

MAY 28 2008

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

FRANCISCO HONORATO-
RODRIGUEZ,

Defendant - Appellant.

No. 07-10285

D.C. No. CR-06-01253-RCC

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Raner C. Collins, District Judge, Presiding

Argued and Submitted May 12, 2008
San Francisco, California

Before: HUG, KLEINFELD, and N.R. SMITH, Circuit Judges.

In this case, we must consider whether Honorato-Rodriguez's prior
Pennsylvania conviction for indecent assault is a crime of violence under USSG §

* This disposition is not appropriate for publication and is not precedent
except as provided by 9th Cir. R. 36-3.

2L1.2(b)(1)(A)(ii). Yet, we cannot discern from the record whether Honorato-Rodriguez's prior Pennsylvania conviction was for violating 18 Pa. Cons. Stat. Ann. § 3126(a)(1), or (2), or both. The record only reflects that Honorato-Rodriguez was charged with violating both subsections of the Pennsylvania indecent assault statute, and that he pleaded guilty to "indecent assault." The Pennsylvania indecent assault statute, however, contains eight subsections, and each subsection criminalizes different conduct.¹ Without knowing whether Honorato-Rodriguez pleaded to (a)(1), (a)(2), or both, we cannot determine whether his prior conviction was a crime of violence.

Section 3126 (a)(1) criminalizes indecent assault as indecent contact "without the complainant's consent," whereas (a)(2) proscribes indecent contact "by forcible compulsion." If convicted under subsection (a)(1), then Honorato-Rodriguez's prior conviction would not be a crime of violence under the Sentencing Guidelines using either the categorical or modified categorical approach.² Under the categorical approach, the full range of conduct encompassed by subsection (a)(1) is greater than the crime of violence definition in USSG §

¹ See 18 Pa. Cons. Stat. § 3126(a).

² See United States v. Bolanos-Hernandez, 492 F.3d 1140, 1144-46 (9th Cir. 2007).

2L1.2(b)(1)(A)(ii).³ Under the modified categorical approach, the government did not produce judicially noticeable documents demonstrating that Honorato-Rodriguez's prior conviction was for a crime of violence.⁴ If convicted under (a)(2), then Honorato-Rodriguez's prior conviction would categorically be a crime of violence under USSG § 2L1.2(b)(1)(A)(ii).⁵ The documents, however, do not establish that he was convicted under that specific subsection.⁶

The sentence is VACATED and the case is REMANDED for resentencing.

³ See Kepilino v. Gonzales, 454 F.3d 1057, 1061 (9th Cir. 2006).

⁴ See Shepard v. United States, 544 U.S. 13, 26 (2005).

⁵ See Bolanos-Hernandez, 492 F.3d at 1145-46.

⁶ See Taylor v. United States, 495 U.S. 575, 602 (1990).