

Fourth Circuit: North Carolina Assaults Don't Count as "Misdemeanor Crimes of Domestic Violence" for Purposes of Firearm Prohibition

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Date : May 16, 2016

It is a federal crime for a person who has been convicted of a "misdemeanor crime of domestic violence" to possess a gun. [18 U.S.C. § 922\(g\)\(9\)](#). A "misdemeanor crime of domestic violence" means a misdemeanor that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon," and that is committed by a person with one of several specified relationships to the victim. [18 U.S.C. § 921\(a\)\(33\)](#). Late last year, the Fourth Circuit ruled that North Carolina misdemeanor assault convictions generally don't satisfy that definition.

Background. The decision in question is [United States v. Vinson, 805 F.3d 120 \(4th Cir. 2015\)](#). The defendant had been convicted of assault on a female in a domestic violence context. He later was found in possession of a gun, and was charged with a federal crime as a result. In federal district court, the defendant moved to dismiss, arguing that assault on a female may include touching that, while offensive and unconsented, is not violent and so does not amount to "physical force." This argument was based on *United States v. White*, 606 F.3d 144 (4th Cir. 2010), which I discussed [here](#). The district court granted the motion and dismissed.

Fourth Circuit proceedings. The government appealed. While the appeal was pending, the Supreme Court ruled in *United States v. Castleman*, ___ U.S. ___, 134 S. Ct. 1405 (2014), that "offensive touching" was sufficient to constitute "physical force." Therefore, the Fourth Circuit [initially ruled](#) that the dismissal was erroneous. However, the defendant sought rehearing, making a different argument. He contended (1) that the phrase "use of physical force" means the *intentional* use of physical force, and (2) that North Carolina allows assault convictions to be based on "culpable negligence," so (3) North Carolina assault convictions do not require, "as an element," the "use of physical force." The Fourth Circuit agreed and so ultimately affirmed the dismissal of the indictment.

Supreme Court to weigh in? *Vinson* was decided on November 3, 2015. Westlaw doesn't show any subsequent history. However, in February, the Supreme Court heard oral argument in *Voisine v. United States*, a case from the First Circuit that presents nearly the same issue and that was decided in favor of the government by the court of appeals. SCOTUSblog's coverage of *Voisine* is [here](#); the [oral argument recap](#) predicts a win for the government.

Analysis. Under the current state of the law, individuals within the boundaries of the Fourth Circuit generally are safe from federal prosecution for possessing a firearm after sustaining a North Carolina misdemeanor assault conviction involving domestic violence. However, while the court's reasoning appears to apply to convictions for simple assault as well as assault on a female, assault with a deadly weapon might be different under the prong of 18 U.S.C. § 921(a)(33) concerning "threatened use of a deadly weapon." As an administrative matter, I'm not sure how the NICS background check system is treating North Carolina domestic violence assaults – in other words, I don't know whether a person with such a conviction would pass a NICS check if it were run today.

When *Voisine* comes down, things may change. If the Court in *Voisine* rules in favor of the government, we're probably back to the situation that most people thought we were in before *Vinson*, with domestic violence assaults

serving to prohibit gun ownership. If the Court rules in favor of the defendant, it will be interesting to see whether the General Assembly decides to enact a statutory definition of assault that requires intent rather than merely negligence. If the Court splits 4-4, the law would continue to be fractured.

As a final note, litigation about the meaning of 18 U.S.C. § 921(a)(33) isn't confined to the federal courts. Readers may also be interested in *Underwood v. Hudson*, __ N.C. App. __, 781 S.E.2d 295 (2015) (ruling that communicating threats and stalking are not "misdemeanor crime[s] of domestic violence" because they do not include, as elements, the use or attempted use of physical force or the threatened use of a deadly weapon; therefore, a person with convictions of those offenses whose guns had been seized pursuant to a DVPO that was later dismissed was entitled to their return).