Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **27th day of January, 2021** are as follows:

PER CURIAM:

2019-KK-01792 *JAMAL WASHINGTON VS. STATE OF LOUISIANA (Parish of Jefferson)*

AFFIRMED. SEE PER CURIAM.

Lombard, J., assigned as Justice ad hoc, sitting for Retired Chief Justice Johnson, for oral argument. He now sits as Justice ad hoc for Justice Piper Griffin at the time this opinion is rendered.

Crain, J., concurs and assigns reasons.

01/27/2021

SUPREME COURT OF LOUISIANA

No. 2019-KK-01792

JAMAL WASHINGTON

versus

STATE OF LOUISIANA

**ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,
FIFTH CIRCUIT, PARISH OF JEFFERSON**

PER CURIAM:[*]

Defendant was indicted for racketeering, La. R.S. 15:1352; human trafficking, La. R.S. 14:46.2; and conspiracy to commit human trafficking, La. R.S. 14:26, 14:46.2. With regard to racketeering, the indictment alleged that defendant, his codefendants, and other persons, known and unknown, engaged in conduct that furthered a criminal enterprise involved in narcotics distribution and prostitution. Defendant pleaded guilty to racketeering, and the State in exchange dismissed the remaining charges and agreed to forego recidivist sentence enhancement. The district court sentenced defendant in conformity with the plea agreement to serve eight years imprisonment at hard labor. The court of appeal affirmed. *State v. Washington*, 18-729 (La. App. 5 Cir. 4/24/19) (unpub'd).

Thereafter, defendant filed a motion in the district court seeking clarification that the court had not designated the offense as a crime of violence. A minute entry indicated that the district court had designated the offense as a crime of violence. However, no such designation was evident in the sentencing transcript. The district

[*] Lombard, J., assigned as Justice ad hoc, sitting for Retired Chief Justice Johnson, for oral argument. He now sits as Justice ad hoc for Justice Piper Griffin at the time this opinion is rendered.

court denied the motion. The court of appeal granted defendant's application for supervisory writs. The court of appeal determined that racketeering is not a crime of violence because it is not enumerated as such in La. R.S. 14:2(B), and because the use (or attempted use) of physical force is not *an element of racketeering*, as that crime is defined by statute. Therefore, the court of appeal found that the crime was incorrectly designated as a crime of violence in the minute entry. *Washington v. State*, 19-0360 (La. App. 5 Cir. 10/9/19) (unpub'd).

Code of Criminal Procedure article 890.3 went into effect on August 1, 2016, two years before defendant was indicted. It provides:

> A. Except as provided in Paragraph C of this Article, when a defendant is sentenced for any offense, or the attempt to commit any offense, defined or enumerated as a crime of violence in R.S. 14:2(B), the district attorney may make a written recommendation to the court that the offense should not be designated as a crime of violence only for the following purposes:
>
> (1) The defendant's eligibility for suspension or deferral of sentence pursuant to Article 893.
>
> (2) The defendant's eligibility for participation in a drug division probation program pursuant to R.S. 13:5304.
>
> B. In the absence of a written recommendation by the district attorney as provided in Paragraph A of this Article, the offense shall be designated as a crime of violence as a matter of law.
>
> C. The following crimes of violence enumerated in R.S. 14:2(B) shall always be designated by the court in the minutes as a crime of violence:
>
> . . . .

The remainder of Part C (omitted above) is a subset of the crimes of violence enumerated in La. R.S. 14:2(B), and includes human trafficking. Just as racketeering is not included in La. R.S. 14:2(B), it is not included in La. C.Cr.P. art. 890.3(C).

In accordance with this article, the crime of racketeering "shall be designated as a crime of violence"—in the absence of a written recommendation by the district attorney to the court that the offense should not be designated as a crime of violence—

provided that it is "*defined or enumerated* as a crime of violence in R.S. 14:2(B)." La. C.Cr.P. art. 890.3(A), (B) (emphasis added). Racketeering is not enumerated as a crime of violence in La. R.S. 14:2(B). Therefore, the question remains as to whether it is defined as such.

A crime of violence is defined as

> an offense that has, as an element, the use, attempted use, or threatened use of physical force against the person or property of another, and that, by its very nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense or an offense that involves the possession or use of a dangerous weapon.

R.S. 14:2(B). The statute also provides a list of offenses that, if committed or attempted, are included as crimes of violence. Racketeering is not an enumerated crime. This court, however, has found that the list is "merely illustrative, not exhaustive, unlisted offenses may be denominated as crimes of violence under the general definition of the term provided by the statute." *State v. Oliphant*, 12-1176, p. 8 (La. 3/19/13), 113 So.3d 165, 170.

The court of appeal correctly found that the provisions defining racketeering do not, as an element of that offense, include any use of physical force against the person or property of another, nor does it, by its very nature, involve a substantial risk of physical force. *See* La. R.S. 15:1352, La. R.S. 15:1353. However, "racketeering activity" is defined as "committing, attempting to commit, conspiring to commit, or soliciting, coercing, or intimidating another person to commit any crime that is punishable under the following provisions" and then lists 65 offenses, some of which are also enumerated crimes of violence. La. R.S. 15:1352(A). In the State's view, when the criminal enterprise involves engaging in violent crimes, then racketeering becomes a crime of violence. The state notes that human trafficking is a legislatively enumerated crime of violence, and the state argues that defendant, by his own admission, assisted

his codefendants, who were engaged in the violent crime of human trafficking.

Although the State originally charged defendant with multiple offenses, including human trafficking, he did not plead guilty to human trafficking. The State dismissed that charge. Defendant pleaded guilty only to racketeering. While the indictment alleged that defendant participated in a criminal enterprise, which included three defendants and other persons known and unknown, and that *one or more* members and associates of the criminal enterprise engaged in violent acts, no specific allegations of violence were made against defendant himself in count one of the indictment alleging racketeering. Instead, the indictment, with regard to specific acts of racketeering involving defendant, alleged only that defendant sold heroin and cocaine on behalf of the criminal enterprise.

The State, however, argues that by defendant's own admission he assisted in human trafficking. As part of the plea agreement, defendant provided a written factual basis for the plea of guilty of racketeering. In it, defendant admitted that he assisted his cousin by driving two women to locations where they engaged in prostitution, and once he cleaned up blood in a hotel room in exchange for drugs. While he was aware that his cousin was violent toward the women, he indicated that he personally never threatened or harmed them. Thus, defendant's admissions do not establish that he engaged in violent acts himself or was a principal to any acts of violence.

In addition, we note that, because defendant expressly admitted his guilt and did not enter his plea pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), there was no legal requirement that the record contain a significant factual basis for the plea by which the court may test whether the plea was intelligently entered. *See Alford*, 400 U.S. at 38 n.10, 91 S.Ct. at 167–168. Instead, the factual basis was compelled by the plea agreement, which indicated that defendant's

statements therein would only be used against him for purposes of impeachment; presumably if he does not testify consistently with those statements in the trials of his codefendants or others. Thus, using the factual basis against defendant to cure deficiencies in the indictment and cause the offense to be designated as a crime of violence would at a minimum violate the spirit of the plea agreement.

Defendant pleaded guilty to racketeering, which is not enumerated as a crime of violence, and which cannot be categorically deemed to be a crime of violence because it does not have, as an element, the use, attempted use, or threatened use of physical force against the person or property of another, and that, by its very nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. In addition, the State's indictment was vague. While the indictment alleged that *one or more persons* involved in the criminal enterprise engaged in violent acts, the only specific allegations against defendant himself were not violent. Defendant did not admit to human trafficking when he pleaded guilty to racketeering, and the State dismissed the charge of human trafficking. Defendant also did not admit that he personally performed any violent acts in the factual basis for his guilty plea. Accordingly, we affirm the decision of the court of appeal, which reversed the district court's ruling denying defendant's motion to correct the sentencing minute entry to reflect that the offense is not designated as a crime of violence, and which remanded to the district court for correction of the minute entry.

AFFIRMED

01/27/2021

SUPREME COURT OF LOUISIANA

No. 2019-KK-01792

JAMAL WASHINGTON

VS.

STATE OF LOUISIANA

On Writ of Certiorari to the Court of Appeal, Fifth Circuit, Parish of Jefferson

CRAIN, J., concurs with reasons.

I find it unnecessary to consider whether racketeering standing alone is a crime of violence as the matter can be resolved by application of the rule of lenity. This rule requires any doubt as to the interpretation of a statute upon which a prosecution is based be resolved in favor of the accused. *See State v. Small*, 2011-2796 (La. 10/16/12), 100 So. 3d 797.

Racketeering, by definition, requires a predicate offense. La. R.S. 15:1352(A). When that underlying offense is a crime of violence, the state may charge and prove a defendant committed a violent crime. Here, the indictment was vague as it charged "one or more" defendants with acts of violence, *i.e.,* human trafficking. The indictment only charged the defendant with racketeering for selling drugs on behalf of the criminal enterprise, which is not a crime of violence. No other specific allegations of violence were made against the defendant. Then, at the time of the plea, the state, dismissing the defendant's human trafficking charge, clarified the indictment as to the defendant. Further, the sentencing transcript did not designate the offense, as pled, a crime of violence. When there is a discrepancy between the minutes and transcript, the transcript prevails. *State v. Lynch*, 441 So.2d 732, 734 (La. 1983).

Based on these events, any doubt as to the interpretation of the inclusion of racketeering as a crime of violence under these circumstances must be resolved in favor of the defendant. Because I believe the rule of lenity prevents designating the defendant's crime as one of violence, I concur.