

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA)
)
 v.) 1:12-cr-00204-JAW
)
JOHN THOMAS HINES)

**ORDER ON GOVERNMENT’S MOTION TO RECONSIDER AND
WITHDRAW MAY 9, 2014 ORDER AND REINSTATE THE JURY VERDICT
OF APRIL 19, 2013 AND ON DEFENDANT’S MOTION TO STAY ACTION
ON THE GOVERNMENT’S MOTION TO RECONSIDER**

It is John Thomas Hines’ fate to be the subject of a prosecution under a criminal statute that is the subject of a legal controversy. While the appellate process resolves whether an undifferentiated conviction for domestic violence assault is a proper predicate for a federal firearms possession charge, the Court declines the Government’s request to reconsider its earlier order granting Mr. Hines a new trial and the Court dismisses as moot Mr. Hines’ motion to stay the Government’s motion.

I. BACKGROUND

A. Procedural History

On April 19, 2013, a federal jury found John Thomas Hines guilty of possession of a firearm after having been convicted of a misdemeanor crime of domestic violence. *Indictment* (ECF No. 1); *Jury Verdict Form* (ECF No. 68) (*Verdict*). The Presentence Investigation Report (PSR) revealed that Mr. Hines had eight prior convictions, was a criminal history category IV, and faced a guideline sentence range of 33 to 41 months. *Presentence Report* ¶¶ 25-32, 62. On February 17, 2014, Mr. Hines moved

to dismiss the indictment for lack of jurisdiction and to vacate the conviction on the ground that Mr. Hines' domestic violence conviction was undifferentiated and could "not satisfy the 'use or attempted use of physical force' requirement in the federal definition of a misdemeanor crime of violence." *Def.'s Mot. to Vacate and Dismiss* at 1 (ECF No. 96) (citing 18 U.S.C. § 921(a)(33)). On April 8, 2014, Mr. Hines filed a second motion to dismiss for lack of jurisdiction on the ground that the underlying state assault conviction was an undifferentiated conviction that may have been based on "the reckless infliction of bodily harm or offensive physical contact." *Def.'s Second Mot. to Vacate and Dismiss* at 1 (ECF No. 109). On May 9, 2014, the Court denied Mr. Hines' motion in part and granted it in part. *Order on Def.'s Mot. to Vacate and Dismiss* (ECF No. 116). Accepting his contention that the United States Supreme Court case of *United States v. Castleman*, 134 S. Ct. 1405 (2014), together with subsequent First Circuit authority, made it "questionable whether a conviction for domestic assault under 17-A M.R.S. § 207-A(1)(A)—without more—may operate as [a] predicate conviction under § 922(g)(9)," the Court granted Mr. Hines a new trial but declined to dismiss the indictment. *Id.* at 18-19.

In its May 9, 2014 Order, the Court acknowledged that Mr. Hines was then incarcerated and urged the parties to consult with each other as to whether he should continue to be incarcerated. *Id.* at 19 n.2. On May 13, 2014, after Mr. Hines moved for pre-conviction bail, the Court granted the motion and released him on a minimally restrictive set of bail conditions. *Def.'s Mot. for Admission to Pre-Conviction Bail*

(ECF No. 119); *Oral Order Granting Mot. for Admission to Pre-Conviction Bail* (ECF No. 127); *Order Setting Conditions of Release* (ECF No. 130).

On July 16, 2014, Mr. Hines moved to dismiss the indictment on the ground that two district judges in the District of Maine had issued orders dismissing indictments in similar cases. *Def.'s Mot. to Dismiss the Indictment* at 2 (ECF No. 131). The Government opposed the motion and urged the Court to withhold decision until the First Circuit had ruled on the issue in the pending appeals of *United States v. Armstrong* and *United States v. Voisine*. *Resp. of the United States of America to the Def.'s Third Mot. to Dismiss the Indictment* at 1 (ECF No. 132). On September 23, 2014, the Court dismissed Mr. Hines' motion without prejudice, determining that the "wiser course is to wait for the First Circuit." *Order on Def.'s Mot. to Dismiss* at 1 (ECF No. 133).

On January 30, 2015, the First Circuit handed down its decision in the consolidated cases of *United States v. Voisine* and *United States v. Armstrong*, Nos. 12-1213, 12-1216, 2015 U.S. App. LEXIS 1638 (1st Cir. Jan. 30, 2015) and concluded that "a conviction for reckless assault against a person in a domestic relationship in Maine constitutes a federal 'misdemeanor crime of domestic violence'" under § 922(g)(9) and § 921(a)(33). *Id.* at *27. On February 5, 2015, the Government filed a motion for the Court to reconsider its May 9, 2014 Order vacating the conviction and reinstate the jury verdict of April 19, 2013. *Mot. of the United States for the Ct. to Reconsider and Withdraw its May 9, 2014 Order and Reinstate the Jury Verdict Issued on Apr. 19, 2013* (ECF No. 134) (*Gov't's Mot.*). On the same day, Mr. Hines

moved to stay action on the Government's motion. *Def.'s Mot. to Stay Action on the Gov't's Mot. for the Ct. to Reconsider and Withdraw its May 9, 2014, Order and Reinstate the Jury Verdict Issued on Apr. 19, 2013* (ECF No. 135) (*Def.'s Mot. to Stay*). On February 6, 2015, the Government responded to Mr. Hines' motion to stay, objecting to the motion and urging the Court to rule on its pending motion to reconsider. *Resp. of the United States to Def.'s Mot. for Continued Stay Pursuant to the May 9, 2014 Order* (ECF No. 136) (*Gov't's Resp.*).

B. The Controversy

In *Voisine*, the First Circuit succinctly posed the question: “whether a conviction with the mens rea of recklessness could serve as a § 922(g)(9) predicate.” 2015 U.S. App. LEXIS 1638 at *7. Here, on September 29, 2011, Mr. Hines had been convicted of Domestic Violence Assault, a violation of 17-A M.R.S. § 207-A, in the Waldo County Superior Court for the state of Maine. PSR ¶ 7. The guilty verdict of April 19, 2013 is consistent with a jury finding that Mr. Hines possessed one or more firearms on March 21, 2012. *Compare Indictment, with Verdict*. At the same time, the Government has been unable to produce *Shepard*¹ documents from the state court proceedings to confirm the level of Mr. Hines' intentionality in committing the domestic assault; it could have been a knowing and intentional assault or a reckless one. *See* 17-A M.R.S. § 207-A.²

¹ *Shepard v. United States*, 544 U.S. 13, 26 (2005).

² Section 207-A of title 17-A creates a separate crime for domestic assault. To commit a domestic assault, a person must commit an assault as defined in section 207 against a family or household member. 17-A M.R.S. § 207-A(1)(A). A person may commit an assault under section 207 “intentionally, knowingly or recklessly.” *Id.* § 207.

C. *United States v. Voisine*

The First Circuit's majority decision in *Voisine* presents a compelling argument for upholding federal convictions for firearms possession following an undifferentiated conviction for domestic violence assault in Maine. *Voisine*, 2015 U.S. App. LEXIS 1638 at *1-27. The majority opinion is impressive; it performs a close analysis of the statutory language, a detailed review of legislative history, a careful dissection of *Castleman*, and a thorough discussion of the Maine domestic assault statute to reach the conclusion that "Congress in passing the Lautenberg Amendment recognized that guns and domestic violence are a lethal combination, and singled out firearm possession by those convicted of domestic violence offenses from firearm possession in other contexts." *Id.* The majority opinion, however, provoked a vigorous and thoughtful dissent, performing a similar review of statutory language, legislative history, *Castleman*, the Maine domestic assault statute, and coming to the opposite conclusion, namely, that the "Supreme Court has obligated" the appellate court to reverse the defendants' convictions. *Id.* at *27-109.

D. The Defendant's Motion to Stay

Mr. Hines states in his motion that defense counsel for Messrs. Voisine and Armstrong assured him she intends to file a motion for rehearing en banc. *Def.'s Mot. to Stay* at 2 n.1. He explains that assuming such a motion is filed at the First Circuit, the earliest a mandate could issue is February 20, 2015.³ *Id.* at 2.

³ After Mr. Hines filed his motion to stay, Messrs. Voisine and Armstrong filed a petition for rehearing and rehearing en banc on February 13, 2015.

II. DISCUSSION

The Court's ruling is grounded on practicality. The Government's premise is that the First Circuit's decision in *Voisine* is the last word. The Government may be correct or it may well be that ultimately the majority prevails and this Court revisits its earlier ruling that granted the motion for new trial. But the Government's declaration of final victory seems premature.

There are two possibilities leading to a final resolution: (1) the *Voisine/Armstrong* majority opinion carries the day; or (2) the *Voisine/Armstrong* dissent prevails. There are a couple avenues for how either of these results could occur—the en banc process at the First Circuit could resolve the issue or there may be further proceedings at the Supreme Court.

If this Court grants the Government's motion and proceeds forward to sentencing while the final answer is still being obtained from the appellate process, the Court will be faced with the likely prospect of imposing a period of incarceration on Mr. Hines; his guideline range is 33 to 41 months, a period long enough so that the appellate legal process may continue throughout a significant portion of his incarceration. Absent a good reason for doing so, incarcerating a defendant for a conviction that bears a chance of being reversed seems unwise. There does not seem to be a good reason for doing so in this case. If the *Voisine/Armstrong* dissent prevails, the likely result will be that the Court will grant Mr. Hines' motion to dismiss the indictment—as the other district judges did in two companion cases that were pending in this District. If Mr. Hines were in prison while the appellate process

resolves the *Voisine/Armstrong* appeals in his favor, he will have been subject to an unjustified and extended period of incarceration.

By contrast, if the Court maintains the status quo, dismissing the Government's motion and maintaining Mr. Hines' bail status while the appellate process is finalized, a decision that affirms the majority in *Voisine/Armstrong* will bring Mr. Hines to sentencing with the full confidence that the sentence is being imposed on a legally sound conviction. By further contrast, a final appellate decision that accepts the dissent's position will result in a dismissal without having unnecessarily incarcerated a man ultimately deemed not guilty of the charged crime.

Given this context, the Court is not clear why the Government is in such a rush. If Mr. Hines were acting up, violating bail conditions, committing new criminal conduct, and in particular, assaulting women, the Government would have a good reason to press the issue. But even though Mr. Hines had difficulty with pretrial supervision in 2013, there is no suggestion on this record that Mr. Hines has violated his bail conditions since the Court released him on bail on May 13, 2014. At least, the Government has not moved to revoke Mr. Hines' bail since his release in May 2014. Nor has the Government suggested any other reason why the Court should forge ahead heedless of the pending legal controversy.

The situation would be different if Mr. Hines were pressing the Court to proceed to sentencing since remaining on bail for an extended period is to submit to supervision and to restrict freedom. *See United States v. Martin*, 363 F.3d 25, 35 n.17 (1st Cir. 2004) (describing the analogous restriction of supervised release as “a

punishment in addition to incarceration, served after completion of a prison term”). But Mr. Hines has not asked the Court to sentence him, and probably wisely so, since the current state of First Circuit law is that his conviction is valid. Mr. Hines is probably wise to bide his time and live within his bail conditions, as he appears content for the moment to do.

The cases the Government cites do not support its position in this case. The Government observes that on February 4, 2015, in *United States v. Eustis*, Chief Judge Torresen of this District refused to dismiss an indictment pending in a case similar to Mr. Hines. *Gov’t’s Resp.* at 1 (citing *Eustis*, No. 2:13-cr-00163-NT, *Order on Mot. to Dismiss* (ECF No. 84) (D. Me. Feb. 4, 2015)). But Chief Judge Torresen’s decision was to maintain the status quo by refusing to dismiss the indictment based on the latest binding authority from the First Circuit. To dismiss an indictment in the face of clear binding precedent to the contrary would have run against basic principles of stare decisis. It would be different for this Court to barge ahead and sentence a defendant where the finality of the First Circuit decision is being actively challenged.

As the Government notes, on February 6, 2015, the Court conducted a final revocation hearing ironically on the William Armstrong case, found Mr. Armstrong had violated the conditions of probation, and sentenced him to seven months in prison. *See id.* at 1 (citing *United States v. Armstrong*, No. 1:11-cr-00050-JAW). But Mr. Armstrong’s case is unusual and is a cautionary tale. Unlike Mr. Hines, while on probation, Mr. Armstrong committed new criminal conduct by yet again assaulting

his wife.⁴ See *United States v. Armstrong*, No. 1:11-cr-00050-JAW, *Pet. for Warrant or Summons for Offender Under Supervision* at 1-2 (ECF No. 65) (*Armstrong Pet.*).⁵

Mr. Armstrong was convicted in state court of domestic violence assault and after serving his state sentence, he was transferred to federal custody on the probation revocation charge.

After successfully moving to continue the revocation hearing and sentencing while incarcerated and awaiting resolution of the *Voisine/Armstrong* appeal, Mr.

⁴ Although his case turned out to be a test case for legality of federal prosecutions for firearm possession after conviction for a misdemeanor crime of domestic violence, Mr. Armstrong is a prime example of why the federal law exists. While he was on probation awaiting the resolution of his appeal, a woman flagged down a state trooper in Maine and told him that Mr. Armstrong's wife had been assaulted and was hiding in the woods. The trooper located Ms. Armstrong and Mr. Armstrong later came upon the scene. Mr. Armstrong was intoxicated and he blamed Ms. Armstrong for the assault. He was arrested and subsequently convicted in Maine state court of yet another misdemeanor crime of domestic violence. Mr. Armstrong has persisted in assaulting his wife despite increasing long periods of incarceration and other significant non-criminal justice consequences from his conduct. Regardless of how his case ultimately is resolved on appeal, he exemplifies how refractory domestic violence can be. With people like Mr. Armstrong in mind, it is difficult to argue against the legislative judgment that Mr. Armstrong and people like him who cannot stop assaulting their domestic partners have ceded their constitutional right to possess a firearm and have earned prosecution, conviction and punishment when they possess such weapons.

⁵ The petition for revocation for Mr. Armstrong alleged:

On July 14, 2014, the defendant was charged with Domestic Violence Assault by the Maine State Police. The crime is charged as a Class C Felony, due to the defendant's prior domestic violence convictions. Armstrong was convicted of Domestic Violence Assault in both 2002 and 2008.

On that date, Maine State Trooper Randy Hall was "flagged down" by a female who advised that her friend, Rose Armstrong, the defendant's wife, was hiding in the nearby woods. Trooper Hall made contact with Rose, who initially advised she did not want to report anything. Trooper Hall was then approached by the defendant, who advised him that Rose had attacked him on Friday evening (July 13). Trooper Hall made contact with Rose again, who advised him that the defendant had punched her in the legs and hit her in the neck on Friday night. In addition, Rose reported that Armstrong "head butted" her in the kitchen a few hours prior, which was the reason she was hiding in the woods. Trooper Hall advised USPO Brown that it appeared that the defendant was under the influence of alcohol. He administered an Intoxilyzer test on Armstrong, which showed 0.10 grams of Alcohol per 210 L of breath.

Armstrong Pet. at 1-2. At the February 6, 2015 revocation hearing, Mr. Armstrong admitted this violation. *J.* (ECF No. 85).

Armstrong asked to be sentenced so that he could resolve the pending revocation petition and move on with his life. During the revocation hearing, the Court made certain that Mr. Armstrong was aware that the First Circuit or the Supreme Court might rule in his favor and, even though he understood the possibility of a favorable appellate ruling, he affirmatively urged the Court to proceed with the revocation. Upon his acquiescence, the Court agreed to hold the revocation hearing and, upon his admission to the violations, the Court sentenced him to seven months incarceration. *Id.*, *J.*

It was a rational choice for Mr. Armstrong to waive any claims of illegality on the revocation petition because by the time the appellate process had run on his initial appeal, he would have been long since out of jail on the revocation petition. Even if the Court had released Mr. Armstrong on bail pending completion of the appellate process, there would have been no telling how long the appellate process would last and Mr. Armstrong had demonstrated he did not do well on bail. If Mr. Armstrong, like Mr. Hines, had asked the Court to stay the revocation proceedings to allow the appellate process to run its course, it would have been a different case.

This leads to a further thought. It is difficult to predict the future progress of the *Voisine/Armstrong* cases on appeal. Each stage of the appellate process may shed more light on the likelihood of a successful appeal from the First Circuit's majority opinion. If either counsel for the Government or for Mr. Hines wishes the Court to revisit this Order, they may do so by filing an appropriate motion.

Finally, rather than grant Mr. Hines' motion to stay outright, which would leave the Government's motion pending, the Court has concluded that the better course is to dismiss the Government's motion without prejudice. Something significant is going to happen at the appellate level that is certain to render the reasoning behind the Government's pending motion obsolete, either affirming the majority opinion or not, and, once it does, the parties will wish to file new motions to take into account future appellate developments.

III. CONCLUSION

The Court DISMISSES without prejudice the Motion of the United States for the Court to Reconsider and Withdraw its May 9, 2014 Order and Reinstate the Jury Verdict Issued on April 19, 2013 (ECF No. 134) and the Court DISMISSES as moot Defendant's Motion to Stay Action on the Government's Motion for the Court to Reconsider and Withdraw its May 9, 2014 Order and Reinstate the Jury Verdict Issued on April 19, 2013 (ECF No. 135).

SO ORDERED.

/s/ John A. Woodcock, Jr.
JOHN A. WOODCOCK, JR.
UNITED STATES DISTRICT JUDGE

Dated this 19th day of February, 2015

Defendant (1)

JOHN THOMAS HINES

represented by **WAYNE R. FOOTE**
LAW OFFICE OF WAYNE R.
FOOTE
344 MT HOPE AVE
BANGOR, ME 04401
(207) 990-5855
Email: WFoote@gwi.net

*LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: CJA Appointment*

Plaintiff

USA

represented by **JAMES M. MOORE**
OFFICE OF THE U.S. ATTORNEY
DISTRICT OF MAINE
202 HARLOW STREET, ROOM
111
BANGOR, ME 04401
945-0344
Email: jim.moore@usdoj.gov
*LEAD ATTORNEY
ATTORNEY TO BE NOTICED*