COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss
1585cr00476

SUPREME JUDICIAL COURT
FAR No. 28400

APPEALS COURT
No. 2020-P-0073

COMMONWEALTH

v.

HERIBERTO RIVERA

DEFENDANT-APPELLANT'S APPLICATION FOR FURTHER APPELLATE REVIEW

Now comes the defendant/appellant, Heriberto Rivera, in the above-entitled matter, and applies, pursuant to Mass. R.A.P. 27.1, for leave to obtain further appellate review in the Supreme Judicial Court of a decision of the Massachusetts Appeals Court on appeal from his judgment of his convictions of felony possession with intent to sell cocaine, misdemeanor firearm possession, and misdemeanor ammunition possession and of the denial of his post-conviction motion to withdraw and correct an illegal sentence pursuant to Mass. R. Crim P. 30 (a) and (b). In an unpublished decision, issued on June 30, 3021, the Appeals Court affirmed the judgment and the order denying the motion to withdraw and correct an illegal sentence, *Com. v. Rivera,* 99 Mass. App. Ct. 1131 (2021).

As set forth in the accompanying memorandum of law, there are substantial reasons affecting the public interest and the interests of justice that warrant or make desirable this Court granting further appellate review of this decision.

Respectfully submitted,
HERIBERTO RIVERA
By his attorney,

/s/ Kari Hong
Kari Hong
BBO# 568975
P.O. Box 86299
Tucson, AZ 85754
C: (510) 384-4524
E: kari.e.hong@gmail.com

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DEFENDANT-APPELLANT'S MEMORANDUM OF LAW IN SUPPORT OF HIS APPLICATION FOR FURTHER APPELLATE REVIEW

This case involves a situation in which the Massachusetts Appeals Court did not correct an illegal sentence imposing a lengthy enhancement for a conviction that is no longer a predicate offense under the Armed Career Criminal Act ("ACCA") even though the same court vacated an ACCA enhancement involving the same prior crime for a different defendant two months prior and for a different defendant two weeks after his case was decided by the Court. The principle that courts must "[t]reat like cases alike" is "the central precept of justice." H.L.A. Hart, The Concept of Law 164 (3d ed. 2012). To ensure that the Appeals Court provides the similar outcomes to defendants who raising similar claims, Defendant/Appellant Heriberto Rivera ("Mr. Rivera") respectfully requests that this Court grant

his application for further appellate review and provide essential guidance to the lower courts on important legal issues.

First, Mr. Rivera had been convicted for three offenses: one misdemeanor gun possession offense, one misdemeanor ammunition possession offense, and one felony drug offense involving 6.63 grams of cocaine. With respect to the two misdemeanor sentences (Count 1 and Count 2), Defendant/Appellant Heriberto Rivera pled guilty to the indictment charges that his prior offenses of Assault with Intent to Kill ("AIK") and Assault With Battery and Assault ("ABDW") were predicate offenses under the Armed Career Criminal Act ("ACCA"). Subsequent case law from the Massachusetts courts and from the United States Supreme Court has since clarified that those offenses no longer are predicate violent felonies. Applying the proper precedent, on May 18, 2021, the Appeals Court vacated an ACCA enhancement based on the ABDW offence that lacked evidence showing that it had been committed with an intentional mens rea. *See Com. v. Purdy,* 99 Mass. App. Ct. 1125, * 2 (2021). Inexplicably, on June 30, 2021, even though the superior court had assumed that Mr. Rivera's prior ABDW offense was based on reckless mens rea, the Appeals Court claimed that it could not and would not correct the sentence because Mr. Rivera had pled guilty to the ACCA enhancement before the

legal changes arose. The Appeals Court's formalistic defense is untenable because no court has the authority to bind a person to a deal that is no longer lawful. The Appeals Court's reasoning is even more troubling given that, on July 9, 2021, it ignored it when vacating a sentence because the Commonwealth had failed to prove that the defendant's prior ABDW conviction was based on intentional and not reckless conduct even though the sentencing hearing, like Mr. Rivera's, was a bifurcated one arising after the trial of the substantive firearm offense. *See Commonwealth v. Perez*, 100 Mass. App. Ct. 7, *2 n.2 (2021).

Second, as another troubling error that occurred below, with respect to the cocaine charge in Count 3, the prosecutor's presentencing memorandum that was filed on the day of the sentencing hearing only asked for a 3 to 4 year sentence on this count and a 10 to 11 year sentence on the ACCA enhancements. But at the sentencing hearing, the prosecutor asked for the same 10 to 12 year sentence on all three counts and the most reasonable explanation is that the prosecutor, and trial court, most likely forgot about her prior recommendation when determining the proper sentence. The Appeals Court reasons that any mistake that occurred does not matter because the prosecutor could have asked for a 10 year sentence on this count. But such reasoning ignores that the prosecutor had not made that

request, and before the Appeals Court, the prosecutor never identified a specific fact that would have and should have changed the original recommendation. The integrity of the judicial system demands more. Just as the prosecutor would have rightfully argued for an increased sentence if a clerical error mistakenly reduced a sentence, so too must the Commonwealth agree to have a full sentencing hearing in which any reasons for any increased sentence are articulated and accepted, when this record had none.

PRIOR PROCEEDINGS

By an indictment, filed with the Worcester Superior Court on July 23, 2015, the Commonwealth charged Mr. Rivera with three counts: one misdemeanor count of knowingly and unlawfully possessing a firearm without FID card, a violation of G.L. c. 269 § 10(h) (Count 1), one misdemeanor count of knowingly and unlawfully possess ammunition, in violation of G.L. c. 269 § 10(h) (Count 2), and one felony count of knowingly or intentionally unlawfully possess with intent to distribute a controlled substance, to wit, cocaine, in violation of G.L. c. 94C § 34A(c) (Count 3). With respect to Count 1 and Count 2, the Commonwealth also alleged that Mr. Rivera "had previously been convicted of one violent crimes [sic] or one serious drug offense, as defined in G.L. c.269, § 10G," which warranted the ACCA enhancement. The specific prior offense that is

alleged to be the predicate offense is not named in the indictment. Before sentencing, the prosecutor amended the indictment to be clear that only one ACCA predicate was charged. However, the amendment did not identify which offense was the predicate to the ACCA-1 allegation.

On May 3, 2017, a jury found Mr. Rivera guilty of all three counts. After the verdicts, the judge conducted a colloquy with Mr. Rivera after he indicated that he did not wish a jury trial on the sentence enhancement.

ACCA Plea and Sentencing Hearing

On May 10, 2017, at a bifurcated hearing, the trial court adjudicated the allegations supporting the enhancement that he imposed for Count 1 and Count 2. At this hearing, the trial court noted that "the only indictments that are affected by [the alleged enhancements] . . . are Counts 1 and 2, which deal with possession of a firearm and possession of ammunition, and both of those indictments add language that would result in a more serious punishment or an enhanced penalty if the Commonwealth can prove its case regarding armed career criminal."

The trial court informed Mr. Rivera "your lawyer tells me that you wish to plead guilty to this portion of these two indictments, still retaining the right to appeal anything. . . ." The prosecutor then detailed the facts that arose behind at June 21, 2007 incident when he pointed a gun at his friend,

the gun fired, and the bullet hit his friend in the arm. On October 27, 2009 Mr. River was convicted of the offenses of assault with the intent to kill ("AIK") and assault and battery with a deadly weapon ("ABDW") for which he was sentenced to 3-5 years for the AIK count and 5 years' probation for the ABDW count. Tr. 4:20, 27.

On Count 3, the prosecutor, in the sentencing memorandum filed on May 10, 2017, recommended a 3 to 4 year sentence for the felony offense of "Possession of Cocaine with Intent to Distribute." Add. at 19.[1] Specifically, "the ***Commonwealth is asking that the defendant be sentenced from three to four years*** in State Prison to run concurrently [to the misdemeanor offenses]." Add. at 19 (emphasis added). However, at the sentencing hearing, the prosecutor departed from this recommendation and suggested instead that the sentence be increased to 10 to 12 years.

The trial court imposed terms of 9 to 10 years, each to run concurrently, on Count 1, Count 2, and Count 3. Mr. Rivera filed a timely appeal of his convictions, which was entered in this Appeals Court on May 16, 2017.

[1] The sentencing memorandum was presented to the superior court, Appeals Court, and is attached under the Addendum to this application at pages 15 to 19.

On May 8, 2019, Mr. Rivera's sentence appeal to reduce his sentence on all three counts, pursuant to Superior Court Rule 64, was heard by the Appellate Division of the Superior Court. On or about June 8, 2019, the Appellate Division denied his appeal.

On March 27, 2019, the Appeals Court stayed the appeal to permit Mr. Rivera to file a Rule 30 motion to withdraw his plea agreement and correct the illegal sentence. Mr. Rivera argued inter alia that neither of prior offenses were "violent crimes" because neither the allegation nor plea identified which offense was the predicate offense, AIK has no element requiring the use, attempted use, or threat of force, and ABDW is not a "violent crime" because the facts relating to Mr. Rivera involved a reckless, not intentional, shooting.

Motion to Withdraw Plea and Correct Sentence

On April 22, 2019, Mr. Rivera filed a motion, pursuant to Mass. R. Crim P. 30 (a) and (b), ("hereinafter "Rule 30") to withdraw his plea and correct his illegal sentence. On August 12, 2019, the Superior Court held a hearing and, on August 16, 2019, denied this motion. *See* Add. at 14. The Superior Court did not address the AIK issue, but found that the ABDW conviction was a "violent crime." *Id*. The trial court reasoned that, even if it is accepted as a reckless offense, *Com. v. Widener,* 91 Mass. App. Ct. 969,

703 (2017) and *Com. v. Wentworth,* 482 Mass. 664 (2019) holds that all forms of committing an ABDW are "violent crimes." Id. The trial court rejected Mr. Rivera's reliance on *United States v. Windley,* 864 F.3d 36, 38–39 (1st Cir. 2017), which reached a contrary result. Id. Mr. Rivera filed a timely appeal of the denial of his Rule 30 motions.

Appeals Court Decision

On January 28, 2020, the Appeals Court consolidated the matters into one appeal. On March 10, 2021, the parties presented oral argument to the Appeals Court via Zoom. On June 30, 2021, the Appeals Court affirmed the trial court's imposition of a 9 to 10 year sentence on all three counts. *See* Add. at 1–4. The Appeals Court dismissed the challenges to Count 1 and Count 2 because "by pleading guilty to the ACCA sentencing enhancements, he 'waived any claim to the lack of sufficient evidence that he committed a 'violent' crime." *Rivera,* 99 Mass. App. Ct. at *4 (quoting *Com. v. Wentworth,* 482 Mass. 664, 673 (2019)). The Appeals Court dismissed the challenge to Count 3 because the final sentence was within the sentencing range "plainly permitted by the statutes enacted by the Legislature." *Id*. at * 3. The defendant does not seek rehearing.

POINTS ON WHICH FURTHER APPELLATE REVIEW IS SOUGHT

1. Did the Appeal Court improperly deny Mr. Rivera the benefit of a new rule while his case was on direct review when claiming that only those convicted by juries, not plea agreements, will benefit from changes in the law?

2. Did the trial court impose an illegal sentence on the firearm offenses because Mr. Rivera's prior offense of ABDW, which was committed with a reckless mens rea, is no longer a "violent crime" pursuant to *Comm. v. Ashford,* 486 Mass. 450, 468 (2020) and *Borden v. United States,* 141 S. Ct. 1817 (2021)?

3. Did the trial court impose an improper sentence on the conviction for possession of cocaine with intent to distribute because the Appeal Court cannot assume proper deliberation when the record is consistent with a lengthy sentence being imposed through a mistake and oversight? Did the trial court sentence violate state law and due process under the state and federal constitutions?

REASONS WHY FURTHER APPELLATE REVIEW IS NECESSARY

Mr. Rivera respectfully requests that the SJC grant further appellate review to correct an illegal sentence imposed on all three of his convictions.

First, Mr. Rivera's two misdemeanor counts were increased to prison terms of 9 to 10 years based on the mistake assumption that his prior ABDW offense was a violent crime under ACCA. In 2020, the SJC held that when someone commits an ABDW with a reckless mens rea, it is not a predicate crime for ACCA. The Appeals Court does not dispute that Mr. Rivera's ABDW conviction was based on recklessness—he shot a friend at a party without malice or provocation and the trial court had granted probation. The most reasonable inference is that Mr. Rivera pointed the gun at his friend,

not realizing it was loaded, and shot him by mistake. As much as that conduct is wanton, dangerous, and injurious, it is not a "violent crime" for purposes of ACCA.

The Appeals Court refuses to correct the 9 to 10 year enhancement based on the faulty agreement that Mr. Rivera agreed to the increased sentence in a plea agreement. But Mr. Rivera is pursuing a timely direct appeal. There is no reason to deprive him of the benefit of the changes in law that arose after his conviction.

Second, in a written memorandum filed on the day of sentencing, the prosecutor recommended that Mr. Rivera's felony conviction for possessing 6.63 grams of cocaine be punished with a 3 to 4 year prison term. At the hearing, however, the prosecutor argued for all three counts to be treated the same, and the trial court imposed the same sentences, to run consecutive, for all three counts. The most reasonable inference from the record is that the prosecutor argued for the increased sentence by mistake. The Appeals Court does not dispute that, but argues that because the ultimate sentence fell at the very high end of what is permissible, there is no error. Such a formalistic defense undermines the integrity of the system. For many in our criminal justice system, how a sentence is calculated and imposed is often even more important than the actual length. The system cannot brush a mistake under

the rug because that result could be the correct sentence for someone else. Because for Mr. Rivera, the sentence for 9 to 10 years on his conviction is not legitimate, it is not just, and it is not right. Mr. Rivera respectfully asks this Court to intervene and ensure that the process used to sentence him is the correct one.

ARGUMENT

I. The Appeals Court Improperly Denied Mr. Rivera The Benefit of A Change of Law While His Case Was On Direct Review

The Appeals Court rejected Mr. Rivera's request to strike his ACCA enhancements because "by pleading guilty to the ACCA sentencing enhancements, he 'waived any claim to the lack of sufficient evidence that he committed a 'violent crime.'" *Com. v. Rivera*, 99 Mass. App. Ct. at *4. Its citation to *Com. v. Wentworth*, 482 Mass. 664, 673 (2019) is misplaced. In *Wentworth,* a defendant had been convicted of three prior violent crimes and entered into a plea agreement confirming that that he had one prior predicate offense. *Id*. at 665. The SJC affirmed the conviction because the defendant's prior conviction under ABDW was a violent crime arising from a domestic assault and battery in which he had "struck his girlfriend at the time in the face and shoved her down on the bed." *Id*. at 667 (quoting prosecutor's recitation of the facts).

Nothing in *Wentworth* stands for the proposition that a plea agreement will deprive a criminal defendant of any change in law that arises during the direct appeal of his conviction. To the contrary, "a criminal defendant gets the full benefit of any changes in the law while on direct review. . . . " *Com. v. Beauchamp*, 424 Mass. 682, 685 (1997). This is true whether the person was convicted by a jury or by a plea.

Indeed, in *Commonwealth v. Purdy*, 99 Mass. App. Ct. 1125 (2021), the Appeals Court remedied the analogous error that Mr. Rivera asserted arose in his sentencing hearing. In *Purdy,* a man had pled guilty to an offense and an ACCA-1 enhancement based on his ABDW conviction. *Id*. at *1. On appeal, the Appeals Court vacated the sentence pursuant to *Com. v. Ashford*, "the Commonwealth failed to provide additional information during the plea that the predicate ABDW conviction was a crime of violence within the meaning of the ACCA." *Purdy*, 99 Mass. App. Ct. at * 1.

Likewise, in *Commonwealth v. Perez,* 100 Mass. App. Ct. at * 2, the Appeals Court remedied the analogous error that Mr. Rivera asserted arose in his sentencing hearing even though, like Mr. Rivera, Mr. Perez had entered into a plea agreement with respect to his ACCA enhancements.

The Appeals Court's contrary outcome in Mr. Rivera's case is one that the SJC is compelled to correct. Courts must "[t]reat like cases alike."

H.L.A. Hart, The Concept of Law 164 (3d ed. 2012). Mr. Rivera is puzzled why the Appeals Court will properly vacate and remand a sentence that had illegally punished Mr. Purdy and Mr. Perez for a prior ABDW conviction that no longer has ACCA consequences, but not his sentence? Why do these two defendants receive the benefit of *Com. v. Ashford* but Mr. Rivera does not? The disparate outcomes in *Com. v. Purdy*, *Com v. Perez,* and *Com. v. Rivera* compel this Court to provide essential guidance to the Appeals Court and to prevent arbitrary decision-making towards defendants who are similarly-situated to one another.

II. ABDW Is Not a Predicate ACCA "Violent Crime" Because Recklessness Involves Only The Risk, and Not Use, Of Force

Mr. Rivera's prior conviction for ABDW, G.L. c. 265, §15A(b) is not a predicate "violent crime" because its inclusion of a reckless or wanton mens rea renders it overbroad and, on this record, nothing narrows Mr. Rivera's offense to one involving an intentional assault.

A. A "Violent Crime" Must Have An Element Involving The Use, Attempted Use, or Threatened Use of Force

Under the ACCA, a "violent crime" is "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 or a deadly weapon against the person of another; (ii) is burglary, extortion, arson or

kidnapping; (iii) involves the use of explosives; or (iv) otherwise involves conduct that presents a serious risk of physical injury to another." G.L. c. 140, § 121. In 2016, the SJC struck down the residual clause under G.L. c. 269, § 10G(e) because measuring which crimes constitute a "serious risk" was an indeterminate task that rendered the directive "unconstitutionally vague." *Com. v. Beal*, 474 Mass. 341, 351 (2016); *see also Johnson v. United States,* 135 S. Ct. 2551, 2557 (2015) (striking down the residual clause of the federal ACCA statute as void for vagueness).

As a result, to constitute a violent crime under the ACCA, the prior conviction must fall within the scope of either (1) the force clause; or (2) the enumerated crimes provision. *See Com. v. Eberhart,* 461 Mass. 809, 815 (2012). There is no doubt that the crimes of ABDW and AIK are not within the enumerated crimes provision that identifies burglary, extortion, arson, or kidnaping as ACCA predicates. The dispositive questions then are whether either of Mr. Rivera's prior offenses have an element involving the use, attempted use, or threatened use of force. As explained supra, the simple answer is no.

B. ABDW Is Overbroad As A "Violent Crime" Because Wanton Or Reckless Conduct Need Not Involve Force

The elements of ABDW, G.L. Mass c. 265, §15A(b) are "[w]hoever commits an assault and battery upon another by means of a dangerous

weapon shall be punished by imprisonment in the state prison for not more than 10 years or in the house of correction for not more than 2 1/2 years, or by a fine of not more than $5,000, or by both such fine and imprisonment." When determining whether this offense is a generic "violent crime" the First Circuit noted that it can be committed by two means:

> (1) The intentional and unjustified touching of another by use of a dangerous weapon, or,
>
> (2) The intentional commission of a ***wanton or reckless act*** [with a dangerous weapon] causing more than transient or trifling injury to another.

United States v. Fish, 758 F.3d 1, 15 (1st Cir. 2014) (emphasis added).

Massachusetts and federal courts have recognized that as much as the intentional form of ABDW is a categorical match as a "violent crime" the second form involving wanton or reckless conduct is not. In 2020, the SJC explained that even though the degree of force underlying a reckless assault can absolutely cause injury and harm, those who act with a reckless mens rea are in a different category than those who act with an intentional mens rea. *See Com. v. Ashford*, 486 Mass. 450, 468 (2020) ("in order for a conviction of assault and battery by means of a dangerous weapon to count as a predicate offense for purposes of the ACCA, the Commonwealth must use the modified categorical approach to prove that the defendant was

convicted of intentional assault and battery by means of a dangerous weapon").

In 2021, the Supreme Court confirmed this insight when holding that crimes committed with a reckless mens rea cannot be predicate convictions for the federal ACCA statute. *See Borden v. United States*, 141 S. Ct. 1817, 1824 (2021) ("Recklessness and negligence are less culpable mental states because they instead involve insufficient concern with a risk of injury").

C. The Trial Court Agreed That Mr. Rivera's ABDW Conviction Likely Involved Only Recklessness

In 2019, after targeted briefing on this issue, the trial court conceded that it was likely that Mr. Rivera's conviction was based on reckless conduct. At the time, the trial court reasoned "[e]ven considering the defendant's ABDW conviction to be one based on reckless conduct, as urged by the defendant, this does not change the result under [*Com. v. Widener,* 91 Mass. App. Ct. 969, 703 (2017)]." Add. at 14. In 2020, *Com. v. Ashford*, clarified that the trial court's legal reasoning was wrong. 486 Mass. 450, 468 (2020).

Of most import, the next question is did Mr. Rivera shoot a gun at his friend with an intentional or reckless mens rea. The Commonwealth has repeatedly ignored this question, and mistakenly focused only on the fact that the firing of a gun is always a violent act. This assertion, as explained

by *Ashford,* confuses the sufficiency of force involved in an assault with the exact mens rea that a person had when shooting a gun. 486 Mass. at 462 (explaining that although prior cases established "that reckless conduct can[] produce sufficient physical force to count as violent," the different question before *Ashford* is whether a reckless mens rea is an ACCA predicate offense).

There is no doubt that conduct arising from recklessness can result in injury and harm. But, for purposes of ACCA, the dispositive question is whether an offense based on reckless conduct is a "violent crime" for purposes of ACCA, which this record shows it is not.

Under the modified categorical approach, there is no proof that Mr. Rivera was found guilty of violating the crime with an intentional mens rea. Unlike other cases in which a person shoots a gun during a heated argument or a domestic dispute, the shooting underlying Mr. Rivera's ABDW conviction occurred without any prior provocation or intent to harm. The victim of the shooting, Mr. Valentin, told the police that Mr. Rivera "had been partying with him and his group of friends earlier." Add. at 24. Mr. Rivera "said something to him which he could not understand, raised a gun, and shot him." Add. at 24. "Mr. Valentin told police that the two have never had problems with one another." Add. at 24.

These facts are a textbook example of what happens when someone picks up a gun, is aware of but disregards the risk that the gun may be loaded, and then shoots it without any prior deliberation or malice. This factual situation is the textbook example of how the reckless conduct of Russian roulette can both cause indelible lasting injury but arise from wanton conduct, not depraved conduct.

Mr. Rivera was not shooting to kill or harm Mr. Valentin. As explained by the victim himself, the two men were at a party together, "never had problems" before the shooting, and the victim did not know why Mr. Rivera shot him. Add. at 24. Rather, unknown words were said, Mr. Rivera raised the gun, and fired it. It is very possible that Mr. Rivera pointed a gun at his friend, believing that it was not loaded. He could have made a joke, and then, to his surprise, fired a shot at his friend. The Commonwealth has never provided evidence that the shooting arose from any intentional mens rea.

Moreover, the sentencing judge that initially sentenced Mr. Rivera for this offense opted to sentence him with ***only probation***. Add. at 25. Given that the offense carries an up to a 10 year prison term, a grant of probation is also only consistent with a crime that was done with a reckless mental state and a not intentional mens rea.

There is no question that these facts are sufficient to uphold the conviction of an ABDW offense. As explained by the SJC "even if a particular defendant is so stupid or so heedless that in fact he did not realize the grave danger [posed by his conduct], he cannot escape the imputation of wanton or reckless conduct in his dangerous act or omission. . . ." *Welansky,* 316 Mass. at 398.

But these facts underlying Mr. Rivera's prior offense are not sufficient to show that this prior conviction is a "violent crime" as defined by ACCA. The facts that occurred—firing a gun at a friend, not in a fight, not during an argument, not with a stranger, is fully consistent with firing a gun with a wanton or reckless mens rea. "The reckless form of ABDW. . . is not categorically a violent felony under ACCA because 'it does not require that the defendant intend to cause injury . . . or ***even be aware*** of the risk of serious injury that any reasonable person would perceive." *Windley,* 864 F.3d at 38 (emphasis added); *Parnell*, 818 F.3d at 982 (after surveying Massachusetts cases, holding that the district court "erred by relying on Parnell's ABDW conviction as an [federal] ACCA predicate").

There is nothing on the record here consistent with Mr. Rivera harboring an intent to harm his friend nor having an intent to shoot the gun at him. These facts stand in stark contrast to those in *Wentworth* involving

the use of force in which the prosecutor alleged and the defendant admitted that he had 'struck his girlfriend at the time in the face and shoved her down on the bed.'" *Wentworth*, 482 Mass. at 674 (quoting prosecutor's recitation of the facts). Indeed, Mr. Rivera's facts are much more convincing to arise from reckless conduct than those found in *Eberhardt* in which the prosecutor's failure to prove any facts beyond a simple plea to the offense was found insufficient to support that offense being a predicate ACCA offense. In *Eberhart*, the defendant's prior ABDW conviction was held not to be an ACCA predicate because "[a]s the Commonwealth concedes, this minimal additional evidence failed to prove beyond a reasonable doubt" that the prior conviction was based on harmful rather than reckless battery. *Eberhart*, 461 Mass. at 820.

Accordingly, to the extent that the trial court found true that Mr. Rivera's prior ABDW offense was a predicate "violent crime," the facts do not support this finding. This offense too cannot be a predicate "violent crime" and the enhancement on this basis is illegal.

D. AIK Is Not a Predicate ACCA "Violent Crime" Because It Has No Element Involving Force

Mr. Rivera's prior conviction for AIK, G.L. c. 265, § 29, also is not a predicate "violent crime" because it lacks an element of force. When this argument was raised to the trial court in the Rule 30 motion, the trial court

did not address it, however, the judge only affirmed the ACCA-1 sentencing based on the ABDW conviction. On appeal, the Appeals Court likewise did not address this argument, instead only affirming that the ABDW conviction was sufficient to impose the ACCA enhancements. The courts' refusal to uphold AIK as a predicate to ACCA is the correct result because that offense is not one.

The elements of the AIK offense are: "Whoever assaults another ***with intent to commit a felony*** . . . ." G.L. c. 265, § 29 (emphasis added). When applying the categorical approach, which is demanded here, the SJC has explained that the crime of assault has three different offenses, two of which are predicate "violent crimes" but one that is not. *Beal*, 474 Mass. at 352 ("Offensive battery, which 'can be committed through such de minimis touchings as tickling and spitting,' is not a violent crime.") (quoting *Eberhart,* 461 Mass. at 818–819). For example, offensive touching can occur when spitting on a victim. *See Com. v. Cohen*, 55 Mass. App. Ct. 358, 359–60 (2002) ("We are in accord with other jurisdictions holding that an intentional and unconsented spitting on another constitutes a criminal battery.").

The elements of AIK thus do not require that the defendant did, or the prosecutor prove, use force, attempted force, or threatened force. This

makes sense because the dangerous aspect of an AIK offense is the mental state that the person holds, in having a desire to kill another person. Indeed, the crime itself only requires proof that the assault occur concurrent with "an intent to commit a ***felony***." G.L. c. 265, § 29 (emphasis added). Under the residual clause, the risk of injury and the risk of death made AIK an intent to commit a felony a "violent crime" but the actual offense does not have an element of force. As a result, if this case is remanded, the AIK conviction cannot serve as a predicate ACCA enhancement.

III. The Appeals Court Cannot Affirm The Upward Departure from Count 3 Based on A Mistake

For the felony drug offense involving 6.63 grams of cocaine, the trial court imposed a sentence of 9 to 10 years. This was error because the trial court did not explain why it was imposing such a lengthy and excessive sentence on a first drug offense involving only 6.63 grams that is not a trafficking offense.

A. The Prosecutor Initially Had Recommended A 3 to 4 Year Term and Never Explained The Reason For Its Departure

In the sentencing memorandum, filed on May 10, 2017, the prosecution properly noted that the recommended range for the count 3 offense (possession of cocaine with intent to distribute) is 1 to 2.5 years in the House of Corrections or 2.5 to 10 years in state prison. Add. at 17. The

prosecutor then recommended that trial court impose a sentence of 3 to 4 years for the sentence for the felony offense of "Possession of Cocaine with Intent to Distribute." Add. at 19. Specifically, "the ***Commonwealth is asking that the defendant be sentenced from three to four years*** in State Prison to run concurrently [to the misdemeanor offenses]." Add. at 19 (emphasis added).

However, at the sentencing hearing, the prosecutor departed from this recommended 3 to 4 year term. The prosecutor instead suggested that the sentence be increased to 10 to 12 years, explaining that the reason for this departure is "based on [Mr. Rivera's] previous record." T. 4/29. The prosecutor never explained why she was departing from her sentencing memorandum.

It is unclear if the prosecutor simply forgot that she had previously recommended separate sentences for all three counts, because she never expressly mentioned the increased recommendation in the sentencing hearing. T. 4/15–37. The most likely explanation for the increased departure is that the prosecutor was simply argued for the same prison term for all three counts. But, if the trial court imposed its sentence on Count 3 for this reason, that mistake is error.

First, as an initial matter, this upward departure is well past the recommended range for sentences for a first time drug offense that does not involve a trafficking element. The offense of "Distribution of Possession with Intent" of cocaine has a minimum mandatory term of 2.5 years, which can be as high as 10 years. Add. at 21.[2] However, according to the same table, it is notable that when the person has a prior drug offense, the minimum ***starts*** at 3.5 years. Id. This offense was Mr. Rivera's first drug offense. Add. at 19 (reciting criminal history). By contrast, the trial court sentenced Mr. Rivera's first drug crime by imposing a 9 to 10 prison term, which is a sentence three times higher than the minimum sentence for someone with a prior drug offense.

Second, it is relevant that the total amount of cocaine involved in the offense was 6.63 grams, T. 2/144, which is well below the 18 gram threshold for which trafficking offenses begin.[3] Add. at 21.[4] Even at 18 to 36 grams,

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[2] Under the chart, prepared by Law Clerk Marc Andrews for the Hon. Charles J. Hely, Jan. 4, 2013, and submitted with the Rule 30 motion, entitled "Drug Sentences Under the 2012 '3 Strikes Act; Minimum, Maximum, and Mandatory Minimum Sentences with Parole Eligibility," the Class B offense of distribution or possession with intent to distribute cocaine has a sentencing range of 2 to 10 years with a 2 year minimum. *See* G.L. c. 94C, § 32A(a). Add. at 21.

[3] The Appeals Court contends that the amount at issue was 7.89 grams. *See Rivera,* 99 Mass. App. Ct. at *1 n.2. Even if that amount is correct, it is still significantly below the 18 to 36 gram range to which a 2 year minimum sentence for a ***trafficking*** offense starts.

the mandatory minimum sentence for trafficking cocaine begins at ***2 years***. Id. Mr. Rivera's sentence is five times longer than what a drug trafficker would receive. By contrast, the legislature has recommended that the term of 9 to 10 years that Mr. Rivera received for his offense is to be given for a trafficking offense involving ***100 to 200 grams***. Id. It is unclear, then, why Mr. Rivera's possession of 6.63 grams is being punished at the rate that higher level drug dealers receive. Even if there are reasons that warrant such a significant upward departure, those reasons must be on the record, which they are not here. *See Com. v. Ruiz,* 453 Mass. 474, 481–82 (2009).

B. The Appeals Court Improperly Upheld The Prosecutor and Trial Court's Mistake

It is not known why the trial court substantially increased Mr. Rivera's sentence for possession of cocaine with intent to distribute to a 9 to 10 year term after the prosecutor had recommend only a 3 to 4 year term. The Appeals Court claimed that we need not know the reason because "the sentences imposed were plainly permitted by the statutes enacted by the Legislature." *Com. v. Rivera*, 99 Mass. App. Ct. at *3. But just because there could be facts that would justify a 9 to 10 year sentence on possessing

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[4] See footnote 1, supra. The sentencing range for trafficking cocaine, methamphetamine, and phenmetrazine starts at 2 years for 18 to 3 grams, is 3.5 years for 36 to 100 grams, is 8 years for 100 to 200 grams, and 12 years for offenses involving more than 200 grams. *See* G.L. c. 94C, § 32E(b).

6.63 grams of cocaine does not mean that there were—in fact, there is nothing on this record to show that there were.

The trial court did not give any explanation for this very lengthy term. The most reasonable inference from the record is that, at the sentencing hearing, because the parties were all in agreement that the final sentencing scheme would involve concurrent sentences, the parties and trial court forgot that a lesser sentence was warranted for count 3.

A mistake can never be a legitimate reason to sentence a person for any prison term, let alone one that is a 6 to 7 year departure from the recommendation in a sentencing memorandum filed on the same day of the hearing. A formalistic defense that erases this fact impugns the integrity of the criminal justice system. In *Gideon v. Wainwright,* the Supreme Court declared the right to counsel a fundamental right because "from the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). A sentence for a prison term based on a mistake is neither fair nor just. It makes a mockery of the time and effort spent on protecting an individualized sentencing hearing if any sentence will be upheld because it could be, not because it

should be. *See Com. v. Parrillo,* 468 Mass. 318, 321 (2014) ("When an appellate court determines that one component of an integrated sentencing package is illegal, the court generally vacates the sentence in its entirety, while leaving the underlying convictions intact, and remands for resentencing").

CONCLUSION

For the foregoing reasons, Mr. Rivera asks the Court to grant his application for further appellate review.

Respectfully submitted,

HERIBERTO RIVERA
By his attorney,

/s/ Kari Hong
Kari Hong
BBO# 568975
P.O. Box 86299
Tucson, AZ 85754
C: (510) 384-4524
E: kari.e.hong@gmail.com

Dated: August 18, 2021

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k) of the
Massachusetts Rules of Appellate Procedure

I, Kari E. Hong, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16 (a)(13) (addendum);
Mass. R. A. P. 16 (e) (references to the record);
Mass. R. A. P. 18 (appendix to the briefs);
Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and
Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 27.1 because it is produced in the proportional font Times New Roman at size 14, and the brief statement advocating for further appellate review contains approximately 3,857 words, as counted using the word count feature of Microsoft Word. Mr. Rivera is filing a motion to permit the Court to accept a brief that is in excess of the 2,000 words permitted indicating why further appellate review is warranted.

/s/ Kari Hong
KARI HONG

Dated: August 18, 2021

CERTIFICATE OF SERVICE

I hereby certify that I served the Defendant-Appellant's Statius Report and Affidavit of Counsel in his appeal, *Commonwealth v. Herbierto Rivera*, No. 20-P-0073, on the Commonwealth's Counsel, Donna-Maire Haran through this Court's electronic filing system.

/s/ Kari Hong
KARI HONG

Dated: August 18, 2021

Addendum

99 Mass.App.Ct. 1131
Unpublished Disposition

Appeals Court of Massachusetts.

COMMONWEALTH
v.
Heriberto RIVERA

20-P-73
|
Entered: June 30, 2021.

By the Court (Green, C.J., Neyman & Grant, JJ.[1])

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

***1** The defendant was convicted by a jury of unlawful possession of a firearm, unlawful possession of ammunition, and possession of cocaine with intent to distribute. He then pleaded guilty to so much of the firearm and ammunition indictments as alleged that he had previously been convicted of at least one violent crime or serious drug offense (predicate offense) as defined in the Massachusetts Armed Career Criminal Act (ACCA), G. L. c. 269, § 10G, making him subject to sentencing enhancements. He now appeals from his convictions and from the denial of his post-conviction motion to withdraw his guilty pleas and to correct illegal sentences. He argues that (1) his pretrial motion to suppress evidence should have been allowed because the manner by which police announced their presence while executing a search warrant was not reasonable; (2) the sentence imposed for possession of cocaine with intent to distribute was too lengthy; and (3) his prior convictions did not qualify as predicate offenses under the ACCA, and so the judge should not have imposed enhanced sentences. We affirm.

Background. The defendant was indicted for possession of a firearm without having a firearm identification (FID) card, after having previously been convicted of an ACCA predicate offense (G. L. c. 269, §§ 10 [h] & 10G); possession of ammunition without an FID card, after having previously been convicted of an ACCA predicate offense (G. L. c. 269, §§ 10 [h] & 10G); and possession of cocaine with intent to distribute (G. L. c. 94C, § 32A [c]). He filed a pretrial motion to suppress evidence, which was denied after a hearing. After a jury trial, he was convicted of the underlying offenses of unlawful possession of a firearm and unlawful possession of ammunition, and of possession of cocaine with intent to distribute. He then pleaded guilty to so much of the firearm and ammunition indictments as alleged ACCA level one sentencing enhancements, G. L. c. 269, § 10G (a), and was sentenced on all three convictions to concurrent terms of nine to ten years in state prison. He moved to withdraw his guilty pleas and to correct illegal sentences; the motion was denied.

Motion to suppress. Based on testimony at an evidentiary hearing, the motion judge found as follows. Worcester police applied for and were granted a search warrant authorizing them to search a certain third-floor apartment (apartment). The search warrant directed that police were not authorized to enter the apartment without announcement. While conducting surveillance before executing the warrant on the afternoon of May 14, 2015, police saw the defendant leave the apartment building and get into a Chevrolet Avalanche, which was driven away by an individual whose license to operate a motor vehicle was suspended. Police followed the vehicle and tried to stop it; when it sped away near an elementary school, they abandoned the pursuit as unsafe. The police then returned to the apartment building to execute the search warrant.

Sergeant Matthew Early entered the apartment building and went to the third floor, with the rest of the entry team following at least ten feet behind him. He knocked three times on the apartment door and announced, "Worcester police, search warrant." He waited five to eight seconds,

then signaled to the other officers waiting below him on the staircase. About two to three seconds later, other officers reached the apartment door. At Sergeant Early's signal, an officer struck the door with a battering ram.

***2** After police entered the apartment, the defendant's sister and her male friend emerged from a bedroom about fifteen to twenty feet from the door. The two were disheveled and getting dressed; the man was pulling up his pants and fastening his belt. In another bedroom, police found a firearm, ammunition, cocaine,[2] and personal papers of the defendant.

In reviewing a ruling on a motion to suppress, "we accept the judge's subsidiary findings of fact absent clear error and leave to the judge the responsibility of determining the weight and credibility to be given oral testimony presented at the motion hearing." Commonwealth v. Wilson, 441 Mass. 390, 393 (2004). "We review independently the application of constitutional principles to the facts found." Commonwealth v. Ferreira, 481 Mass. 641, 653 (2019), quoting Wilson, supra.

In his motion to suppress, the defendant argued that police did not knock or announce their presence at all before forcing entry into the apartment. The motion judge found that police did announce their presence, crediting Sergeant Early's testimony and declining to credit that of the defendant's sister. "On a motion to suppress, '[t]he determination of the weight and credibility of the testimony is the function and responsibility of the judge who saw the witnesses, and not this court' " (citations omitted). Commonwealth v. Yesilciman, 406 Mass. 736, 743 (1990). "Where there has been conflicting testimony as to a particular event or series of events, a judge's resolution of such conflicting testimony invariably will be accepted." Id., quoting Commonwealth v. Spagnolo, 17 Mass. App. Ct. 516, 517-518 (1984).

On appeal, the defendant argues that, even if police did knock and announce their presence, their conduct was not reasonable because they did not wait long enough before forcing entry into the apartment. The motion judge found that Sergeant Early "waited somewhere between seven and eleven seconds before entering the apartment having received no response from the occupants." The judge ruled that that interval was reasonable, citing to Commonwealth v. Bush, 71 Mass. App. Ct. 130, 134 (2008) (delay of five seconds). The police were not required to keep knocking until someone opened the door. See Commonwealth v. Antwine, 417 Mass. 637, 641 (1994); Commonwealth v. Herring, 66 Mass. App. Ct. 360, 365 (2006).

The defendant also maintains, for the first time on appeal, that the forced entry was unreasonable because the police knew that the defendant was not at the apartment, and so there was no threat of violence or risk of destruction of evidence. However, because the defendant did not raise this claim below, facts to support or refute it were not developed, and we will not consider it. See Commonwealth v. **Rivera**, 429 Mass. 620, 623 (1999) (where defendant argued below that police failed to knock and announce, he was not permitted to argue for first time on appeal that police did not have reasonable belief that he was in apartment). See also Bush, 71 Mass. App. Ct. at 135 (relying on facts known to police to determine whether reasonable for police to fear threat to safety).[3] Accordingly, we conclude that there was no error in the judge's denial of the motion to suppress.

***3** Sentence for possession of cocaine with intent to distribute. The defendant argues that the sentence imposed on his conviction for possession of cocaine with intent to distribute was improper because it was "a substantial, and illegal, departure from the guidelines and [the] prosecutor's original recommended term[ ] [a]nd there is an inference that it was based on improper factors."

The firearm and ammunition convictions, to which the ACCA sentencing enhancement applied, each carried a state prison sentence of "not less than three years nor more than [fifteen] years," G. L. c. 269, § 10G (a). The conviction for possession of cocaine with intent to distribute carried a possible sentence of "not more than [ten] years," G. L. c. 94C, § 32A (c). In her sentencing memorandum, the prosecutor recommended a sentence of ten to twelve years on each of the ACCA convictions, and three to four years on the cocaine conviction, but at the sentencing hearing she argued that the judge should impose ten to twelve year sentences on all three convictions, because the defendant's criminal record included two prior state prison sentences and showed that he continued to commit crimes while on probation rather than "look[ing] for a job" or "go[ing] back to school." The judge sentenced the defendant on all three convictions to concurrent state prison terms of nine to ten years.

The defendant complains that the concurrent sentence imposed on the cocaine conviction exceeded the recommendation in the prosecutor's sentencing memorandum and "the guidelines."[4] As set forth above, the sentences imposed were plainly permitted by the statutes enacted by the Legislature. "This court will

consider a sentence only to determine if it is illegal or unconstitutional." Commonwealth v. Molino, 411 Mass. 149, 155 (1991). See Commonwealth v. Hogan, 17 Mass. App. Ct. 186, 187 (1983) ("Appellate courts have no general power to review the severity or leniency of an otherwise lawful sentence which is within the limits permitted by statute").[5]

To the extent that the defendant contends that the judge based his sentence on improper criteria because the prosecutor mentioned his lack of employment and failure to further his education, we disagree. At sentencing, the judge stated that based on the defendant's prior criminal record and these convictions, he "has shown himself to be consistently and repeatedly ... a threat to other members of society by the possession of guns, and now drugs with the intent to distribute." The record contains no inkling that the judge considered any improper factor. See Commonwealth v. Plasse, 481 Mass. 199, 205 (2019) ("In fashioning an appropriate and individualized sentence that takes account of a defendant's personal history, a judge has discretion to weigh 'many factors which would not be relevant at trial,' including the defendant's behavior, background, family life, character, history, and employment"). See also Commonwealth v. Goodwin, 414 Mass. 88, 92 (1993) (sentence "should reflect the judge's careful assessment of several goals: punishment, deterrence, protection of the public, and rehabilitation").

***4** ACCA sentencing enhancement. After trial, the defendant pleaded guilty to so much of the firearm and ammunition indictments as alleged that his sentences were subject to enhancement because he had been previously convicted of crimes that qualified as ACCA predicate offenses. Those prior convictions were for assault with intent to kill and assault and battery by means of a dangerous weapon, both arising from his June 21, 2007 shooting of a named victim, the facts of which the prosecutor summarized during the plea colloquy for the ACCA sentencing enhancement.[6] Questioned by the judge, the defendant admitted he had heard the prosecutor's recitation of the facts of the 2007 shooting, and that he "not only committed the acts that were described ..., but that [he] was found guilty ... on the assault with intent to kill and ... on the assault and battery with a dangerous weapon." The defendant acknowledged that by admitting to those acts, he was pleading guilty to the portions of the firearm and ammunition indictments that constituted ACCA sentencing enhancements.

The defendant now claims that his ACCA sentencing enhancements could not be based on his prior convictions for assault with intent to kill or assault and battery by means of a dangerous weapon because those did not amount to "violent crime[s]" under the ACCA, G. L. c. 269, § 10G (e). His claim is meritless, because by pleading guilty to the ACCA sentencing enhancements, he "waived any claim to the lack of sufficient evidence that he committed a 'violent' crime." Commonwealth v. Wentworth, 482 Mass. 664, 673 (2019), citing Commonwealth v. Cabrera, 449 Mass. 825, 831 (2007). As the court noted in Wentworth, supra at 675-676, had the defendant gone to trial on his ACCA enhancements, the Commonwealth would have had the burden to prove beyond a reasonable doubt that his prior convictions were for violent crimes. Thus, he misplaces his reliance on cases where defendants had jury-waived trials on their ACCA sentencing enhancements. See Commonwealth v. Ashford, 486 Mass. 450, 459-460 (2020); Commonwealth v. Eberhart, 461 Mass. 809, 818-819 (2012).

As to the defendant's claim that his ACCA sentencing enhancement was improperly based on two predicate offenses arising out of the same prior prosecution, we note as follows. He pleaded guilty to so much of his firearm and ammunition indictments as alleged that each was subject to an ACCA level one sentencing enhancement; that required proof of only a single predicate offense, G. L. c. 269, § 10G (a). The ACCA defines a "violent crime" as one that "(i) has as an element the use, attempted use or threatened use of physical force or a deadly weapon against the person of another...." G. L. c. 140, § 121. Based on the facts of the 2007 shooting to which the defendant admitted and which resulted in his convictions for assault with intent to kill and assault and battery by means of a dangerous weapon, at least one of those crimes sufficed as an ACCA predicate offense. See Wentworth, 482 Mass. at 677 (concluding assault and battery satisfied force clause based on facts admitted by defendant during plea). In denying the defendant's motion to withdraw his guilty plea and correct an illegal sentence, the judge focused on the conviction for assault and battery by means of a dangerous weapon as the predicate ACCA offense.

For those reasons, we discern no error, and decline the defendant's request that the case be remanded for resentencing. See G. L. c. 269, § 10G (a). Cf. Commonwealth v. Baez, 480 Mass. 328, 331 (2018), quoting Commonwealth v. Resende, 474 Mass. 455, 468-469 (2016) ("best interpretation of ACCA is one that 'reflects and implements the principle that penal discipline can have [or should have] a reforming influence on an offender, with enhanced consequences if prior convictions and sentences do not have such an effect' ").

***5** Judgments affirmed.

Order denying motion to withdraw guilty plea and correct sentence affirmed.

All Citations

99 Mass.App.Ct. 1131, 170 N.E.3d 370 (Table), 2021 WL 2692416

Footnotes

1 The panelists are listed in order of seniority.

2 The trial evidence established that it was 7.89 grams of cocaine packaged in several bags.

3 In any event, we discern no substantial risk of a miscarriage of justice on the present record. See Commonwealth v. Randolph, 438 Mass. 290, 294-295 (2002). The defendant's absence from the apartment did not remove entirely the risk of destruction of evidence by other occupants, whom the defendant could have telephoned for the purpose of enlisting their assistance in doing so.

4 The defendant's brief apparently refers to the Advisory Sentencing Guidelines promulgated in 2018 by the Massachusetts Sentencing Commission. Those have not been "enacted into law," G. L. c. 211E, § 3 (a) (1), and so the judge was not bound by them. See Commonwealth v. Laltaprasad, 475 Mass. 692, 696 (2016).

5 The Appellate Division of the Superior Court does have the authority to review the defendant's sentences, see G. L. c. 278, § 28B. It has dismissed the appeal of his sentences.

6 The prosecutor stated that, after "partying" with the victim and his friends, the defendant went outside; when the victim came out, the defendant said something unintelligible, then raised a gun and shot him. The victim suffered a single gunshot wound to his bicep which entered his chest and became lodged in his spinal cord.

99 Mass.App.Ct. 1125
Unpublished Disposition

Appeals Court of Massachusetts.

COMMONWEALTH
v.
Tredane PURDY.

19-P-1169
|
Entered: May 18, 2021.

By the Court (Green, C.J., Blake & Kinder, JJ.[1])

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

***1** The defendant, Tredane Purdy, appeals from orders of a Superior Court judge denying the defendant's motions to vacate and correct sentence, and for reconsideration.[2]

Background. In 2014, pursuant to a plea agreement, the defendant pleaded guilty to a number of indictments stemming from an armed home invasion. As relevant here, the defendant pleaded guilty to carrying a firearm without a license, second offense, with a level two sentencing enhancement under the armed career criminal act (ACCA), reduced as part of the plea agreement from a level three sentencing enhancement. In 2018 and 2019, the defendant filed a series of motions, both pro se and with counsel, seeking to vacate and correct the sentence imposed. All the defendant's motions were denied. This appeal followed.

ACCA sentencing enhancement -- motion and supplemental motion to vacate and correct sentence. The defendant contends, and the Commonwealth concedes,[3] that the judge abused her discretion in denying his motion and supplemental motion to vacate and correct sentence because the record evidence of one of the predicate offenses for the ACCA sentencing enhancement -- assault and battery by means of a dangerous weapon (ABDW) -- did not qualify under the statute.[4] See G. L. c. 269, § 10G. Because a conviction of ABDW can be for an intentional or a reckless touching, a modified categorial approach is required to determine whether the prior offense falls within the purview of the ACCA. See Commonwealth v. Ashford, 486 Mass. 450, 466-468 (2020). Here, the Commonwealth failed to provide additional information during the plea that the predicate ABDW conviction was a crime of violence within the meaning of the ACCA.[5] Accordingly, the denial of the defendant's motions on this issue was error.

Arraignment -- motions for reconsideration. The defendant next claims that the judge erred in imposing an ACCA sentencing enhancement without conducting an arraignment informing him of the nature of the charge, and without conducting a separate plea hearing.[6] We are not persuaded.[7] Statutes providing for sentence enhancements "do not create independent crimes, but enhance the sentence for the underlying crime" (citation omitted). Commonwealth v. Richardson, 469 Mass. 248, 252 (2014). See Alicea v. Commonwealth, 466 Mass. 228, 230-231 n.6 (2013). More specifically, "[t]he armed career criminal statute does not define a stand-alone separate offense. Rather, the repeat offender statute establishes sentencing enhancements for offenders who, [having qualifying previous convictions,] commit certain firearm offenses" (quotation omitted). Commonwealth v. Sylvia, 89 Mass. App. Ct. 279, 288 (2016), quoting Alicea, supra. See Rivera v. Commonwealth, 484 Mass. 1015, 1018 (2020) (subsequent ACCA trial did not raise double jeopardy concerns as trial was not for second, separate offense). Accordingly, there was no error.

***2** Conclusion. The orders entered November 14, 2018, denying the motion and supplemental motion to vacate and correct sentence are vacated, and an order shall enter allowing the motions. On indictment eight, charging carrying a firearm without a license, second offense, so

much of the finding as pertains to the predicate offense of ABDW is set aside, and a guilty finding shall enter under G. L. c. 269, § 10G (a), based on one predicate offense. On the remaining indictments, the findings shall stand. In view of the fact that the sentence on indictment eight was the lead sentence, the sentences on all indictments are vacated, and the case is remanded for resentencing. The orders entered January 20, 2019, and July 25, 2019, denying the motions for reconsideration are affirmed.

So ordered.

Vacated in part and remanded; affirmed in part.

All Citations

99 Mass.App.Ct. 1125, 168 N.E.3d 386 (Table), 2021 WL 1976327

Footnotes

1 The panelists are listed in order of seniority.

2 The appeal from the November 14, 2018, orders denying the motion and supplemental motion to vacate and correct sentence was brought before this court in a prior appeal (docket no. 18-P-1705). That appeal was dismissed for lack of prosecution. Given that a proper notice of appeal was filed from those original orders, all parties have assumed that those orders are properly before us, and the Commonwealth has conceded error, it is in the interest of justice and judicial economy that we consider the merits of that appeal in the context of this case.

3 The Commonwealth's concession does not relieve us of our appellate function of determining whether error was committed. See Commonwealth v. Smith, 60 Mass. App. Ct. 204, 206 n.2 (2003).

4 The defendant does not challenge the predicate offense of possession with intent to distribute a class B substance.

5 The Commonwealth set forth additional details of the ABDW conviction for the first time in response to the defendant's postconviction motions. This proffer was not timely and did not satisfy the requirements outlined in Ashford, 486 Mass. at 466-468.

6 This argument was raised in motions for reconsideration brought first by the defendant pro se, and then by counsel; the motions were denied on January 20, 2019, and July 25, 2019, respectively.

7 The Commonwealth argues that this issue was waived. Passing on the question of waiver, we proceed to the merits.

100 Mass.App.Ct. 7
Appeals Court of Massachusetts,
Worcester.

COMMONWEALTH
v.
Franky PEREZ.

No. 19-P-1672
|
Argued April 5, 2021.
|
Decided July 9, 2021.

Firearms. Assault and Battery on Certain Public Officers and Employees. Assault and Battery by Means of a Dangerous Weapon. Assault by Means of a Dangerous Weapon. Evidence, Prior violent conduct, Guilty plea, Prior conviction, Presumptions and burden of proof. Statute, Construction. Intentional Conduct. Wanton or Reckless Conduct. Practice, Criminal, Bifurcated trial, Prior conviction, Sentence, Assistance of counsel, Question by jury, Instructions to jury, Presumptions and burden of proof.

INDICTMENTS found and returned in the Superior Court Department on May 15, 2014.

The cases were tried before J. Gavin Reardon, Jr., J., and a motion for a new trial, filed on April 8, 2019, was considered by him.

Attorneys and Law Firms

Paul C. Brennan, Winchester, for the defendant.

Michelle R. King, Assistant District Attorney, for the Commonwealth.

Present: Ditkoff, Singh, & Englander, JJ.

Opinion

ENGLANDER, J.

***1** The Massachusetts version of the armed career criminal act (ACCA), G. L. c. 269, § 10G, provides for enhanced sentences for certain firearm offenses, where the Commonwealth also shows that the defendant has been "previously convicted of" one or more "violent crime[s]." Recently, in Commonwealth v. Ashford, 486 Mass. 450, 457, 159 N.E.3d 125 (2020), the Supreme Judicial Court held that a conviction of assault and battery by means of a dangerous weapon that is based on reckless, rather than intentional conduct, does not qualify as a "violent crime" under our ACCA. Here we consider what proof will suffice, in light of Ashford, to show that a prior conviction of assault and battery qualifies as a violent crime, particularly in the context where the defendant pleaded guilty to the prior offense.

In this case the Commonwealth sought to prove that the defendant was "convicted of" five prior violent crimes (all variants of assault and battery or assault) by having the previous victims or witnesses testify, at the ACCA portion of the trial, to their memory of what the defendant had done (in some instances twenty years earlier). G. L. c. 269, § 10G (c). With respect to several of the crimes the testimony described conduct that could have been found to be either intentional or reckless. The Commonwealth introduced no evidence regarding any of the plea hearings, and thus no evidence as to what facts were presented or agreed to in connection with the pleas. The judge found that the defendant had committed four prior violent crimes (of the five alleged), and sentenced him to the mandatory minimum of fifteen years in prison, as an armed career criminal with a level three enhancement. See G. L. c. 269, § 10G (c). We hold that the Commonwealth's evidence as to two of the prior convictions -- both of which involved guilty pleas -- was insufficient as a matter of law. Discerning no error in the convictions of the more recent firearm offenses, we remand for resentencing.[1]

Background. 1. The firearm offenses trial. The underlying firearm offenses stem from an event on February 23, 2014. At about 1:50 A.M. on that date, a crowd of patrons was exiting the El Rincon bar and restaurant in Worcester when a member of the crowd produced a handgun and fired several shots into the air. Worcester police officers responded to the scene and interviewed members of the crowd. One witness, a photographer who had been hired to take photographs at the bar that night, reported that the shooter was a man with long dreadlocks, and showed the officers three photographs that he had taken of the shooter earlier that night at the bar. A second witness gave a description of the shooter that was similar to the photographer's, and later that evening identified the defendant in a showup identification.

The defendant was indicted for unlawful possession of a firearm, G. L. c. 269, § 10 (a), as an armed career

criminal, G. L. c. 269, § 10G (c); unlawful possession of ammunition, G. L. c. 269, § 10 (h) (1), as an armed career criminal, G. L. c. 269, § 10G (c); and discharging a firearm within 500 feet of a building, G. L. c. 269, § 12E. The case went to trial in June of 2017, and the firearm charges were first tried to a jury,[2] which returned guilty verdicts for possession of a firearm, possession of ammunition, and discharging a firearm within 500 feet of a building.

***2** 2. The armed career criminal trial. After the convictions of the firearm offenses, the case moved to the ACCA phase, which was tried jury waived. The Commonwealth presented evidence of five prior offenses that it claimed met the "violent crime" standard, four involving a guilty plea and the fifth a bench trial. G. L. c. 269, § 10G (c). As to each the Commonwealth presented a police officer witness to prove the nature of the offenses. In all but one instance the police officer was also a victim of the crime. As noted, no evidence was submitted regarding any of the plea hearings. There were no transcripts, and no testimony as to what was said at the hearings.

After hearing the witnesses, the judge found beyond a reasonable doubt that four of the five crimes met the criteria of G. L. c. 269, § 10G, for an armed career criminal enhancement. The evidence as to those crimes is summarized here:

a. 1995 assault and battery on a police officer. In 1995 the defendant pleaded guilty to assault and battery on a police officer, as a result of an incident where he elbowed an officer in the nose while resisting arrest. At the ACCA trial, the Worcester police officer involved testified that he had attempted to stop the defendant following a suspected drug deal. The defendant did not stop, prompting the officer to grab the defendant by the arm. The officer testified that:

> "[The defendant] continued to move away. He flailed his arms, telling me to get off him .... That's when he flailed -- swung his arm backwards and hit me in the nose[,] ... he moved his elbow straight back into my face."

The blow temporarily stunned the officer, but he eventually restrained the defendant.

b. 1998 assault and battery by means of a dangerous weapon -- a door. In 1998 the defendant pleaded guilty to two counts of assault and battery by means of a dangerous weapon (a door) after shutting a door on two police officers, while resisting arrest. At the ACCA trial a different officer of the Worcester Police Department testified that he had responded to a residence regarding a noise complaint involving loud music. The officer testified that he was met at the doorway by the defendant, who was hostile to the officers and "took his chest and put it against my chest, pushing me back." When the defendant was informed that he was under arrest,

> "[h]e started flailing his arms and forced his way back into the apartment.... He was flailing his arms, trying not to allow us to place cuffs on him. He was kicking us back and kicking us at the lower part of our legs ... multiple times. He was just trying to ... [avoid] getting arrested.... [The other officer] was trying to ... grab his arm. That's when he struck [the other officer] with the door.... He grabbed the door, trying to slam it shut so that we couldn't put him under arrest."[3]

Additional officers responded and the defendant was subdued.

c. 2000 assault by means of a dangerous weapon -- motor vehicle. In 2000 the defendant pleaded guilty to assault by means of a dangerous weapon after nearly hitting an officer with his automobile. At the ACCA trial Massachusetts State Trooper Sean Murphy, who had been a Southbridge Police Officer at the time of the event, testified that he had been working a traffic detail at a construction site with two other officers. Murphy observed the defendant driving an automobile, and remarked to the other officers that he believed the defendant to have a suspended driver's license. The officers attempted to flag down the defendant, but the defendant attempted to drive away, coming very close to one of the officers in the process. Trooper Murphy testified:

> ***3** "I saw [the defendant's automobile] swerve towards the deputy, and [the deputy] made the basic maneuver to get out of the way, and the vehicle continued.... [The deputy had to] [m]ove out of the way.... [The vehicle got] [v]ery close [to the deputy] ... within two to three feet."

With the help of additional officers, the defendant was located in an apartment a short distance away and arrested.

d. 2000 assault by means of a dangerous weapon -- firearm. Finally, in 2000 the defendant was convicted of assault by means of a dangerous weapon after a bench trial. Following a report of shots fired in the Great Brook Valley neighborhood in Worcester, yet another Worcester Police Officer responded to the scene and spoke to a witness who had seen the shooter, as well as the vehicle

the shooter had fled in. The vehicle and the defendant were located nearby, and the defendant was then brought back to the scene, where the witness identified him as the shooter. The officer testified at the ACCA trial that "a couple of shell casings" were recovered, and that two vehicles at the scene had been damaged and bore punctures consistent with bullet holes.

Having found four qualifying predicate offenses, the judge sentenced the defendant to the mandatory minimum terms of fifteen years under G. L. c. 269, § 10G (c). This appeal followed.

Discussion. 1. The defendant's enhanced sentences under the ACCA. General Laws c. 269, § 10G, provides a staircase of mandatory minimum and maximum enhanced punishments for certain weapons-related offenses, if a defendant has been "previously convicted of [one or more] violent crime[s] or ... serious drug offense[s] ... arising from separate incidences." Commonwealth v. Wentworth, 482 Mass. 664, 670, 128 N.E.3d 14 (2019). Here we are concerned only with the "violent crime" prong of the statute, as the defendant was not previously convicted of serious drug offenses. "Violent crime" is a defined term. See G. L. c. 269, § 10G (e); G. L. c. 140, § 121. It has four enumerated components, but in this case we concern ourselves only with one, known as the "force clause":

> "[A]ny 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 or a deadly weapon against the person of another."

G. L. c. 140, § 121.[4]

The language of the Massachusetts statute "largely replicates" that of its Federal counterpart, 18 U.S.C. § 924(e)(2)(B) (Federal ACCA), and there is a considerable body of case law, from both the Federal courts and the Supreme Judicial Court, that grapples with the many issues raised when a prosecutor seeks to prove that a defendant was "previously convicted of" a "violent crime" (citation omitted). Commonwealth v. Eberhart, 461 Mass. 809, 817, 965 N.E.2d 791 (2012). In general, the case law prefers to take a "categorical approach," in which a particular crime is identified as categorically "violent," or nonviolent, in all of its factual iterations. Id. at 815-816, 965 N.E.2d 791. A crime is categorically a violent crime if proof of the required elements will always satisfy the statutory definition -- an example is rape, for which intentional use of force is a required element. Where the prior crime is categorically a violent crime, a conviction can be proved simply by a court document, such as a judicial record of a judgment. See id. at 817, 965 N.E.2d 791, citing Commonwealth v. Colon, 81 Mass. App. Ct. 8, 16-17, 958 N.E.2d 56 (2011).

***4** Certain crimes, however, may or may not qualify as violent crimes, depending on their particular facts. Among these are assault and battery, assault and battery by means of a dangerous weapon, and assault and battery of a police officer. As the Supreme Judicial Court explained in Eberhart, 461 Mass. at 818, 965 N.E.2d 791, "[t]he statutory crime of assault and battery ... encompasses three common-law crimes: harmful battery, reckless battery, and offensive battery." The Eberhart court concluded that harmful battery -- defined as "[a]ny touching 'with such violence that bodily harm is likely to result' " -- is a violent crime under the "force clause" of the ACCA, but that offensive battery is not (citation omitted). Id. at 818-819, 965 N.E.2d 791. In Ashford, the Supreme Judicial Court examined a related issue involving reckless conduct, and this time concluded that reckless assault and battery does not qualify as a violent crime under G. L. c. 269, § 10G. See Ashford, 486 Mass. at 467, 159 N.E.3d 125. Relying in part on the reasoning of Federal case law, the court concluded that where the application of force results from recklessness as opposed to intentional conduct, it does not meet the statutory language of the ACCA requiring that the defendant "use[d]" force "against the person of another." Id. at 462, 159 N.E.3d 125. See G. L. c. 140, § 121.[5]

Importantly, for those crimes such as assault and battery that are not categorically violent crimes, the Supreme Judicial Court has adopted a "modified categorical approach" to determining whether the defendant committed a violent crime. Ashford, 486 Mass. at 459-460, 159 N.E.3d 125. As applied in our courts, under the modified categorical approach the finder of fact is not limited to court documents, such as a judgment or the transcript of a colloquy, but can consider additional evidence regarding the factual basis for the conviction at issue. See Ashford, supra at 468, 159 N.E.3d 125.

Against this backdrop, we consider the evidence regarding the first two prior crimes found by the judge. Each of these crimes was a variant of assault and battery, and accordingly neither of them qualifies as categorically violent. More evidence was required. The Commonwealth attempted to prove the violent nature of the crimes by

presenting the victims to testify as to what had occurred. The Commonwealth asserts that this approach is endorsed by language in several Supreme Judicial Court opinions, which it claims allows the predicate facts to be shown by "any evidence that would have been admissible at the original trial of the alleged predicate offense." Ashford, 486 Mass. at 468, 159 N.E.3d 125, quoting Eberhart, 461 Mass. at 816, 965 N.E.2d 791. The Commonwealth accordingly contends that it can satisfy its burden with "a police report or the testimony of a police officer witness," and that the evidence adduced here was sufficient to establish that the convictions were for violent crimes.

The defendant counters that the evidence presented was not sufficient to show that the convictions at issue were based on intentional, rather than reckless, conduct. The defendant goes further, however, and contends that at least where the conviction in question is the result of a guilty plea, the testimony of victim-witnesses is essentially irrelevant. He contends instead that the Commonwealth needed to show that the defendant pleaded guilty to a violent crime, and that the only way to show this, where the crime is not categorically violent, would be by adducing evidence of what facts were presented at the plea hearing. The defendant also points out that any approach that would allow the Commonwealth to prove the violent nature of the prior crime through witness testimony not previously adduced would raise serious constitutional issues, under (at least) the double jeopardy and due process clauses.

In our view, the defendant is correct at least to this extent: as a matter of the statute's plain language, the Commonwealth must show that the crime the defendant was "convicted of" was violent. G. L. c. 269, § 10G. Where the defendant pleaded guilty, a transcript of the plea hearing or a related document, such as a plea agreement, will be the best evidence of what the defendant was "convicted of." Id. If the Commonwealth seeks to use other evidence, however, that evidence must be sufficiently tied to the defendant's plea to support a reasonable conclusion about the facts of the crime to which the defendant actually pleaded guilty. Cf. Shepard v. United States, 544 U.S. 13, 25, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005) ("the only certainty of a ... finding lies ... [in a pleaded case] in the defendant's own admissions or accepted findings of fact"). Put another way, where as here the defendant pleaded guilty to an offense that encompasses both violent and nonviolent crimes under the ACCA, whatever evidence the Commonwealth puts forward must be sufficient for the fact finder to find that the facts to which the defendant pleaded guilty showed (beyond a reasonable doubt) that he was convicted of the violent offense.

***5** In the context of an assault and battery, it may be very difficult to demonstrate that a defendant pleaded guilty to intentional rather than reckless conduct through subsequent testimony of a victim-witness, as the facts of this case show. Here the victim-witnesses' testimony did not address what happened at the plea hearing, or what the defendant agreed that he did. More generally, we observe that a victim-witness might testify at the ACCA trial to facts that the defendant does not agree with, and never did. Indeed, it is not hard to imagine that a defendant could have pleaded guilty to assault and battery, even though there was significant disagreement between the victim and the defendant as to what the defendant actually did, and in particular, whether the defendant's conduct was intentional or merely reckless. And these possibilities beg the question of how such factual disputes can be resolved, without reference to what happened at the plea hearing.

In short, there is considerable nuance to the issue of how the Commonwealth proves that a crime was violent, when the predicate crime at issue is subject to the modified categorical approach. In this case, however, we need not decide the broader questions posed by the defendant, because in our view the Commonwealth simply did not prove, with respect to the two guilty plea convictions at issue, that the defendant was "convicted of" an intentional, rather than a reckless, assault and battery. G. L. c. 269, § 10G. As described above, with respect to each of these convictions the testimony of the victims at the ACCA trial could have supported a finding of either intentional or reckless conduct. The 1995 assault and battery was an elbow to the face of a police officer, during an arrest. The 1998 assault and battery by means of a dangerous weapon involved shutting a door on an officer, also during an arrest. In each instance had the battery been intentional it would have been violent under Ashford, but a lack of intention would have left the conduct as merely reckless.

Even if the judge could have found that the defendant agreed to the facts as described by the witnesses, the defendant's agreement would not necessarily have established intentional rather than reckless assaults and batteries. Rather, the defendant would merely have agreed that he committed an assault and battery that could either be intentional or reckless. An assault and battery that could be either intentional or reckless, however, is not a "violent crime." Ashford, 486 Mass. at 465, 159 N.E.3d 125. But in any event, in neither of these two prior convictions do we know what actually transpired at the plea hearing. Under the circumstances the evidence before

the judge was not sufficient for the judge to determine that the defendant pleaded guilty to intentional rather than reckless assault and battery.[6]

Our decision is in line with the Supreme Judicial Court's decision in Wentworth, 482 Mass. at 673-674, 128 N.E.3d 14. In Wentworth the predicate offense also was an assault and battery to which the defendant had pleaded guilty, and the issue was whether the Commonwealth had sufficiently proved violence under the modified categorical approach. Id. at 671-674, 128 N.E.3d 14. The court ruled that the evidence was sufficient, but notably, in Wentworth, supra at 674, 128 N.E.3d 14, there was evidence as to the facts the defendant admitted:

> "During the plea colloquy [at the ACCA trial], ... the prosecutor elaborated that the facts of the domestic assault and battery were that the defendant 'struck his girlfriend at the time in the face and shoved her down on the bed.' The defendant agreed to the facts presented by the prosecutor. This evidence is sufficient 'evidence of the circumstances surrounding' the assault and battery to demonstrate a touching with such violence that bodily harm is likely to result -- i.e., a harmful battery."

***6** Evidence such as the above was lacking in this case, and here the two prior assaults and batteries involving guilty pleas have not been proven to be "violent crimes" beyond a reasonable doubt for the purposes of the ACCA.[7] G. L. c. 269, § 10G.

As the court stated in Commonwealth v. Beal, 474 Mass. 341, 354, 52 N.E.3d 998 (2016), "remand [for a second trial for the introduction of further evidence] is not appropriate" where "[t]here was no improper receipt or exclusion of evidence, only a failure to marshal the evidence necessary to support a conviction." Thus, we remand for resentencing under G. L. c. 269, § 10G (a), consistent with this opinion.[8]

***7** 2. Ineffective assistance of counsel at the firearm offenses trial and the defendant's motion for a new trial. Finally, the defendant raises issues with respect to the trial of the firearm charges, having to do with the handling of a question from the jury during deliberations. The jury sent two questions to the judge, one of which asked:

> "Does [the defendant] have a previous record?"

At sidebar, the judge briefly discussed the jury's questions with both the prosecutor and defense counsel, and determined that the best course would be to send a short written response to the jury:

> "The testimony and evidence has been closed. You must rely on your collective memory in resolving these questions."

Both attorneys assented to this response.

In his motion for a new trial, the defendant argued that the judge's instruction was inadequate, and that his trial counsel should have requested a curative instruction "that to the extent that [the jury] may have the recollection of any evidence that the defendant had a criminal record, they are to disregard it." A statement from the defendant's trial counsel submitted with the motion for a new trial explained that counsel's decision not to request any further curative instruction was a tactical decision, and that his "legal strategy was not [to] amplify the matter and perhaps make it worse or confussing [sic] by the judge giving too much of an explanation in his response to the question." The judge, considering this statement, denied the motion without an evidentiary hearing, stating that "trial counsel made a rational tactical decision not to draw attention to a potentially harmful question."

We perceive no error. The "trial judge, who has observed the evidence and the jury firsthand and can tailor supplemental instructions accordingly," has discretion over the appropriate response to a jury question. Commonwealth v. Van Bell, 455 Mass. 408, 420, 917 N.E.2d 740 (2009), quoting Commonwealth v. Robinson, 449 Mass. 1, 7-8, 864 N.E.2d 1186 (2007). The judge's instruction was not inaccurate, nor was there an objection to it. Trial counsel stated that he had "made a tactical decision not to press the issue.... This decision was not unreasonable, much less 'manifestly unreasonable' " (citation omitted). Commonwealth v. Haley, 413 Mass. 770, 777-778, 604 N.E.2d 682 (1992) (discussing tactical decision to request no curative instruction after some jurors had "viewed the defendant in restraints" to avoid "emphasiz[ing]" issue). We also conclude that the judge did not abuse his discretion in declining to hold an evidentiary hearing on the defendant's motion as it did not raise a substantial issue. See Commonwealth v. Wallis, 440 Mass. 589, 596, 800 N.E.2d 699 (2003).

Conclusion. For the foregoing reasons, the underlying convictions of unlawful possession of a firearm, unlawful possession of ammunition, and discharging a firearm within 500 feet of a building are affirmed. The finding that the defendant was guilty as an armed career criminal

pursuant to G. L. c. 269, § 10G (c), is vacated, and the case is remanded for resentencing under G. L. c. 269, § 10G (a), consistent with this opinion.

So ordered.

All Citations

--- N.E.3d ----, 100 Mass.App.Ct. 7, 2021 WL 2880100

Footnotes

1 As discussed infra, at note 8, a third prior conviction does not qualify under the ACCA, because it is not "sequential" under the holding in Commonwealth v. Resende, 474 Mass. 455, 469, 52 N.E.3d 1016 (2016).

2 Where a defendant is indicted with a sentence enhancement under the ACCA there is a bifurcated trial. The underlying offenses are tried first, without reference to any prior offense. G. L. c. 278, § 11A. If the defendant is found guilty on the underlying offense(s), the second stage of the trial addresses whether the defendant was previously convicted of the ACCA predicate offenses. Id.

3 The defendant was also charged with two counts of assault and battery by means of a dangerous weapon -- shod foot -- in relation to his kicking of the officers. Those charges were dismissed, and the defendant pleaded guilty only to the charges involving the door.

4 More fully, G. L. c. 140, § 121, defines "violent crime" as:

> "[A]ny 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 or a deadly weapon against the person of another; (ii) is burglary, extortion, arson or kidnapping; (iii) involves the use of explosives; or (iv) otherwise involves conduct that presents a serious risk of physical injury to another."

Clause (iv) above -- known as the "residual clause" -- was held to be unconstitutionally vague by the Supreme Judicial Court and is not operative. Commonwealth v. Beal, 474 Mass. 341, 351, 52 N.E.3d 998 (2016).

5 Since Ashford was decided, the United States Supreme Court has also reached the conclusion, under the Federal ACCA, that offenses with a mens rea of recklessness do not qualify as a violent crime. See Borden v. United States, —— U.S. ——, 141 S.Ct. 1817, —— L.Ed.2d —— (2021).

6 We note that the defendant was tried and sentenced under the ACCA in June of 2017, some two and one-half years prior to the Supreme Judicial Court's decision in Ashford. At that time, the case law indicated that reckless battery qualified as a violent crime under the ACCA. See Wentworth, 482 Mass. at 673, 128 N.E.3d 14; Eberhart, 461 Mass. at 818, 965 N.E.2d 791.

7 We note that the problems with taking additional evidence regarding a prior conviction have previously been addressed at length in the Federal courts. See Ashford, 486 Mass. at 462, 159 N.E.3d 125 (looking to Federal court decisions as persuasive authority). Indeed, as a result of these problems the Federal courts simply do not allow proof such as was adduced in this case, when addressing whether a particular noncategorical crime qualifies as a predicate offense under the Federal ACCA. See Shepard, 544 U.S. at 25-26, 125 S.Ct. 1254; Taylor v. United States, 495 U.S. 575, 601-602, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990). Instead, "enquiry under the [Federal] ACCA ...

is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." Shepard, supra at 26, 125 S.Ct. 1254. And, while the Supreme Judicial Court allows the Commonwealth to submit a broader class of ACCA evidence than is allowed in the Federal courts (because our process includes a jury right), the Commonwealth still bears the burden of proving what the defendant was previously "convicted of," and where the defendant pleaded guilty, this requires evidence that allows a reasonable inference as to the facts of the crime to which the defendant pleaded guilty.

Deciding the case as we do, we do not reach the defendant's arguments regarding potential constitutional issues with the process employed here -- that is, whether the double jeopardy or due process clauses prevent having a victim or witness testify, years later, as to a crime that has already been adjudicated, in order to enhance the sentence for a new offense.

[8] The defendant has raised no argument that the third offense -- for assault by means of a dangerous weapon -- is not categorically a violent crime, and expressly conceded at oral argument that it qualifies as a predicate offense. Likewise, the defendant has not challenged the sufficiency of the evidence as to the fourth offense -- the conviction in 2000, after a bench trial, involving the firing of a weapon into two automobiles (shooting conviction). This was also a conviction of assault by means of a dangerous weapon.

Nevertheless, these two convictions qualify as only one predicate offense under the ACCA, because the fourth crime was prosecuted during the pendency of the prosecution of the third crime (the 2000 assault involving the defendant's driving his automobile near a police officer), and thus did not qualify as a separate or "sequential," offense. Commonwealth v. Resende, 474 Mass. 455, 469, 52 N.E.3d 1016 (2016). Accordingly, on remand there is but one qualifying offense remaining for ACCA purposes.

End of Document

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss. SUPERIOR COURT
NO. 1585CR00476

COMMONWEALTH

v.

HERIBERTO RIVERA

DEFENDANT'S MOTION TO WITHDRAW PLEA AND CORRECT ILLEGAL SENTENCE PURSUANT TO MASS. R. CRIM. P. 30(A) AND 30(b)

'riberto Rivera (hereinafter
'ursuant to Mass. R. Crim. P.
' moves this Court to permit
and grant him a new trial.
rrent sentence is an illegal
he prior convictions that
for his 9 to 10 year
eanor possession of a
ior possession of ammunition),
cing, "violent crimes" as
. Pursuant to Mass. R. Crim.
Rivera's plea to the ACCA
rial judge illegally imposed
ed by law.
ring thus was contrary to
14th Amendment to the United
12 of the Massachusetts

8/16/19

After hearing, **DENIED**. The undersigned concluded at the plea hearing, as now, that the defendant's prior ABDW conviction constituted a "violent crime" under the "force clause" of the ACCA, Commonwealth v. Widener, 91 Mass. App. Ct. 696, 703 (2017). Even considering the defendant's ABDW conviction to be one based on reckless conduct, as urged by the defendant, this does not change the result under Widener. It is only by adopting the divergent holding of the court in U.S. v. Windley, 864 F.3d 36, 38-39 (1st Cir. 2017), that the result could be different here. This court can not ignore clear and binding precedent of the Appeals Court, just as that court can not alter decisions of the SJC. So long as a higher court's holding has not been abrogated, it is the law that a trial judge must apply. See, Commonwealth v. Vasquez, 456 Mass. 350, 356-357 (2010); Commonwealth v. Dube, 59 Mass. App. Ct. 476, 485 (2003).
Having concluded that the ABDW conviction qualified as a predicate violent crime under the ACCA, the undersigned finds that there was no injustice here. (The same result is reached in consideration of Commonwealth v. Wentworth, 482 Mass. 664 (2019) decided after the filing of this motion.)

me, J. Attest: Pennypacker, Esq.

7 3

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

DEPARTMENT OF THE TRIAL COURT
SUPERIOR COURT DIVISION
INDICTMENT NO. 2015-0476

Commonwealth

v.

Heriberto Rivera

COMMONWEALTH'S SENTENCING MEMORANDUM

Introduction

The above referenced defendant was convicted by a jury on May 3, 2017 for Possession of a Firearm, Possession of Ammunition and Distribution of Cocaine. On the same date the defendant pled guilty to be an Armed Career Criminal Level One. The defendant's Massachusetts Board of Probation Record reveals that the defendant has two prior convictions for firearm offenses, two prior convictions for ammunition, as well as convictions for Assault and Battery with a Dangerous Weapon and Assault to Kill. The defendant previously served a 3-5 years State Prison Sentence on the Assault to Kill charge (2007). The defendant was given probation on the Assault and Battery with a Dangerous Weapon charge (2012). He subsequently violated his probation and served a 2-2 years and one days State Prison Sentence. Previous to his State Prison Sentences the defendant was given a suspended jail sentence back in 2004 for Possessing a Firearm. He violated his probation and served six months at the House of Corrections. The current convictions for Possession of a Firearm and Possession of Ammunition now represent his third convictions on each charge.

Facts

On Thursday, May 14, 2015, Officer Jeffrey Carlson of the Worcester Police Department Vice Squad held a search warrant for 89 Endicott Street, Apartment #3. The target of the search was the defendant, Heriberto Rivera. Prior to two o'clock in the afternoon Officer Carlson began conducting surveillance on this three family residence. Officer Carlson observed a man on the front porch who he believed to be Heriberto Rivera. He watched the man get into the front seat passenger side of a Chevy Avalanche. He then began to follow the truck. After losing sight of the truck for about fifteen minutes he then observed it in the area of Providence Street. He was able to identify the driver of the vehicle at this time as being Jorge Zambrano. Knowing that Zambrano's driver's license had been suspended Officer Carlson asked uniform patrols to conduct a motor vehicle stop. As officers were approaching the truck it took off which led to a high speed chase. The chase was called off due to public safety concerns.

Members of the Vice Squad made their way back to Endicott Street to execute the search warrant. Entry was made through the front door. Forceful entry was made to the third floor apartment after officers knocked and announced their presence. Upon making entry into the apartment officers encountered Catherine Ortiz and David Perez coming out of a bedroom. They were given Miranda Rights and shown a copy of the warrant. Ms. Ortiz, the sister of Heriberto Rivera, made statements to police indicating her brother resided in the third bedroom. Officers observed this bedroom was locked from the outside. After entry was made into this bedroom members of the Vice Squad recovered a number of items including a loaded .357 Smith and Wesson Revolver, four different bags of cocaine varying in size, a digital scale with residue, crib notes, address book, photographs of Heriberto

Rivera, a jar containing cut, a Pyrex measuring cup with cocaine residue, glassine baggies, cell phones, tablet and several small zip bags. The items were secured and brought to the station where they were fingerprinted. Heriberto Rivera's fingerprint was recovered off a number of items including the firearm. An arrest warrant was issued for him.

On Tuesday, May 19, 2015 members of the Worcester Police Department SWAT Team and Vice Squad executed a search warrant at 15 Division Street, Apartment 2 for the arrest of Heriberto Rivera. He was found inside the apartment with Carmen Ortiz. Upon being arrested the defendant made several statements including one that referenced him being with the driver of the Chevy Avalanche. During this encounter Ms. Ortiz told police the firearm was her weapon and that she was holding it for a man named David.

Sentencing Guidelines

The defendant is classified under the sentencing guidelines as a 4D which calls for 20-30 months on each offense. This does not take into account the Armed Career Criminal Enhancement. The defendant has pled guilty to being an Armed Career Criminal Level One on the Possession of a Firearm Charge and Possession of Ammunition Charge. The minimum sentence as an ACC 1 is 3 years in State Prison with a maximum sentence being 15 years in State Prison. The Possession of Cocaine with Intent to Distribute carries a minimum one year in the House of Correction or 2.5 years in State Prison with a maximum 2.5 years in the House of Corrections or ten years State Prison.

Defendant's Record

The defendant's record dates back to when he was in the juvenile court system. Dating back to 2001 and 2002 the defendant was committed to the Department of Youth Services. Soon after that the defendant graduated to the adult court system. In 2003 the defendant was giving a

Continuance without a Finding. He then served ten days in the House of Corrections for motor vehicle offenses in 2004. This behavior continued throughout 2004. He was then charged with two counts of Possession of a Firearm. He was given a suspended sentence in July 2004. The defendant violated probation and served six months in the House of Corrections. Throughout much of 2005 and 2006 the defendant picked up several motor vehicle and assault type offenses which resulted in dismissals. In 2007 the defendant was indicted for Assault to Kill, Assault and Battery with a Dangerous Weapon and Firearms offenses for his role in the shooting of Edwin Valentin. The defendant pled guilty in the Worcester Superior Court and was sentenced to 3-5 years on the Assault to Kill charge. He was given probation from and after on the Assault and Battery with a Dangerous Weapon and Firearm offenses. The defendant was found in violation of probation in 2012 and sentenced to 2 years to 2 years and one day in State Prison for the Assault and Battery charge. He was given concurrent sentences in the House of Corrections for the firearm offense.

The defendant was just 18 years old when he was convicted of his first firearm offense. He was convicted in 2009 at the age 23 for shooting another man at the age of 21. Here, the defendant has been convicted of his third firearm offense at the age of 30.

Commonwealth's Recommendation

There are no mitigating circumstances which justify the defendant's behavior. In 2015 the defendant used a bedroom in his sister's apartment at 89 Endicott Street for the sole purpose of selling drugs. The defendant has continued to show this court over the years that it does not matter what type of sentence he has been given; he is going to continue to engage in a violent and dangerous behavior. The defendant has been given several breaks in the past. The first break he was given was in 2004 for his first firearm offense. The defendant had the opportunity

to serve probation. He violated probation and did six months in the House of Correction. After that the defendant continued on a path of destruction. His behavior escalated in 2007 when he shot Edwin Valentin. Once again the defendant was given a break. Although he served a State Prison Sentence he was only given 3-5 years with the opportunity to serve probation on and after that sentence. The defendant still did not curtail his behavior. He violated probation and was sentenced to State Prison. The defendant has proven to this court that regardless if he is placed on probation or given a House of Correction or State Prison he is still not going to adhere to the rules of the criminal justice system.

The defendant has previously been classified by the Worcester Police Department Gang Unit as being a member of the Great Brook Valley Outlaws. Given his previous history before the court and his known gang ties in the community the Commonwealth is recommending that the defendant be sentenced to 10-12 in State Prison on the Possession of a Firearm charge and Possession of Ammunition. With regard to the Possession of Cocaine with Intent to Distribute the Commonwealth is asking that the defendant be sentenced from three to four years in State Prison to run concurrently.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests this Honorable Court to adopt its recommendations.

Respectfully Submitted,
For the Commonwealth
JOSEPH D. EARLY, JR.
DISTRICT ATTORNEY
For the Middle District

Julieanne Richard-Karcasinas
Assistant District Attorney
For the Middle District
BBO # 674319
225 Main Street
Room G-301
Worcester, MA 01608
(508) 755-8601

Date: May 10, 2017

Drug Sentences Under the 2012 "3 Strikes" Act; Minimum, Maximum, and Mandatory Minimum Sentences with Parole Eligibility

(All references below are to G. L. c. 94C as amended by Chapter 192 of the Acts of 2012)

Prepared by Law Clerk Marc Andrews for the Hon. Charles J. Hely, January 4, 2013

Charge	Not Less Than	Not More Than	Minimum Mandatory[1]
Class A Controlled Substances - §32			
Distribution or Possession w/ Intent - §32(a)		10 - SP or 2.5 - HC	
w/ a Prior Conviction - §32(b)	3.5 - SP	15 - SP	3.5 – SP
Violation in a School Zone[3,4] (Separate Offense) - §32J	2.5 - SP or 2 - HC	15 - SP or 2.5 HC	2 - SP or 2 – HC[2]
Trafficking - (Heroin, Morphine, Opium[5]) - §32E(c)			
18-36 grams - §32E(c)(1)	3.5 - SP	20 - SP	3.5 – SP
36-100 grams - §32E(c)(2)	5 - SP	20 - SP	5 – SP
100-200 grams - §32E(c)(3)	8 - SP	20 - SP	8 – SP
200< grams - §32E(c)(4)	12 - SP	20 - SP	12 – SP
Class B Controlled Substances - §32A			
Distribution or Possession w/ Intent - §32A(a)		10 - SP or 2.5 - HC	
w/ a Prior Conviction - §32A(b)	2 - SP	10 - SP	2 – SP
Escalator for Cocaine, Phencyclidine, and Methamphetamine - §32A(c)[6]	2.5 - SP or 1 - HC	10 - SP or 2.5 - HC	1 - SP or 1 – HC[2]
Escalator w/ a Prior Conviction - §32A(d)[6]	3.5 - SP	15 - SP	
Violation in a School Zone[3,4] (Separate Offense) - §32J	2.5 - SP or 2 - HC	15 - SP or 2.5 HC	2 - SP or 2 – HC[2]
Trafficking - (Cocaine, Methamphetamine, Phenmetrazine) - §32E(b)			
18-36 grams §32E(b)(1)	2 - SP	15 - SP	2 – SP
36-100 grams §32E(b)(2)	3.5 - SP	20 - SP	3.5 – SP
100-200 grams §32E(b)(3)	8 - SP	20 - SP	8 – SP
200< grams §32E(b)(4)	12 - SP	20 - SP	12 – SP

Other Charges

Trafficking - Marijuana - §32E(a)			
50-100 lbs - §32E(a)(1)	2.5 - SP or 1 - HC	15 - SP or 2.5 - HC	1 - SP or 1 – HC[2]
100-2000 lbs - §32E(a)(2)	2 - SP	15 - SP	2 – SP
2,000-10,000 lbs - §32E(a)(3)	3.5 - SP	15 - SP	3.5 – SP
10,000< lbs - §32E(a)(4)	8 - SP	15 - SP	8 - SP

Notes

This memorandum does not address any retroactivity issues.

SP – State Prison

HC – House of Correction

[1] Minimum Mandatory Sentences to State Prison are not eligible for parole or good conduct credit for the specified minimum mandatory period - §32H

[2] Minimum Mandatory Sentences to a House of Correction are eligible for parole after serving one half the maximum term of the sentence so long as no aggravating factor as outlined in §32E(d) or §32J applies.

[3] School Zone is defined as a violation between 5 a.m. and midnight within 300 feet of a school or within 100 feet of a public park or playground

[4] School Zone Sentences begin from and after the expiration of the sentence for the original violation of §32 or §32A

[5] Opium is normally a Class B substance but is grouped with Class A Heroin and Morphine for Trafficking Charges

[6] Note that cocaine is a coca leaves derivative under §31, Class B (a)(4). A cocaine offense is therefore subject to the escalators in §32A(c) and (d) if it is properly pleaded in the indictment.

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Exhibits: None

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS. SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

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COMMONWEALTH OF MASSACHUSETTS

v. Docket No. 1585CR00476

HERIBERTO RIVERA

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CHANGE OF PLEA and SENTENCING
BEFORE THE HONORABLE DAVID RICCIARDONE

APPEARANCES:

For the Commonwealth:
Worcester County District Attorney's Office
225 Main Street
Worcester, Massachusetts 01608
By: Julieanne Karcasinas, Assistant District Attorney

For the Defendant:
90 West Main Street
Dudley, Massachusetts 01571
By: Thomas W. Brousseau, Esq.

Worcester, Massachusetts
Room 10
May 10, 2017

Jennifer Witaszek, CVR-M
Official Court Reporter

to trial on the armed career criminal portion of the indictments.

MS. KARCASINAS: Understandable, your Honor.

THE COURT: So is what I just said clear to you, that if I exceed what the prosecution recommends, I'll let you go to trial on this phase of the indictment. Do you understand?

THE DEFENDANT: Yes, your Honor.

THE COURT: At this point, I'm going to ask the prosecutor to recite the facts regarding the enhanced portion of the indictments which the Commonwealth would be prepared to prove at trial.

Please listen carefully to the prosecutor's statement of the facts so that you can then respond to the follow-up questions I will put to you when she's done.

Yes, ma'am.

MS. KARCASINAS: Thank you, your Honor. Had the Commonwealth proceeded to trial on the armed career criminal enhancement, it would have offered evidence that on June 21st of 2007, Worcester police officers were dispatched to 85 Chatham Street for a shooting.

Upon their arrival, officers found an Edwin Valentin motionless in the street. Officer Bill Pero of the Worcester Police Department located an entrance

wound in Mr. Valentin's upper right arm and his chest area. As the officers tried to speak with him, they noted he was going in and out of consciousness.

The police spoke to the hospital that indicated Mr. Valentin suffered a single gunshot wound to his bicep which entered the right lateral side of his chest, and the caliber projectile became lodged into his spinal cord.

Through an investigation, police then spoke to Mr. Valentin on June 5, 2007, when he had been moved out of the intensive care unit. He told police that the person who shot him is a male that goes by the name of Macho and that he drives a gray BMW. He also identified Macho out of a photo array.

He told police that Macho had been partying with him and his group of friends earlier when Macho left. Mr. Valentin then went outside and saw Macho. Macho said something to him which he could not understand, raised a gun, and shot him. Mr. Valentin told police that the two have never had any problems with one another.

The person who was identified by Mr. Valentin as being Macho was later identified by the Worcester Police Department as the defendant before the Court today, Heriberto Rivera.

The defendant was convicted on Docket No. -- out of the Worcester Superior Court, Indictment Number -- excuse me -- 07-2023-1. He was convicted of assault to kill and assault and battery with a dangerous weapon. That occurred on October 27th of 2009.

And that would have been the evidence that the Commonwealth would have offered at trial.

THE COURT: And after conviction, what was the sentence he received?

MS. KARCASINAS: Your Honor, on the assault to kill, the defendant received a three- to five-year State Prison sentence. On the assault and battery with a dangerous weapon, he did receive five years' probation. He did violate probation and he was given a two- to two-year-and-one-day State Prison sentence.

THE COURT: Okay. Thank you.

MS. KARCASINAS: Thank you, your Honor.

THE COURT: Did you hear the statement that the prosecutor read to me, Mr. Rivera?

THE DEFENDANT: Yes, your Honor.

THE COURT: And is it true that you not only committed the acts that were described to me, but that you were found guilty and sentenced to a State Prison sentence on the assault with intent to kill and five years' probation on the assault and battery with a

dangerous weapon, and ultimately violated that probation and received a two-year sentence. Is all that true?

THE DEFENDANT: Yes, your Honor.

THE COURT: You understand that by pleading guilty to those things or admitting to those things, you are pleading guilty?

THE DEFENDANT: Yes, your Honor.

THE COURT: So it is your request formally to plead guilty to these armed career criminal offenses. Is that true?

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you understand that by doing this, by pleading guilty, you're giving up the right to a trial, with or without a jury, to determine your guilt or innocence as to this portion of the indictments?

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you understand that if you chose to have a jury trial, just like you did on the underlying offenses, you could have the right to participate in the selection of 12 jurors who would decide your guilt or innocence. And before you could be convicted, those jurors would have to return a unanimous verdict.

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you understand that by pleading