[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-13819
Non-Argument Calendar

D.C. Docket No. 1:15-cr-00091-SCJ-CMS-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

IGNACIO TOVALIN,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

(February 26, 2016)

Before HULL, MARCUS and JILL PRYOR, Circuit Judges.

PER CURIAM:

The issue presented in this appeal is whether Ignacio Tovalin's simple battery conviction under O.C.G.A. § 16-5-23(a)(1) for "[i]ntentionally mak[ing] physical contact of an insulting or provoking nature with the person of another" is a conviction of a "crime of violence" under 18 U.S.C. § 16. Section 2L1.2(b)(1)(C) of the United States Sentencing Guidelines provides for an eight-level increase in a defendant's base offense level "[i]f the defendant previously was deported . . . after . . . a conviction for an aggravated felony." In turn, 8 U.S.C. § 1101(a)(43)(F) provides that an "aggravated felony" includes a "crime of violence" under 18 U.S.C. § 16. Thus, whether Tovalin's simple battery conviction is a "crime of violence" determines whether the district court properly applied the aggravated felony enhancement to his sentence.

I.

Tovalin entered the United States as a lawful permanent resident in 1990. In 1994, he pled guilty in the State Court of DeKalb County, Georgia, to two counts of simple battery under O.C.G.A. § 16-5-23. He was sentenced to 18 months' imprisonment.

Tovalin remained in the United States for nearly twenty years after this incident. During this period, he was arrested several times for alcohol-related infractions, culminating in a 2012 arrest for driving under the influence ("DUI"). While he was in state custody on the DUI charge, authorities determined that he

was subject to removal under the Immigration and Nationality Act ("INA"). Shortly thereafter, Tovalin was transferred to a United States Immigration and Customs Enforcement ("ICE") detention facility, ordered removed, and promptly removed from the United States to Mexico.

Tovalin illegally reentered the United States in February 2014. Three months later, ICE learned that Tovalin was again in state custody, this time on charges arising out of a domestic disturbance. ICE determined that Tovalin had illegally entered the United States and served him with a Notice of Intent/Decision to Reinstate Prior Order (I-871) and an Immigration Warrant for Arrest (I-200). Tovalin was transferred to ICE custody and indicted for violating 8 U.S.C. § 1326(a), making it a crime to reenter the United States after removal and without authorization. Tovalin ultimately pled guilty, acknowledging his illegal reentery.

The probation office prepared a Presentence Investigation Report ("PSI"), which set Tovalin's base offense level at eight, pursuant to U.S.S.G. § 2L1.2(a). The PSI then applied U.S.S.G. § 2L1.2(b)(1)(C)—which provides for an eight-level enhancement "[i]f the defendant previously was deported . . . after . . . a conviction for an aggravated felony"—based on Tovalin's two 1994 simple battery convictions. With a three-level reduction for acceptance of responsibility and assistance pursuant to U.S.S.G. § 3E1.1(a) and (b), the PSI calculated a total

offense level of 13. With a criminal history category of IV, the PSI arrived at an advisory guidelines range of 24 to 30 months' imprisonment.

Tovalin objected to the aggravated felony enhancement on the ground that a violation of O.C.G.A. § 16-5-23(a)(1) did not constitute an aggravated felony for purposes of § 2L1.2(b)(1)(C). The district court overruled Tovalin's objection and sentenced him to 22 months' imprisonment, a downward variance from the guidelines range. Had the court sustained Tovalin's objection, however, his guidelines range would have been four to 10 months' imprisonment. *See* U.S.S.G. ch. 5, pt. A (Table) (providing four to 10 months of imprisonment for a base offense level of 10 and criminal history category of IV). The district court suggested that it would have sentenced Tovalin to less time had the enhancement not applied. This appeal followed.

On appeal, the parties agree that the aggravated felony enhancement did not apply here. Thus, both sides urge us to conclude that the district court erred and to vacate Tovalin's sentence and remand for resentencing.

II.

We review *de novo* a district court's determination that a prior conviction qualifies as an aggravated felony for purposes of an enhancement under U.S.S.G. § 2L1.2(b)(1)(C). *United States v. Ayala-Gomez*, 255 F.3d 1314, 1316 (11th Cir. 2001). For purposes of this guideline, we use the definition of an aggravated

felony in the INA, 8 U.S.C. § 1101(a)(43). *United States v. Estrada*, 777 F.3d 1318, 1322-23 (11th Cir. 2015) (citing U.S.S.G. § 2L1.2, comment. n.3(A)).

Under § 1101(a)(43), several offenses constitute aggravated felonies including, relevant to this appeal, a "crime of violence" as defined in 18 U.S.C. § 16, for which the term of imprisonment is at least one year. 8 U.S.C. § 1101(a)(43)(F). Section 16, in turn, provides two definitions of the term "crime of violence," but only one is potentially applicable here. A crime of violence includes "an offense that has as an element the use, attempted use, or threatened use of *physical force* against the person or property of another." 18 U.S.C. § 16(a) (emphasis added). Thus, we must decide whether the simple battery offense of which Tovalin previously was convicted has as an element the use of such "physical force." *Id.*

In making this determination, we focus on the elements of Tovalin's prior conviction, not the facts of the crime. *See United States v. Palomino Garcia*, 606 F.3d 1317, 1335-1336 (11th Cir. 2010). Generally, we apply a categorical approach, "look[ing] no further than the statute and judgment of conviction." *Id*. at 1336. "However, when the law under which a defendant has been convicted contains different statutory phrases—some of which require the use of force and some of which do not—the judgment is ambiguous and we apply a modified categorical approach." *Id.* (internal quotation marks omitted). Under the modified

categorical approach, we may consult "a narrow universe" of documents, including any charging documents, to determine which statutory phrase within a divisible statute was the basis of the prior conviction. *Id.* at 1337; *see, e.g.*, *United States v. Rosales-Bruno*, 676 F.3d 1017, 1020-21 (11th Cir. 2012). The focus remains, however, "on the elements of a prior conviction and never on the facts of the underlying conduct." *United States v. Estrella*, 758 F.3d 1239, 1246 n.2 (11th Cir. 2014).

Georgia's simple battery statute provides: "A person commits the offense of simple battery when he or she either: (1) [i]ntentionally makes physical contact of an insulting or provoking nature with the person of another; or (2) [i]ntentionally causes physical harm to another." O.C.G.A. § 16-5-23(a). Because O.C.G.A. § 16-5-23(a) has alternative elements, it is divisible; thus we apply a modified categorical approach and consider the charging document. *See Rosales-Bruno*, 676 F.3d at 1020-21, 1024. The state indictment charged Tovalin with violating O.C.G.A. § 16-5-23, without reference to a subsection. The indictment alleged, however, that Tovalin "intentionally ma[de] contact of an insulting and provoking nature" by hitting, kicking and resisting arrest, which more closely tracks the language of O.C.G.A. § 16-5-23(a)(1). The indictment did not allege "physical harm," which is the language of O.C.G.A. § 16-5-23(a)(2). Thus, Tovalin's guilty plea resulted in a conviction under O.C.G.A. § 16-5-23(a)(1) for intentional

physical contact of an insulting or provoking nature. Next, we must determine whether a conviction under O.C.G.A. § 16-5-23(a)(1) qualifies as a "crime of violence" under 18 U.S.C. § 16(a).

At first glance, our opinion in *United States v. Griffith*, 455 F.3d 1339 (11th Cir. 2006), would appear to control the outcome of this appeal. In fact, at sentencing, the government told the district court that *Griffith* "held that a violation of [O.C.G.A. § 16-5-23(a)(1)] constitutes a crime of violence," and that *Griffith* controlled and "remain[ed] good law," although it now reverses course.

In *Griffith*, we held that a conviction under O.C.G.A. § 16-5-23(a)(1) serves as a predicate "misdemeanor crime of domestic violence" under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 922(g)(9), because O.C.G.A. § 16-5-23(a)(1) "ha[d], as an element, the use or attempted use of physical force." 18 U.S.C. § 921(a)(33)(A); *Griffith*, 455 F.3d at 1341-42. Because this Court held in *Griffith* that O.C.G.A. § 16-5-23(a)(1) has, as an element, the "use or attempted use of physical force," the district court might well reason, as it did, that O.C.G.A. § 16-5-23(a)(1) must qualify as a "crime of violence" under 18 U.S.C. § 16(a), which employs the identical language of "physical force." Subsequent to *Griffith*, the U.S. Supreme Court has now made clear that this is not the case.

In *United States v. Castleman*, the U.S. Supreme Court held that the physical force required to qualify as a "misdemeanor crime of domestic violence" under the

ACCA is different from the physical force required to qualify as a "crime of violence" under 18 U.S.C. § 16(a)'s definition. *See* 134 S. Ct. 1405, 1410-13 & n.4 (2014). A "misdemeanor crime of domestic violence" requires only the use of physical force under its presumptive common-law meaning, which equates "physical force" with a mere "offensive touching." *Id*. at 1410.[1]

In addition, the U.S. Supreme Court held in *Johnson v. United States* that the term "physical force" as used in 18 U.S.C. § 16(a)'s definition of a "crime of violence" contemplates more than slight offensive touching.[2] 559 U.S. 133, 139-40 (2010); *see also Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004) ("The ordinary meaning of [the term 'crime of violence'], combined with § 16's emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggests a category of violent, active crimes . . . ."). The

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[1] Under the ACCA, the term "misdemeanor crime of domestic violence" means an offense that:

> (i) is a misdemeanor under Federal, State, or Tribal law; and
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> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

18 U.S.C. § 921(a)(33)(A).

[2] While *Johnson* dealt with the term "physical force" as used in the ACCA's definition of "violent felony" under 18 U.S.C. § 924(e)(2)(B), the identical language is contained in § 16(a)'s definition of a "crime of violence." *See United States v. Diaz-Calderone*, 716 F.3d 1345, 1349 (11th Cir. 2013) (applying the meaning of the phrase "physical force" from *Johnson* to conclude that a Florida aggravated battery conviction is a "crime of violence" under U.S.S.G. § 2L1.2(b)).

term "physical force" as used in the statutory definition of a "crime of violence" under 18 U.S.C. §16(a), "means *violent* force—that is, force capable of causing physical pain or injury to another person." *Johnson*, 559 U.S. at 140.

Tovalin was convicted of simple battery under O.C.G.A. § 16-5-23(a)(1), a crime that requires only slight offensive or provocative touching, not violent force capable of causing physical pain or injury to another person. *See Blanch v. State*, 667 S.E.2d 925, 926 (Ga. Ct. App. 2008) (holding that the act of spitting may constitute physical contact of an insulting or provoking nature under O.C.G.A. § 16-5-23(a)(1)); *Miller v. State*, 495 S.E.2d 329, 330 (Ga. Ct. App. 1997) (holding that putting one's hand around a person when that contact was unwelcome satisfied the elements necessary for simple battery conviction under O.C.G.A. § 16-5-23(a)(1)); *Lyman v. State*, 374 S.E.2d 563, 565 (Ga. Ct. App. 1988) ("Subsection (a)(1) concerns intentional contact of an insulting or provoking nature, contemplating a touching which does not injure but which is insulting."). Thus, while *Griffith* holds that Tovalin's simple battery conviction under O.C.G.A. § 16-5-23(a)(1) qualifies as a predicate "misdemeanor crime of domestic violence" under 18 U.S.C. § 922(g)(9) and remains good law as to § 922(g)(9), we must now apply *Johnson*'s analysis as to a "crime of violence" under 18 U.S.C. § 16(a) and a "violent felony" under 18 U.S.C. § 924(e)(2)(B) and conclude that Tovalin's simple battery conviction does not qualify as a predicate "crime of violence" under

18 U.S.C. § 16(a). Therefore, the aggravated felony enhancement under U.S.S.G. § 2L1.2(b)(1)(A) is inapplicable, and the district court erred in applying this eight-level enhancement. We vacate Tovalin's sentence and remand for resentencing

VACATED AND REMANDED.