. 1994). This is because the Speedy Trial Act would lose all force if federal criminal authorities could arrange with state authorities to have the state authorities detain a defendant until federal authorities are ready to file criminal charges. Id. For this reason, Speedy Trial Act time periods may be triggered by state detentions that are merely a “ruse” to detain the defendant exclusively or primarily for the purpose of bypassing the requirements of the Act. Id. The Court of Appeals in this case noted that the “ruse” exception has been adopted in other circuits. Appendix A-2.

In the instant case, Costello confronted both federal and state criminal charges for the bank robbery. During the investigation, arrest, extradition and ultimate indictment of Costello, SAUSA Kurland worked for the United States Attorney’s Office while serving in a dual capacity as a prosecutor for the Berks County District Attorney’s Office. Based upon the efforts and actions of Kurland, the “primary purpose” of Costello’s incarceration at SCI-Huntington was in connection with, and in anticipation of, his federal prosecution. As a Special Assistant United States Attorney, Kurland was commissioned to perform the same prosecutorial tasks as an assistant United States Attorney.² Kurland facilitated Costello’s federal prosecution by

²Congress authorized the appointment of Special Assistant United States Attorneys by enacting 28 U.S.C. § 543. That statute, entitled “Special attorneys”, provides that “[t]he Attorney General may appoint attorneys to assist United States attorneys when the public interest so requires....” Id. § 543(a).

The range of work which Special Assistant United States Attorneys may undertake includes:

- (a) The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General as a matter of law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil

communicating with the case agent; communicating with AUSA Astolfi, who was government co-counsel in this case; and communicating with Astolfi's supervisor, AUSA Stark. In addition, Kurland notified the United States Attorney's Office of Costello's extradition to Pennsylvania from Texas and was privy to the timetable underlying Costello's federal indictment. In order to expedite Costello's return to Pennsylvania from Texas after Kurland's federal colleagues communicated their interest in prosecuting Costello, Kurland withdrew the Cumru Township Police Department arrest warrant, which Costello was contesting in extradition proceedings, in favor of the state parole detainer, which Costello did not contest. Indeed, Kurland was so in-tuned with the federal prosecution of Costello that he withdrew the Berks County charges the day after Costello's federal indictment.

Thus, contrary to the suggestion of the District Court that there "was confusion and lack of communication between the state and federal government—the antithesis of collusion[.]"³ the evidence showed that the federal and state prosecution of Costello moved in lock-step; all with the inside assistance of SAUSA Kurland. While there may not have been "collusion" between state and federal authorities in the pejorative sense in Costello's federal prosecution, there was seamless coordination between state and federal authorities with Kurland, in his dual capacity as Special United States Attorney and Berks County prosecutor, serving as the common denominator and liaison in Costello's federal and state prosecutions. Thus, given the status and

or criminal, including grand jury proceedings and proceedings before committing magistrate judges, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.
28 U.S.C. § 515(a) (emphasis supplied).

³Appendix A-2.

role played by SAUSA Kurland in this case, the Speedy Trial Act clock was triggered upon Costello's arrival at SCI-Huntington on January 15, 2014. Costello's indictment on March 6th, only 50 days after his return to Pennsylvania, reflects that the government's decision to prosecute him federally was not speculative or uncertain. Rather, it shows that Costello was effectively under federal arrest when he arrived at SCI-Huntington. The government's failure, then, to indict within thirty days from January 15, 2014 constituted a violation of the Speedy Trial Act.

Because the Speedy Trial Act is implicated in every federal criminal prosecution, this Court should grant the instant petition and examine the "ruse" exception to ensure that a defendant's speedy trial rights are not violated by the machinations of federal prosecutorial authorities. Confidence in the federal criminal justice system is undermined where, as here, federal authorities are complicate in violating a defendants speedy trial rights. This case cries out for certiorari review and ultimate dismissal of the indictment.

Costello's aggravated assault conviction under 18 Pa. C.S.A. § 2702(a)(3) is not a "crime of violence" under U.S.S.G. § 4B1.2(a)(1) because "bodily injury," a necessary element of section 2702(a)(3), does not require the employment of "violent force," a necessary requisite under this Court's decision in Johnson v. United States, 559 U.S. 133 (2010).

The District Court, over objection, concluded that Costello's aggravated assault conviction under 18 Pa. C.S.A. § 2702 (a)(3) constituted a "crime of violence" under U.S.S.G. § 4B1.2 (a)(1). The version of U.S.S.G. § 4B1.2 (a)(1) in effect at the time of Costello's sentencing defined a "crime of violence," in part, as:

any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that —(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2)

U.S.S.G. § 4B1.2(a) (1).

Section 2702 (a)(3) defines aggravated assault as follows:

(a) Offense defined.--A person is guilty of aggravated assault if he:

. . .

(3) attempts to cause or intentionally or knowingly causes bodily injury to any of the officers, agents, employees or other persons enumerated in subsection (c), in the performance of duty[.]

18 Pa. C.S.A. § 2702 (a) (3).

“Bodily injury” is defined as the “[i]mpairment of physical condition or substantial pain.” 18 Pa. C.S.A. § 2301.

The language under U.S.S.G. § 4B1.2 (a)(1) was examined by this Court in Johnson v. United States, 559 U.S. 133 (2010). In Johnson, the defendant pleaded guilty to knowingly possessing ammunition by a convicted felon in violation of 18 U.S.C. § 922(g)(1). The Government sought an enhanced penalty under the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e), which provides for a 15-year mandatory minimum sentence for a person who has three previous convictions for “a violent felony” committed on separate occasions.

A “violent felony” under ACCA is defined as “any crime punishable by imprisonment for a term exceeding one year” that: “(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) . . . “ 18 U.S.C. § 924(e)(2)(B). This is the same language used to define a “violent felony” under U.S.S.G. § 4B1.2(a) at the time Costello was sentenced.

The issue in Johnson was whether the Florida felony offense of battery, which was defined, in part⁴, to include “[a]ctually and intentionally touch[ing]” another person, involved the

⁴Under Fla. Stat. § 784.03(1)(a), a battery occurs in one of three instances: (1) the defendant “[i]ntentionally caus[ed] bodily harm;” (2) the defendant “intentionally str[uck]” the

use of “physical force against the person of another.” The defendant’s conviction of violating this statute constituted one of the three predicate offenses that triggered the application of ACCA at his sentencing.

This Court ruled that, in the context of the statutory definition of “violent felony,”

. . . the phrase “physical force” means violent force—that is, force capable of causing physical pain or injury to another person. . . . Even by itself, the word “violent” in § 924(e)(2)(B) connotes a substantial degree of force. . . . When the adjective “violent” is attached to the noun “felony,” its connotation of strong physical force is even clearer.

Johnson, 559 U.S. at 140–41 (internal citations omitted) (emphasis supplied). The Court ultimately concluded that the Florida felony offense of battery by “[a]ctually and intentionally touch[ing]” another person does not have “as an element the use ... of physical force against the person of another,” and thus does not constitute a “violent felony” under ACCA. Id. at 145.

In the instant case, the Court of Appeals erred in concluding, as did the District Court, that aggravated assault under section 2702 (a)(3) is a “crime of violence” under U.S.S.G. § 4B1.2 (a)(1). The Court of Appeals reasoned:

Section 2702(a)(3) requires that the accused knowingly or intentionally cause “bodily injury.” The statute therefore necessarily contemplates the use of such physical force as to impair one’s physical condition or produce “substantial pain.” “Johnson held that so long as the force involved is ‘capable of causing physical pain or injury to another person,’ ... the ‘physical force’ requirement of the crime-of-violence definition is satisfied.” Costello cites no authority to support his assertion that a person can intentionally impair another’s physical condition without use of such physical force as is “capable of causing pain or injury.” Common sense dictates that knowingly or intentionally causing impairment of another’s physical condition requires the use of physical force.

Appendix A-3 (citations omitted).

victim; or (3) the defendant “[a]ctually and intentionally touche[d]” the victim. 559 U.S. at 136-137. Johnson analyzed whether the defendant committed a violent felony under ACCA where he “[a]ctually and intentionally touche[d]” the victim.

Contrary to the rational of the Court of Appeals, aggravated assault under 18 Pa. C.S.A. § 2702 (a)(3) does not necessarily require the defendant to employ “violent force—that is, force capable of causing physical pain or injury to another person.” The term “bodily injury” under section 2702(a)(3) can arise either where the victim has suffered the (1) “impairment of physical condition” or (2) “substantial pain.” 18 Pa. C.S.A. § 2301. The noun “impairment,” although not defined by Pennsylvania statute, is defined in Black’s Law Dictionary as “[t]he fact or state of being damaged, weakened, or diminished.” Blacks Law Dictionary at 754 (7th edition 1999). The verb “to impair” is defined as (1) “to make or become worse; diminish in ability, value, excellence, etc.; weaken or damage . . . (2) to grow or become worse; lessen.” Random House Webster’s Unabridged Dictionary at 958 (2nd edition 2001).

By contrast, under Johnson, “. . . the phrase ‘physical force’ means violent force—that is, force capable of causing physical pain or injury to another person. . . .” 559 U.S. at 140–41. A person’s physical condition can be worsened, lessened, or diminished—i.e., impaired—without the person necessarily suffering “physical pain or injury” through the employment of “violent force.” Thus, because aggravated assault under 18 Pa. C.S.A. § 2702 (a)(3) can be committed with force less than “violent force,” it is not a “crime of violence” under U.S.S.G. § 4B1.2 (a)(1). Because the decision of the Court of Appeals conflicts with this Court’s decision in Johnson, the writ should issue and Costello’s judgment of sentence reversed so that he can be sentenced without consideration of the career offender provisions of the Sentencing Guidelines.

CONCLUSION

WHEREFORE, Petitioner respectfully prays for the issuance of a writ of certiorari for the reasons stated herein.

Respectfully submitted,

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