

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**UNITED STATES OF AMERICA**

v.

**KEVIN WHITE**

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**CRIMINAL ACTION  
NO. 03-CR-378**

**MEMORANDUM**

**RUFE, J.**

**December 23, 2003**

Presently before the Court is Defendant’s Motion for Determination of Non-Applicability of 18 U.S.C. § 924(e), which raises a question of first impression in this circuit: whether Defendant’s prior conviction under 75 Pa. Cons. Stat. Ann. § 3735.1, for aggravated assault while driving under the influence, is a “violent felony” within the meaning of the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e). Stated differently, is aggravated assault by vehicle/DUI a crime that is “punishable by imprisonment for a term exceeding one year” and that “otherwise involves conduct that presents a serious potential risk of physical injury to another.”<sup>1</sup> 18 U.S.C. § 924(e)(2)(B)(ii). The parties agree that other portions of the definition are not relevant here. In making its assessment, the Court must look to the fact of the conviction and the statutory definition of aggravated assault by vehicle/DUI, and not to the conduct underlying the conviction. Taylor v. United States, 495 U.S. 575, 602 (1990).

Section 3735.1 of the Pennsylvania Motor Vehicle Code defines aggravated assault by vehicle/DUI accordingly:

(a) Offense defined.– Any person who negligently causes serious bodily injury to another person as the result of a violation of section

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<sup>1</sup> This provision is sometimes referred to as the “otherwise clause.”

3731 (relating to driving under influence of alcohol or controlled substance) and who is convicted of violating section 3731 commits a felony of the second degree when the violation is the cause of the injury.

(b) Definition.— As used in this section, the term "serious bodily injury" means any bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ.

75 Pa. Cons. Stat. Ann. § 3735.1.<sup>2</sup> The negligence standard referenced in subsection (a) is criminal negligence, not ordinary negligence. Commonwealth v. Ketterer, 725 A.2d 801, 806 (Pa. Super. Ct. 1999). Criminal negligence is defined accordingly:

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and intent of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

18 Pa. Cons. Stat. Ann. § 302(b)(4).

The parties agree that aggravated assault by vehicle/DUI is a felony of the second degree, for which punishment exceeds one year in the Commonwealth of Pennsylvania,<sup>3</sup> but disagree as to whether it meets the conditions of § 924(e)(2)(B)(ii)'s "otherwise clause." The Court is of the opinion that it does. By pleading guilty to aggravated assault by vehicle/DUI, Defendant admitted that he should have been aware of "a substantial and unjustifiable risk" that "serious bodily injury" would result from his drunk driving, and that his drunk driving did in fact cause serious bodily injury

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<sup>2</sup> Effective February 4, 2004, an amendment to § 3735.1 will account for renumbering in the Motor Vehicle Code by substituting "3802" for "3731."

<sup>3</sup> A felony of the second degree carries with it a maximum sentence of up to ten years imprisonment. 18 Pa. Cons. Stat. Ann. § 106(b)(3).

to another person. 18 Pa. Cons. Stat. Ann. § 302(b)(4); 75 Pa. Cons. Stat. Ann. § 3735.1(a). A conviction under the aggravated assault by vehicle/DUI statute, by its nature, requires that the underlying conduct present “a serious potential risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B)(ii). “Serious bodily injury,” which is a precondition to a conviction for aggravated assault by vehicle/DUI, must flow from violent circumstances. Cf. United States v. O’Neal, 937 F.2d 1369, 1372 (9th Cir. 1991) (holding that vehicular manslaughter is a violent felony under § 924(e)(2)(B)(ii) because it “involves the death of a human being under violent circumstances”). Accordingly, the Court concludes that aggravated assault by vehicle/DUI is a violent felony under 18 U.S.C. § 924(e). Cf. United States v. Rubio, 317 F.3d 1240, 1242-43 (11th Cir. 2003) (holding DUI causing serious bodily injury is a “crime of violence” under the career offender provisions of the sentencing guidelines, U.S.S.G. § 4B1.2.); United States v. Rutherford, 54 F.3d 370, 374-77 (7th Cir. 1995) (same) (“the risk of injury from drunk driving is neither conjectural nor speculative”).

Defendant argues that this conclusion will expand the scope of § 924(e) beyond that intended by Congress or interpreted by the courts. In making this argument, Defendant contends that there is no material difference between an ordinary DUI and aggravated assault by vehicle/DUI because the conduct at issue presents the same risk of harm. As such, he argues, the Court’s interpretation of “violent felony” would embrace DUI and imprudently broaden the applicability of ACCA.

The plain language of the respective statutes belies this assertion. First, aggravated assault by vehicle/DUI is a felony of the second degree, see 75 Pa. Cons. Stat. Ann. § 3735.1(a). By contrast, many if not most convictions for DUI under 75 Pa. Cons. Stat. Ann. § 3731 are not punishable by imprisonment for a term exceeding one year, and so they would not qualify as a

“violent felony” under § 924(e). See 75 Pa. Cons. Stat. Ann. § 3731(e)(1)(i)-(iv). Second, a precondition to a conviction for aggravated assault by vehicle/DUI is a causal relationship between the defendant’s drunk driving and serious bodily injury to another. This causal relationship between conduct and injury cannot exist without some violence, usually in the form of a vehicular accident. Such is not an essential element of a conviction for DUI. Therefore, Defendant’s assertion that there is no principled distinction between the crimes of DUI and aggravated assault by vehicle/DUI is ultimately unpersuasive.

An appropriate Order follows.

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**ORDER**

**AND NOW**, this 23rd day of December, 2003, upon consideration of Defendant's Motion for Determination of Non-Applicability of 18 U.S.C. § 924(e) [Doc. # 25], Government's Opposition thereto [Doc. # 26], Defendant's Reply [Doc. # 27], Government's Sur-Reply [Doc. # 31], after oral argument, and for the reasons set forth in the attached Memorandum, it is hereby **ORDERED** that Defendant's Motion is **DENIED**.

It is so **ORDERED**.

**BY THE COURT:**

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**CYNTHIA M. RUFÉ, J.**