Vinson, Voisine, and Misdemeanor Crimes of Domestic Violence

This post was authored by School of Government faculty member Jeff Welty and posted originally on the School's Criminal Law Blog

The United States Supreme Court recently decided a case about what counts as a "misdemeanor crime of domestic violence" for purposes of the federal statute prohibiting individuals who have been convicted of such crimes from possessing firearms. I've had several questions about whether the ruling affects last year's Fourth Circuit decision holding that North Carolina assaults generally don't qualify as "misdemeanor crime[s] of domestic violence." For the reasons set out below, I don't think the Supreme Court case clearly overrules the Fourth Circuit's decision.

Background: federal law. 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" is 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 with the victim. 18 U.S.C. § 921(a)(33). (The existence of the personal relationship need not be an element of the crime of conviction, under *United States v. Hayes*, 555 U.S. 415 (2009).)

***Vinson*, the Fourth Circuit case.** I previously blogged here about *United States v. Vinson*, 805 F.3d 120 (4th Cir. 2015). In a nutshell, the court ruled that a man with a previous North Carolina domestic violence conviction for assault on a female had not been convicted of a "misdemeanor crime of domestic violence." The court reasoned (1) that the phrase "use of physical force" in 18 U.S.C. § 921(a)(33) means the intentional use of physical force; (2) that North Carolina allows assault convictions can be based on "culpable negligence" rather than intent; so (3) North Carolina assault convictions do not require, "as an element," the "use of physical force."

Vinson was a big deal. The most common charges in domestic violence situations in North Carolina are simple assault and assault on a female, and under *Vinson*, neither counts as a "misdemeanor crime of domestic violence." Note that the *Vinson* rule is categorical: because North Carolina assault convictions don't require intent as an element, they aren't "misdemeanor crime[s] of domestic violence" even when factually, it is clear that a particular defendant intentionally used physical force in the course of committing an assault.

***Voisine,* the Supreme Court case.** People who didn't like the outcome of *Vinson* hoped that it would be reversed by the Supreme Court in *Voisine v. United States*, __ U.S. __, 136 S.Ct. 2272 (2016), available here. *Vosine* involved two defendants who had previous domestic violence assault convictions in Maine. Under Maine law, an assault may be committed by intentionally,

knowingly, or recklessly causing injury to another. Each defendant subsequently possessed a firearm and was charged in federal court with violating 18 U.S.C. § 922(g)(9). As some saw it, the case was an opportunity for the Court to declare that any domestic violence assault conviction involving force qualifies as a misdemeanor crime of domestic violence, regardless of the specific *mens rea* required by the assault statute. Had the Court so ruled, it would have undermined *Vinson.*

But that's not what the Court did. Instead, it ruled more narrowly that reckless assaults may qualify as misdemeanor crimes of domestic violence. First, it stated that the "use" of force is not limited to the intentional use of force:

[T]he word "use" does not demand that the person applying force have the purpose or practical certainty that it will cause harm, as compared with the understanding that it is substantially likely to do so. Or, otherwise said, that word is indifferent as to whether the actor has the mental state of intention, knowledge, or recklessness with respect to the harmful consequences of his volitional conduct.

Second, it stated that ruling otherwise would undermine Congress's intent to prohibit "domestic abusers convicted of garden-variety assault or battery misdemeanors—just like those convicted of felonies—from owning guns":

Then, as now, a significant majority of jurisdictions—34 States plus the District of Columbia—defined such misdemeanor offenses to include the reckless infliction of bodily harm. . . . So in linking § 922(g)(9) to those laws, Congress must have known it was sweeping in some persons who had engaged in reckless conduct. . . . [Defendants'] reading [would render] § 922(g)(9) broadly inoperative in the 35 jurisdictions with assault laws extending to recklessness.

Impact of *Voisine* on *Vinson*. Although the Court surely was aware of *Vinson*, the majority opinion does not cite it and never uses the word "negligence" at any point. It addresses recklessness only, in what I view as almost certainly a conscious avoidance of the negligence issue. Therefore, I don't think that *Voisine* overrules *Vinson*.

However, there is language in *Voisine* that could be used by federal prosecutors to ask the Fourth Circuit to reconsider *Vinson.* At times the majority opinion seems to suggest that "use" rules out only "merely accidental" conduct or conduct that is "involuntary." If that's the line, then criminal negligence may surpass it. Indeed, the distinction between criminal negligence and recklessness is quite fine. *See, e.g., State v. Hefler*, 310 N.C. 135 (1984) ("Culpable negligence under the criminal law is such recklessness or carelessness, resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others."). Furthermore, if there are a number of other jurisdictions that allow assault convictions to be based on criminal negligence – and I don't know whether there are or not – then the intent-of-Congress argument made by the *Voisine* majority could also apply.

The bottom line for me is that while *Voisine* may cast some doubt on *Vinson*, it doesn't overrule it. Still, because other circuits may not follow *Vinson*, and because the Fourth Circuit might reconsider it or the Supreme Court might overrule it, I would never recommend that a person with a North Carolina domestic violence assault conviction possess a firearm. In fact, notwithstanding *Vinson*, it may be appropriate to provide defendants convicted of domestic violence assaults with form AOC-CR-617, which warns such defendants that "it may be unlawful" for them to possess a firearm and that if they have questions about that, they should consult an attorney.