ORIGINAL

Supreme Court, U.S.
FILED
DEC 24 2008
OFFICE OF THE CLERK

No. 08-6925

IN THE SUPREME COURT OF THE UNITED STATES

CURTIS DARNELL JOHNSON, 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 IN OPPOSITION

GREGORY G. GARRE
Solicitor General
Counsel of Record

MATTHEW W. FRIEDRICH
Acting Assistant Attorney General

MICHAEL A. ROTKER
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner's prior conviction for felony battery under Florida law is a "violent felony" under the Armed Career Criminal Act. 18 U.S.C. 924(e)(2)(B)(i).

2. Whether Almendarez-Torres v. United States, 523 U.S. 224 (1998), should be overruled.

IN THE SUPREME COURT OF THE UNITED STATES

No. 08-6925

CURTIS DARNELL JOHNSON, 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 IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is reported at 528 F.3d 1318.

JURISDICTION

The judgment of the court of appeals was entered on May 30, 2008. A petition for rehearing was denied on July 22, 2008. Pet. App. B1. The petition for a writ of certiorari was filed on October 20, 2008. 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 Middle District of Florida, petitioner was convicted of being a felon in possession of ammunition, in violation of 18 U.S.C. 922(g)(1). Because he had been convicted on three prior occasions for a "violent felony," petitioner was subject to a 15-year mandatory minimum sentence under 18 U.S.C. 924(e)(1). The district court sentenced him to 185 months of imprisonment. The court of appeals affirmed. Pet. App. A1-A5.

1. On August 9, 2006, police officers were dispatched to petitioner's residence in response to a domestic disturbance between him and Carol Woodbury. During the altercation, petitioner yelled at Woodbury, bit her finger, and retrieved a rifle and loaded it. Petitioner and Woodbury subsequently left the residence separately, and the officers arrested petitioner without incident when he came out. The officers also recovered a rifle, a semi-automatic pistol, and ammunition from petitioner's residence. Presentence Report ¶¶ 5-10 (PSR).

Petitioner has an extensive criminal history, including felony convictions under Florida law for aggravated battery, burglary, and battery. PSR ¶¶ 30, 31, 48.[1]

---

[1] Under Florida law, a battery occurs "when a person [a]ctually and intentionally touches or strikes another person against the will of the other; or [i]ntentionally causes bodily harm to another person." Fla. Stat. § 784.03(1)(a). Violations of that statute are first-degree misdemeanors, see Fla. Stat. § 784.03(1)(b), except that "[a] person who has one prior conviction for battery, aggravated battery, or felony battery and who commits any second or subsequent battery commits a felony of the third degree." Fla. Stat. § 784.03(2). Accordingly, petitioner's

2. A federal grand jury in the Middle District of Florida returned a single-count indictment charging petitioner with possession of ammunition as a convicted felon, in violation of 18 U.S.C. 922(g)(1). Petitioner pleaded guilty to the charge.

3. The Armed Career Criminal Act (ACCA) imposes a 15-year mandatory minimum sentence for an individual convicted under 18 U.S.C. 922(g) who also has three prior convictions for a "violent felony." 18 U.S.C. 924(e)(1). The PSR applied ACCA to petitioner due to his three prior Florida state convictions. PSR ¶ 24. Based on the relevant Sentencing Guidelines and ACCA's mandatory minimum 15-year sentence, the PSR recommended an advisory sentencing range of 180 to 188 months of imprisonment. Id. ¶¶ 102-103.

As relevant here, petitioner objected to the PSR's recommendation on two grounds. First, he contended that to sentence him on the basis of the PSR's finding that his prior felony convictions subjected him to ACCA without a supporting jury verdict would violate his Sixth Amendment right to a jury trial. Second, he contended that his felony conviction for battery was not a "violent felony" because battery can be committed by offensive touching. PSR Add.

4. The district court overruled petitioner's objections, accepted the PSR's application of ACCA and its advisory sentence

---

battery conviction was elevated to felony status by virtue of his prior aggravated battery conviction.

calculation, and sentenced petitioner to 185 months of imprisonment. Pet. 4-5.

5. The court of appeals affirmed. Pet. App. A1-A5. As relevant here, the court rejected petitioner's claim that he should not have been sentenced as an armed career criminal because, in his view, "felony battery under Florida law does not come within the definition of 'violent felony' that is contained in the ACCA." Id. at A1. The court explained that its precedent made clear that "[t]he crime of battery under Florida law * * * requires at a minimum the actual and intentional touching or striking of another person against that other person's will." Id. at A2 (citing United States v. Llanos-Agostadero, 486 F.3d 1194, 1197 (11th Cir. 2007) (per curiam), petition for cert. pending, No. 08-6486, and United States v. Glover, 431 F.3d 744, 749 (11th Cir. 2005) (per curiam)). Those decisions, in turn, held that battery under Florida law was a "crime of violence" under Sentencing Guidelines § 2L1.2(b)(1), see Llanos-Agostadero, 486 F.3d at 1196-1198, and Sentencing Guidelines § 4B1.2(a), see Glover, 431 F.3d at 749. The court then explained that, because the relevant part of the "violence" definition in those guidelines provisions was "identical to the definition of the violence element" in ACCA's definition of a "violent felony," it "follows that [the] Llanos-Agostadero and Glover decisions about this same definition of violence apply with full force in [ACCA] cases, unless they have been overruled in some

relevant respect." Pet. App. A3.

The court then rejected petitioner's argument that those decisions had in fact been overruled by State v. Hearns, 961 So. 2d 211 (Fla. 2007), in which the Florida Supreme Court held that battery was not a "forcible felony" for purposes of the State's own violent career criminal statute. Pet. App. A2-A4. The court of appeals concluded that Hearns had not undermined any state-law premises in its prior decisions because "[t]he issue of whether [ACCA] applies to the state law defined crime of battery is a federal question, not a state one." Id. at A4.

The court also rejected petitioner's contention that "the district court lacked the authority to sentence him as an armed career criminal because he did not admit in his guilty plea to the facts necessary to being one." Pet. App. A5. The court found that contention "foreclosed by" Almendarez-Torres v. United States, 523 U.S. 224 (1998).

The court denied petitioner's timely petition for rehearing and rehearing en banc. Pet. App. B1.

ARGUMENT

1. Petitioner renews his contention (Pet. 6-21) that felony battery under Florida law is not a "violent felony" for purposes of 18 U.S.C. 924(e)(2)(B). The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or of any other court of appeals. Further

review is therefore not warranted.

a. The court of appeals correctly concluded that felony battery under Fla. Stat. § 784.03 qualifies as a "violent felony" within the meaning of 18 U.S.C. 924(e)(2)(B).

Under ACCA, a "violent felony" includes a felony that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. 924(e)(2)(B)(i). Florida's felony offense for battery requires physical contact with another person because it applies only "when a person [a]ctually and intentionally touches or strikes another person against the will of the other; or [i]ntentionally causes bodily harm to another person." Fla. Stat. § 784.03(1)(a). As the Eleventh Circuit explained in United States v. Griffith, 455 F.3d 1339, 1342 (11th Cir. 2006), a person "cannot make physical contact * * * with another without exerting some level of physical force." See also United States v. Nason, 269 F.3d 10, 20 (1st Cir. 2001) (stating that "offensive physical contacts" with another person's body under Maine assault statute "invariably emanate from the application of some quantum of physical force"); United States v. Smith, 171 F.3d 617, 621 n.2 (8th Cir. 1999) (explaining that "insulting or offensive" physical contact under Iowa assault statute "by necessity * * * requires physical force to complete"); cf. Leocal v. Ashcroft, 543 U.S. 1, 9 (2004) (stating in dicta that for purposes of definition of "crime of violence" in 18 U.S.C. 16(a),

"a person would 'use . . . physical force against' another when pushing him"). Accordingly, a battery under Florida law qualifies as a "violent felony" under ACCA.

b. Contrary to petitioner's contention (Pet. 7), the court of appeals' decision is not "in direct conflict" with this Court's determination that a federal court is bound by a state court's definition of the elements of a state criminal offense. See, e.g., Mullaney v. Wilbur, 421 U.S. 684, 691 (1975) (noting "that state courts are the ultimate expositors of state law" and accepting state supreme court's construction of homicide law). The court of appeals in this case correctly relied on state law in considering the elements of petitioner's prior felony battery conviction. See Pet. App. A4 (reviewing prior federal cases applying the Florida definition of battery, citing State v. Hearns, 961 So. 2d 211 (Fla. 2007), and noting that Hearns states that "any intentional touching against another person's will is battery even if insufficient to injure"). But as the court of appeals also explained, while the elements of the offense present a question of state law, the determination whether the offense amounts to a "violent felony" under ACCA is itself a federal question. See ibid. ("The issue of whether the federal Armed Career Criminal Act applies to the state law defined crime of battery is a federal question, not a state one.").

Petitioner's reliance (Pet. 6-12) on Hearns is therefore

misplaced. Hearns held that battery committed against a law enforcement officer did not categorically involve "physical force or violence" for purposes of Florida's own violent career criminal statute. 961 So. 2d at 219. The question here, however, is whether Florida felony battery involves "physical force" and is therefore a "violent felony" under the federal armed career criminal statute. Whether Florida state courts categorize felony battery as not involving "physical force" under a state law provision is thus irrelevant here. See, e.g., United States v. Walker, 442 F.3d 787, 788 (2d Cir. 2006) (per curiam) ("Congress chose to define 'violent felony' by reference to the elements of the offense of conviction rather than to the status of that offense within the relevant state law.").

c. Petitioner also contends on two grounds that the courts of appeals are divided on classifying crimes as violent. That contention lacks merit and does not warrant further review.

First, petitioner contends (Pet. 18) that decisions from the Eleventh and Fifth Circuits "directly conflict[]" on whether the Florida offense of battery committed against a pregnant woman, Fla. Stat. § 784.045(1)(b), is a "crime of violence" under Sentencing Guidelines § 2L1.2. Compare Llanos-Agostadero, 486 F.3d at 1198 (holding that it is), with United States v. Gonzalez-Chavez, 432 F.3d 334, 338 n.6 (5th Cir. 2005) (suggesting that it is not). There is no such conflict, however, because the Fifth Circuit's

discussion on the point was dicta. See id. at 338 & n.6 (remanding to sentencing court because "the record does not indicate" the defendant's prior offenses and noting in passing that battery committed against a pregnant woman under Florida law "is not clearly a crime of violence"). But even assuming that a conflict exists in that context, petitioner's battery conviction arose under Florida's standard battery statute, Fla. Stat. § 784.03, not under its battery statute pertaining to pregnant women, Fla. Stat. § 784.045(1)(b). Likewise, petitioner's case arises under ACCA's definition of "violent felony," not under the Sentencing Guidelines' definition of "crime of violence" at issue in Llanos-Agostadero and Gonzalez-Chavez, and any conflict regarding the application of the Guidelines can be addressed by the Sentencing Commission without any need for intervention by this Court.

Second, petitioner contends (Pet. 19-21) that the Eleventh Circuit's position that physical contact against the will of another constitutes physical force conflicts with decisions from the Fifth, Seventh, Ninth, and Tenth Circuits. According to petitioner (id. at 19-20), those courts "hold that the physical force required must be in some way violent in nature." Although the federal statutory provisions at issue in those cases are materially identical to the ACCA provision at issue here, those decisions do not directly conflict with the decision below because they involved neither Florida's general battery statute nor ACCA's

"violent felony" definition. See Gonzalez-Chavez, 432 F.3d 334 (discussed above) (involving Florida statute pertaining to battery committed against a pregnant woman and Sentencing Guidelines § 2L1.2's definition of "crime of violence"); Flores v. Ashcroft, 350 F.3d 666 (7th Cir. 2003) (involving Indiana battery statute and 18 U.S.C. 16's definition of "crime of violence"); Ortega-Mendez v. Gonzales, 450 F.3d 1010 (9th Cir. 2006) (involving California battery statute and 18 U.S.C. 16's definition of "crime of violence"); United States v. Hays, 526 F.3d 674 (10th Cir. 2008) (involving Wyoming battery statute and 18 U.S.C. 921(a)(33)(A)'s definition of "misdemeanor crime of domestic violence"); United States v. Belless, 338 F.3d 1063 (9th Cir. 2003) (involving Wyoming battery statute and 18 U.S.C. 921(a)(33)(A)'s definition of "misdemeanor crime of domestic violence"). Accordingly, the decision in this case does not squarely conflict with any of those decisions, and further review thus is unwarranted.

2. Petitioner also asks the Court (Pet. 22-23) to overrule its decision in Almendarez-Torres v. United States, 523 U.S. 224 (1998), in which it held that a prior criminal conviction need not be alleged in a federal indictment and proved to a jury beyond a reasonable doubt to support an enhancement above the otherwise applicable maximum sentence. That contention does not warrant review.

In Apprendi v. New Jersey, 530 U.S. 466 (2000), the Court

held, as a matter of federal constitutional law, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490. Since then, the Court has repeatedly reaffirmed that Apprendi applies to any fact that enhances the statutory maximum penalty "[o]ther than a prior conviction." Cunningham v. California, 127 S. Ct. 856, 864 (2007); see James v. United States, 127 S. Ct. 1586, 1600 n.8 (2007) ("[P]rior convictions need not be treated as an element of the offense for Sixth Amendment purposes."); see also United States v. Booker, 543 U.S. 220, 244 (2005); Blakely v. Washington, 542 U.S. 296, 301 (2004). In addition, this Court has repeatedly denied petitions for a writ of certiorari that have urged overruling Almendarez-Torres. See, e.g., Rangel-Reyes v. United States, 547 U.S. 1200, 1201-1202 (2006) (Stevens, J., respecting the denial of the petitions for writ of certiorari) ("[T]here is no special justification for overruling Almendarez-Torres. * * * The doctrine of stare decisis provides a sufficient basis for the denial of certiorari in these cases.") (Nos. 05-10743, 05-10706, 05-10815); Cerna-Salquero v. United States, 545 U.S. 1130 (2005) (No. 04-9248); Ortiz-Rosas v. United States, 543 U.S. 1124 (2005) (No. 04-6950); Aguilera-De Flores v. United States, 542 U.S. 906 (2004) (No. 03-9351); Garza-Garza v. United States, 541 U.S. 1031 (2004) (No. 03-8730); Garcia-Saldivar

v. United States, 541 U.S. 1011 (2004) (No. 03-8536). There is no reason for a different outcome in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREGORY G. GARRE
Solicitor General

MATTHEW W. FRIEDRICH
Acting Assistant Attorney General

MICHAEL A. ROTKER
Attorney

DECEMBER 2008