The Evolution of the Lautenberg Amendment

What is a crime of domestic violence?

By David J. Fetters

In *United States v Castleman*, 695 F.3d 582 (6th Cir. 2012), the Sixth Circuit Court of Appeals limited the federal firearm disability under 18 U.S.C. § 922(g)(9) by refining the degree of force required for a conviction to qualify as a misdemeanor crime of domestic violence. The court ruled that Castleman’s conviction for misdemeanor domestic assault under Tennessee law did not qualify as a predicate offense, and therefore he was not subject to the federal disability. Before explaining the reasoning behind the Sixth Circuit’s decision, an understanding of the law prior to *Castleman* is useful in appreciating the full import of the court’s ruling.

Congress passed the Lautenberg Amendment on September 30, 1996, creating a federal firearm disability for individuals convicted of misdemeanor crimes of domestic violence. The law is applied retroactively and nearly every individual convicted of a qualifying crime has been subject to a lifetime firearm ban. The law defines a misdemeanor crime of domestic violence (MCDV) as a conviction that

“(i) is a misdemeanor . . . and (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a [person having a qualified domestic relationship with the victim].”

The previous conviction will not be considered a predicate offense “if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) . . . .” The predicate offense does not have to have a domestic relationship as an element as long as it includes “as an element, the use or attempted use of physical force . . . .”

To determine what convictions qualify as a predicate offense for an MCDV, the Sixth Circuit applies the “categorical approach” developed by the United States Supreme Court in *Taylor v. United States*, 495 U.S. 575 (1990) and subsequent cases. Taylor examined the Armed Career Criminal Act (ACCA), a statute that imposes lengthy mandatory minimum sentences for individuals found in possession of a firearm who have committed three or more violent felonies or other specified crimes. The categorical approach is applied under both the ACCA and the MCDV because both are federal laws triggered by convictions.
under state or federal law. To determine whether a statute qualifies as a predicate offense, the categorical approach asks whether all individuals convicted under the statute meet the threshold contained in the federal law. If the statute of conviction is overbroad and covers conduct that does not meet the threshold, the statute itself never qualifies as a predicate offense.7

Unlike many other federal firearm disabilities, most individuals caught in the “Lautenberg trap,” cannot avail themselves of the usual processes to regain their firearm rights. In Ohio, convictions under R.C. 2919.25(A) and (B) are ineligible for sealing because they are first degree misdemeanor offenses of violence.8 Moreover, because Ohio law does not take away the civil rights of misdemeanants, the state is incapable of restoring their civil rights.9 The practical result is that knowingly causing de minimis physical harm to family or household member in violation of R.C. 2919.25(A) creates a lifetime firearm ban. Abusers who cause serious physical harm and are convicted under R.C. 2903.11(A)(1) felonious assault paradoxically can commit domestic violence in a way that does not use violent physical force.10 Police officers and members of the armed forces convicted of an MCDV predicate offense often lose their job because they can no longer legally handle a firearm.

As a firearm rights advocate and as an attorney, I find something palpably disconcerting about a lifetime firearm ban for a misdemeanor conviction. Regardless of the underlying justification for the Lautenberg Amendment, no citizen should permanently lose a Constitutional right solely on the basis of a misdemeanor conviction. Moreover, unlike the federal disability for felons under 18 U.S.C. § 922(g)(1), there is no safe harbor for “official use” of firearms.8 The Sixth Circuit in Castleman dramatically limited the scope of 922(g)(9) by refining the degree of force necessary for a conviction to constitute a predicate offense. The court held that the degree of force required for an MCDV is the same degree of force U.S. v. Johnson, 599 U.S. 133(2010) requires for a violent felony predicate offense under the ACCA.9 In Johnson, the Supreme Court interpreted “physical force” under the ACCA to mean “violent force – that is, force capable of causing physical pain or injury to another person.”10

The Sixth Circuit stated that the term MCDV “is most naturally interpreted to mean any crime requiring strong and violent physical force, . . . .”11 The court further explained that an MCDV is “a subset of misdemeanor offenses which does not include all assault and battery offenses, but rather only those assault and battery offenses in which violent physical force is involved.”12 Castleman was indicted for knowingly or intentionally causing “bodily injury to [the mother of his child].”13 Under Tennessee law, bodily injury includes “a cut, abrasion, bruise, burn or disfigurement, physical pain or temporary illness . . . .”14 The court reasoned that it was therefore possible to knowingly cause a bodily injury without using “violent” force, and gave as examples causing a paper cut or stubbed toe.

The direct implications of Castleman are limited to the Tennessee domestic assault statute because the categorical approach examines each statute individually. Applying the logic of the case to Ohio law suggests that Ohio’s domestic violence statute does not qualify as a predicate offense. The subsection of Tennessee’s domestic assault statute at issue in Castleman is similarly worded to Ohio’s R.C. 2919.25(A) domestic violence statute, which prohibits “knowingly caus[ing] or attempt[ing] to cause physical harm to a family or household member.” Ohio law defines “physical harm” as “any injury, illness, or other physiological impairment, regardless of its gravity or duration.”15 Because any injury is sufficient under Ohio law, an individual can commit domestic violence in a way that does not use violent physical force. Although Castleman suggests that Ohioans with domestic violence convictions can own firearms, until the Sixth Circuit has an opportunity to rule on Ohio’s domestic violence statute, federal law enforcement will probably still enforce the Lautenberg Amendment as it was previously understood. A circuit split has developed over whether simple assault and battery or the Castleman/Johnson violent force requirement is the correct quantum of force for an MCDV.

The United States Supreme Court granted certiorari in Castleman, docket no. 13-1371, to resolve the circuit split and oral arguments are currently scheduled for January 15, 2014.

6. See R.C. 2953.36(C).
9. Castleman, 695 F.3d at 587.
11. Castleman, 695 F.3d at 588.
12. Id.
13. Castleman, 695 F.3d at 583 (modified in original).
15. R.C. 2901.01(A)(3) (emphasis added).

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15