

No. 07-9390

IN THE SUPREME COURT OF THE UNITED STATES

OSCAR ARREGUIN-AGUILAR, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner's prior state conviction for carrying a concealed firearm qualifies as a "crime of violence" under Sentencing Guidelines § 2L1.2(b)(1)(A)(ii).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not published in the Federal Reporter, but is available at 2007 WL 3355457.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 2007. The petition for a writ of certiorari was filed on February 12, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Northern District of Florida to illegally reentering the United States after removal, in violation of 8 U.S.C. 1326. He was sentenced to 46 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. A1-A2.

1. Section 1326, Title 8 of the United States Code makes it unlawful for an alien to reenter the United States after having been removed, unless he has received the consent of the Attorney General. 8 U.S.C. 1326(a). Illegal reentry is generally punishable by up to two years of imprisonment. Ibid. If, however, the alien's removal follows a felony conviction, the statutory maximum term of imprisonment for the offense is ten years; if the alien's removal follows a conviction for an aggravated felony, the maximum term of imprisonment is 20 years. 8 U.S.C. 1326(b)(1) and (2).

The Sentencing Guidelines applicable to persons convicted of illegal reentry provide for a 16-level increase of the defendant's base offense level if the defendant was previously removed after a felony conviction for a "crime of violence." Guidelines § 2L1.2(b)(1)(A)(ii). The commentary to Guidelines § 2L1.2 defines the term "crime of violence" as:

murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, statutory rape, sexual abuse of a minor,

robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.

Sentencing Guidelines § 2L1.2, comment. (n.1(B)(iii)).

2. In October 2005, petitioner, a native and citizen of Mexico, was convicted in Florida state court of the felony offense of carrying a concealed firearm, namely, a .22 caliber revolver. In November 2005, petitioner was deported to Mexico. Presentence Report (PSR) ¶¶ 10, 28, 30.

In December 2006, Florida police stopped a car in Fort Walton Beach and found 68 grams of suspected marijuana in a cardboard box in the middle of the rear passenger floorboard, a bag of suspected marijuana and a metal pipe inside the seam of the front passenger seat, and another bag of suspected marijuana under the rear passenger seat. Petitioner was one of four occupants of the car, all of whom were arrested. Following his arrest, petitioner admitted that he had entered in the United States in June 2006 near Eagle Pass, Texas, without proper authorization. PSR ¶¶ 6-9.

Petitioner was charged with, and pleaded guilty to, illegally reentering the United States in violation of 8 U.S.C. 1326. Pet. App. A1. The PSR recommended a 16-level enhancement to his base offense level of 8 under Guidelines § 2L1.2(b)(1)(A)(ii) based on his 2005 conviction for carrying a concealed firearm, which the PSR characterized as a "crime of violence." PSR ¶ 16. With a total

offense level of 21, after a three-level reduction for acceptance of responsibility pursuant to Guidelines § 3E1.1, and a criminal history of category of II, petitioner's advisory Guidelines range was 41-51 months of imprisonment. PSR ¶¶ 21, 47. Although petitioner filed objections to the PSR, he did not object to the PSR's determination that he was eligible for a 16-level enhancement under Guidelines § 2L1.2(b)(1)(A)(ii), based on his conviction for carrying a concealed firearm. See Addendum to the PSR.

At sentencing, petitioner's attorney argued that petitioner should receive "the lowest possible sentence that the Court can impose." Sent. Hrg. Tr. 4. Counsel noted that "[w]hat increased [petitioner's offense level] was the felony carrying of a concealed firearm," but explained that petitioner "lived in a relatively dangerous neighborhood." Ibid. Counsel added: "[T]hat's not, to my way, a crime of violence of carrying a firearm. He didn't choose it." Ibid. Counsel made no argument, however, that petitioner's prior conviction for carrying a concealed firearm did not constitute a "crime of violence" as that term is defined under Guidelines § 2L1.2. Adopting the findings of the PSR, the district court sentenced petitioner to 46 months of imprisonment, to be followed by three years of supervised release. Sent. Hrg. Tr. 5-6.

3. In his appellate brief, petitioner's counsel noted that petitioner wished to challenge the characterization of his concealed-carrying offense as a crime of violence, but stated that

"[i]t was explained to [petitioner] * * * that the case law would not support his contentions." Pet. C.A. Br. 8-9. Petitioner's counsel cited United States v. Gilbert, 138 F.3d 1371 (1998), cert. denied, 526 U.S. 1111 (1999), in which the Eleventh Circuit held that carrying a concealed weapon is a "crime of violence" under Guidelines § 4B1.2. Pet. C.A. Br. 9. In its brief, the government noted that, because petitioner failed to raise the argument in the district court, petitioner's claim was reviewable only for plain error. Gov't C.A. Br. 9-11. The government agreed with petitioner's counsel that there had been no error in this case, because the Eleventh Circuit had held that "a conviction for carrying a concealed firearm under Florida law qualifies as 'a crime of violence' under the Sentencing Guidelines." Id. at 14; see ibid. (citing, inter alia, Gilbert, supra).

The court of appeals affirmed. Pet. App. A1-A2. The court rejected petitioner's argument that the 16-level enhancement was improper because carrying a concealed weapon in violation of Florida law did not constitute a "crime of violence" under Sentencing Guidelines § 2L1.2(b)(1)(A)(ii). The court agreed with both petitioner's counsel and the government that "[a] line of cases from this court establishes as a matter of law that a conviction for carrying a concealed firearm in Florida is a crime of violence under the Guidelines," citing Gilbert, supra, and

United States v. Williams, 435 F.3d 1350 (11th Cir. 2006). Pet. App. A1.

DISCUSSION

Petitioner contends (Pet. 4-8) that the court of appeals erred in concluding that his prior conviction for carrying a concealed firearm in violation of Florida law constituted a "crime of violence" under Sentencing Guidelines § 2L1.2(b)(1)(A)(ii). The court of appeals, like the parties below, proceeded on the premise that the phrase "crime of violence" has a single definition "under the Guidelines" and that the question in this case was controlled by Eleventh Circuit precedent holding that carrying a concealed firearm qualifies as a "crime of violence" under Guidelines § 4B1.2. On further examination, however, that premise is erroneous. There is more than one definition of the relevant phrase in the Guidelines. The definition of the term "crime of violence" in the commentary to Guidelines § 2L1.2 differs in material respects from the definition of the same term under Guidelines § 4B1.2. The government accordingly suggests that this Court grant the petition, vacate the judgment of the court of appeals, and remand this case for further consideration.

1. Section 790.01(2) of the Florida Statutes makes it a felony for a person to "carr[y] a concealed firearm on or about his or her person." Fla. Stat. Ann. § 790.01(2) (West 2005). In holding that petitioner's Florida conviction for carrying a

concealed firearm qualified as a "crime of violence" for purposes of the 16-level enhancement under the illegal-reentry guideline, Guidelines § 2L1.2(b)(1)(A)(ii), the court of appeals relied on Eleventh Circuit precedent holding that crime constitutes a "crime of violence" under the career-offender guideline, Sentencing Guidelines § 4B1.2. See Pet. App. A1 (citing United States v. Gilbert, 138 F.3d 1371 (1998), cert. denied, 526 U.S. 1111 (1999); and United States v. Williams, 435 F.3d 1350 (11th Cir. 2006)).

Under the career-offender guideline, a "crime of violence" is defined 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) 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." Guidelines § 4B1.2(a). The Eleventh Circuit has concluded that the Florida offense of carrying a concealed weapon constitutes a "crime of violence" under that definition because it involves conduct that "presents a serious potential risk of physical injury." Gilbert, 138 F.3d at 1372; see also United States v. Hall, 77 F.3d 398 (11th Cir.) (carrying a concealed weapon qualifies as a "violent felony" under the nearly identically worded provision of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)), cert. denied, 519 U.S. 849 (1996). As the court

explained in Hall, the Florida offense of carrying a concealed firearm requires both (1) that the firearm be physically carried on the defendant's person or readily accessible to him, and (2) that the firearm be hidden from sight. 77 F.3d at 402 n.4. Those statutory elements, the court explained, create a "likelihood of immediate violence." Ibid.

Although neither the parties nor the courts below recognized it, the definition of "crime of violence" in the commentary to Guidelines § 2L1.2(b)(1)(A)(ii) differs in material respects from the career-offender Guideline definition of the same phrase. Under Guidelines § 2L1.2(b)(1)(A)(ii), which applies to this case, an offense is a "crime of violence" if it is included among the enumerated offenses listed in application note 1(B)(iii) of the commentary to Guidelines § 2L1.2, or if it is "any offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another." Guidelines § 2L1.2, comment. (n.1(B)(iii)). The definition in the commentary to Guidelines § 2L1.2(b)(1)(A)(ii), unlike the career-offender guideline definition, does not encompass other offenses that "present a serious potential risk of physical injury to another," Guidelines § 4B1.2(a)(2). In other words, the definition in the commentary to Guidelines § 2L1.2(b)(1)(A)(ii) provides a catchall similar to the definition of "crime of violence" in Guidelines § 4B1.2(a)(1), but

lacks a catchall provision comparable to that provided in Guidelines § 4B1.2(a)(2).

This difference is material. Carrying a concealed firearm is not among the offenses enumerated in the commentary to Guidelines § 2L1.2. Nor does it have "as an element the use, attempted use, or threatened use of physical force against the person of another." Cf. Gilbert, 138 F.3d at 1372 ("The elements of a concealed firearm offense do not include any use of force."). Accordingly, the courts below erred in concluding that petitioner's prior conviction for carrying a concealed weapon qualified as a "crime of violence" under Guidelines § 2L1.2(b)(1)(A)(ii).

2. Although petitioner argued at sentencing that his conviction for carrying a concealed firearm did not warrant a 16-level enhancement under Guidelines § 2L1.2, he did not argue that carrying a concealed firearm is not a "crime of violence" under Guidelines § 2L1.2(b)(1)(A)(ii). Moreover, in his appellate brief, petitioner's counsel conceded that carrying a concealed firearm qualifies as a "crime of violence" under the Guidelines. Petitioner's contention is therefore reviewed under the plain-error standard. Petitioner accordingly must show that there was (1) an error at trial that (2) was "plain," "clear," or "obvious," and (3) "affect[ed] substantial rights." United States v. Olano, 507 U.S. 725, 732-734 (1993). If all three conditions are met, "an appellate court may then exercise its discretion to notice a

forfeited error, but only if * * * the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." United States v. Cotton, 535 U.S. 625, 631-632 (2002) (quoting Johnson v. United States, 520 U.S. 461, 466-467 (1997)) (alteration in original).

This case appears to satisfy the Olan standard. The district court clearly erred in applying a 16-level enhancement on the basis that petitioner's conviction for carrying a concealed firearm qualified as a "crime of violence" under Guidelines § 2L1.2, and that conviction does not fall within any of the other categories of offenses that warrant a 16-level enhancement under that guideline.*

Guidelines § 2L1.2 provides for an eight-level enhancement where the defendant has a prior conviction for an "aggravated felony." Had petitioner's offense level been calculated as 13, as opposed to 21, petitioner's advisory Guidelines range would have been 15 to 21 months, as opposed to 41 to 51 months. See Guidelines § 2L1.2(b)(1)(C). The error thus may be noticed, despite petitioner's failure to raise the issue below.

3. Petitioner (Pet. 7-8) does not seek plenary review of the question presented, and plenary review is not warranted to correct

* Although Guidelines § 2L1.2 also provides for a 16-level enhancement where the defendant has a prior felony conviction for a "firearms offense," Guidelines § 2L1.2(b)(1)(A)(iii), petitioner's conviction does not fall within the definition of that term set forth in the Guidelines commentary. See Guidelines § 2L1.2 comment. (n.1(B)(v)).

the court of appeals' error. Under the circumstances of the case, however, we agree with petitioner that it would be appropriate to grant the petition for the limited purpose of vacating the court of appeals' judgment and remanding for further proceedings.

CONCLUSION

The petition for a writ of certiorari should be granted, the court of appeals' decision vacated, and the case remanded for further proceedings.

Respectfully submitted.

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