IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16-41663

United States Court of Appeals
Fifth Circuit
FILED
June 4, 2020
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

ALEJANDRO CALZADA VEGA, also known as Alejandro Vegas,

Defendant - Appellant

Appeal from the United States District Court for the Southern District of Texas

Before CLEMENT, SOUTHWICK, and HIGGINSON, Circuit Judges.

STEPHEN A. HIGGINSON, Circuit Judge:

In 2016, Alejandro Calzada Vega pleaded guilty to one count of illegal reentry after deportation in violation of 8 U.S.C. § 1326. Vega's presentence report determined that his 2004 Michigan conviction for home invasion in the second degree qualified as an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(F) (defining "aggravated felony" as a "crime of violence" under 18 U.S.C. § 16). Therefore, using the 2015 United States Sentencing Guidelines, the PSR applied an eight-level sentencing enhancement under U.S.S.G. § 2L1.2(b)(1)(C). *See* U.S.S.G. § 2L1.2, cmt. n.3(A) ("For purposes of subsection (b)(1)(C), 'aggravated felony' has the meaning given that term in . . . 8 U.S.C. § 1101(a)(43) . . . without regard to the date of conviction for the aggravated

felony."). Based on the same 2004 conviction, the PSR also determined that Vega was subject to the 20-year statutory maximum sentence in 8 U.S.C. § 1326(b)(2), which increases the maximum sentence for an illegal reentry defendant "whose removal was subsequent to a conviction for commission of an aggravated felony."

At sentencing on December 7, 2016, the district court overruled Vega's objections to the PSR's classification of his 2004 conviction and sentenced him to a within-guidelines sentence of 26 months of imprisonment, followed by a three-year term of supervised release. The district court entered judgment under 8 U.S.C. §§ 1326(a) and 1326(b)(2).

Vega filed a notice of appeal in December 2016. In his initial brief, he argued that his 2004 conviction did not have an element of force, so it therefore does not qualify as a "crime of violence" under 18 U.S.C. § 16(a). He also argued that § 16(b) is unconstitutionally vague, though he acknowledged that this argument was foreclosed by Supreme Court precedent at the time that he filed his brief. Because he maintained that his 2004 conviction did not qualify as a "crime of violence," he argued that the district court erred when it found that he had previously been convicted of an "aggravated felony"—a conclusion that led to his eight-level sentence enhancement and the district court's entry of judgment under § 1326(b)(2) instead of § 1326(b)(1).

During the pendency of this appeal, the court twice suspended briefing to await guidance from the Supreme Court in two related cases: *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), and *United States v. Herrold*, 139 S. Ct. 2712 (2018) (mem.). In late 2017, Vega was released from custody and deported. His three-year period of supervised release will not expire until November 20, 2020.

Both parties now agree that the merits of Vega's appeal are foreclosed by the Supreme Court's decision in *Quarles v. United States*, 139 S. Ct. 1872

(2019). The only issue in dispute is whether Vega's release from custody mooted his challenge to the PSR's calculation of his sentencing guidelines—a threshold jurisdictional issue.

Applying the binding precedent of *United States v. Lares-Meraz*, 452 F.3d 352 (5th Cir. 2006), we hold that Vega's appeal of the eight-level sentence enhancement is not moot because he remains subject to a term of supervised release. We therefore reach the merits of his appeal, and we AFFIRM.

I.

In the district court, Vega objected to his guidelines enhancement under § 2L1.2(b)(1)(C), but he did not specifically object to the district court's entry of judgment under § 1326(b)(2). Nevertheless, because his objection to the sentencing enhancement relied on the same argument that he now makes about the application of § 1326(b)(2), that objection was sufficient to preserve his challenge to the statutory basis of his conviction. *See United States v. Valle-Ramirez*, 908 F.3d 981, 984 (5th Cir. 2018). Like the defendant in *Valle-Ramirez*, Vega's challenges are based on his argument that his 2004 conviction does not qualify as an "aggravated felony." *See Id.* Accordingly, we review the district court's characterization of his 2004 conviction *de novo*. *See id.*; *Patel v. Mukasey*, 526 F.3d 800, 802 (5th Cir. 2008).

"Whether an appeal is moot is a jurisdictional matter, since it implicates the Article III requirement that there be a live case or controversy." *United States v. Heredia-Holguin*, 823 F.3d 337, 340 (5th Cir. 2016) (en banc) (quoting *Bailey v. Southerland*, 821 F.2d 277, 278 (5th Cir. 1987)). We review the question of mootness *de novo*, raising the issue *sua sponte* if necessary. *Lares-Meraz*, 452 F.3d at 355. In order to maintain jurisdiction, the court must have before it an actual case or controversy at all stages of the judicial proceedings. *See Spencer v. Kemna*, 523 U.S. 1, 7 (1998). "A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing

party." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) (internal quotation marks and citation omitted). "[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id.* at 307–08 (alteration in original) (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 442 (1984)).

II.

Vega advances two challenges to his sentence. First, he argues that the district court erred when it applied an eight-level sentencing enhancement based on its conclusion that Vega had previously been convicted of an aggravated felony. Second, he argues that the district court erred when it entered judgment under § 1326(b)(2).

The parties agree that Vega's release from prison does not moot his statutory challenge. Regardless of Vega's custody status, "whether his judgment reflects a conviction under § 1326(b)(1) or (b)(2) could have consequences." *United States v. Valle-Ramirez*, 908 F.3d 981, 984 n.4 (5th Cir. 2018). Because a (b)(2) conviction carries its own collateral consequences, we have held that a defendant may challenge the statutory basis of his judgment of conviction even when he is no longer in custody. *Id.*; *see also United States v. Ovalle-Garcia*, 868 F.3d 313, 314 (5th Cir. 2017).

However, the parties dispute whether Vega's release from custody and deportation moot his challenge to his sentencing enhancement. A live case or controversy is necessary to invoke federal jurisdiction. *See Heredia-Holguin*, 823 F.3d at 340. Thus, the court must evaluate mootness on a claim-by-claim basis to determine whether each claim satisfies the constitutional requirements for Article III jurisdiction. *See In re Pac. Lumber Co.*, 584 F.3d 229, 251 (5th Cir. 2009) (evaluating mootness for each claim); *see also In re*

Scopac, 624 F.3d 274, 282 (5th Cir. 2010) (same).[1] Though Vega remains subject to an active term of supervised release, he does not argue that the district court erred when it imposed a three-year period of supervised release; instead, his appeal of the sentencing enhancement challenges the term of *imprisonment* imposed by the district court.

In *Lares-Meraz*, we held that a defendant's appeal of his sentence is not moot as long as he remains subject to an active period of supervised release. 452 F.3d at 355. Like Vega, the defendant in *Lares-Meraz* had been released from custody and deported. *Id.* at 353. At the time of his direct appeal of his sentence, he remained subject to a three-year term of supervised release. *Id.* We held that Lares-Meraz's "subjection to the terms of supervised release satisfy an ongoing consequence that is a sufficient legal interest to support Article III's case or controversy requirement." *Id.* at 355. If the district court determined that he had been improperly sentenced, it would "have the authority to modify [the] conditions of supervised release . . . or the authority to terminate obligations of supervised release." *Id.*; *see also United States v. Johnson*, 529 U.S. 53, 60 (2000) (noting that the trial court may modify conditions of supervised release or terminate supervised release obligations if certain conditions are met). The possibility of relief thus demonstrated that Lares-Meraz's claim was not moot, even though his appeal did not challenge the term of supervised release itself. In another published case, *Johnson v. Pettiford*, 442 F.3d 917 (5th Cir. 2006), we echoed the reasoning of *Lares-Meraz*, holding that a defendant's release from custody did not moot his habeas petition under 28 U.S.C. § 2241 because there remained a "possibility that the

[1] Therefore, to the extent that Vega argues that the court may avoid deciding the mootness question because his claims fail on the merits, we disagree.

district court may alter [his] period of supervised release . . . if it determines that he has served excess prison time." *Id.* at 918.[2]

Though the government does not acknowledge the published authority of *Lares-Meraz*, it argues that our 2016 *en banc* decision in *Heredia-Holguin* requires us to find that Vega's appeal is now moot. In *Heredia-Holguin*, we held that a defendant's deportation and release from custody did *not* moot his challenge to his term of supervised release. 823 F.3d at 343. Unlike Vega, the defendant in *Heredia-Holguin* challenged the imposition of supervised release itself, arguing that the district court erred when it sentenced him to three years of supervised release. *Id.* at 339–40. We acknowledged this distinction in a footnote, recognizing that the out-of-circuit cases that have come to the opposite conclusion have done so in a different context: where the defendant "had completed his term of imprisonment and been deported, yet was still trying to challenge the *term of imprisonment* on the ground that the term of supervised release had not yet expired." *Id.* at 342 & n.3. Yet we also cited a Sixth Circuit case that matched the facts of Vega's appeal, explaining that the Sixth Circuit had "reached the same conclusion" as the *en banc* court. *Id.* at 343 n.5. In that case, *United States v. Solano-Rosales*, 781 F.3d 345, 355 (6th Cir. 2015), the Sixth Circuit held that an appeal was not moot if the defendant remained on supervised release, even though he did not challenge the supervised release term and instead challenged only the "completed custodial portion of his or her sentence."[3]

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[2] The government contends that this rule conflicts with the Supreme Court's decisions in *Johnson*, 529 U.S. at 59–60, and *Spencer*, 523 U.S. at 14–16. In fact, *Lares-Meraz* was decided well after both of those cases, and the panel's decision relied on those cases to support its mootness analysis. 452 F.3d at 355.

[3] Thus, while the government is correct that there is a circuit split on this issue, its arguments do not alter the fact that *Lares-Meraz*, a published case of our court, binds this panel. *See, e.g.*, *Lee v. Frozen Food Exp., Inc.*, 592 F.2d 271, 272 (5th Cir. 1979) ("[T]his panel of the Court is bound by the decisions of prior panels.").

In *Heredia-Holguin*, we used expansive language to describe our holding, explaining that "our court has the authority to grant relief as long as the term of the supervised release has not expired." 823 F.3d at 343. And though we cited *Lares-Meraz* repeatedly, we never suggested that we disagreed with the more specific holding in that case: that a defendant may challenge his *term of imprisonment* as long as he remains under an active term of supervised release. *See id.* at 339 & n.1. To the contrary, our decision in *Heredia-Holguin* expressly overturned a decision that was in conflict with *Lares-Meraz*, further suggesting that the *en banc* court's holding was consistent with—and did not disturb—the rule of law in *Lares-Meraz*. *See id.*

Since *Heredia-Holguin*, several unpublished decisions of this court have found that *Lares-Meraz* remains good law. In *United States v. Solano-Hernandez*, 761 F. App'x 276, 280 (5th Cir. 2019), we cited *Heredia-Holguin*, *Lares-Meraz*, and *Johnson* to hold that a defendant's appeal of his sentence was not mooted by his deportation and release from custody because he continued to remain "subject to a three-year term of supervised release" at the time of his appeal. We reached the same conclusion in several other cases that have addressed the identical issue. *See United States v. Taylor*, No. 18-60425, 2020 WL 1487705, at *2 (5th Cir. Mar. 24, 2020); *Greene v. Underwood*, 939 F.3d 628, 628 (5th Cir. 2019) (reaching same decision in context of a habeas petition); *United States v. Villarreal-Garcia*, 761 F. App'x 425, 427 (5th Cir. 2019) (relying on *Pettiford* and *Lares-Meraz*). Though another set of unpublished cases has reached the opposite conclusion, those cases are unpersuasive because they fail to cite or engage with the binding authority of *Lares-Meraz*. *See, e.g.*, *United States v. Bacio-Gonzales*, 713 F. App'x 357, 358 (5th Cir. 2018); *United States v. Chavez-Martinez*, 669 F. App'x 268, 268 (5th Cir. 2016); *United States v. Beltran*, 668 F. App'x 100, 100 (5th Cir. 2016).

We agree with the decisions of our court that have held that *Lares-Meraz* continues to govern the mootness analysis for a defendant in Vega's position. The government argues that *Heredia-Holguin* casts doubt upon the decision reached in *Lares-Meraz*. *See, e.g.*, *Heredia-Holguin*, 823 F.3d at 343 (holding that "where a defendant has been deported, his appeal of a *term of an existing supervised release* is not mooted solely by that deportation" (emphasis added)). But an *en banc* decision cannot overturn a binding published panel decision unless it does so clearly. *See, e.g.*, *Carter v. S. Cent. Bell*, 912 F.2d 832, 840 (5th Cir. 1990). Even if we believe a prior panel's decision is flawed, we are bound to abide by it "unless that interpretation is irreconcilable with" a later decision of the en banc court. *Id.*; *cf. Gahagan v. U.S. Citizenship & Imm. Servs.*, 911 F.3d 298, 302 (5th Cir. 2018) ("For a Supreme Court decision to override a Fifth Circuit case, the decision must unequivocally overrule prior precedent; mere illumination of a case is insufficient." (alteration omitted) (quoting *United States v. Petras*, 879 F.3d 155, 164 (5th Cir. 2018)). The fact that the *en banc* decision in *Heredia-Holguin* confined itself to the facts before it does not mean that it overturned—either explicitly or implicitly—the analogous but distinct holding of *Lares-Meraz*. Published decisions of this court remain binding "absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or [the] en banc court." *United States v. Traxler*, 764 F.3d 486, 489 (5th Cir. 2014) (quoting *Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008)).

Thus, because *Heredia-Holguin* neither implicitly nor explicitly overruled *Lares-Meraz*, we conclude that Vega's release from custody did not moot his appeal of his sentencing enhancement.

III.

Because Vega's appeal is not moot, we must reach the merits of his claims. As both parties agree, Vega's challenges to his sentencing enhancement and to the statutory basis of his conviction both fail as a matter of law.

The district court applied an eight-level sentencing enhancement and entered judgment under § 1326(b)(2) because it concluded that Vega had previously been convicted of an "aggravated felony." To determine whether a prior conviction qualifies as an aggravated felony, we employ the categorical approach, examining "'the elements of the offense, rather than the facts underlying the conviction or the defendant's actual conduct, to determine whether' the enhancement applies." *United States v. Teran-Salas*, 767 F.3d 453, 458 (5th Cir. 2014) (quoting *United States v. Carrasco-Tercero*, 745 F.3d 192, 195 (5th Cir. 2014)).

The same definition of "aggravated felony" applies to the statute and the sentencing guidelines. *See* 8 U.S.C. § 1101(a)(43); U.S.S.G. § 2L1.2 cmt. n.3(A). The district court found that Vega's 2004 conviction was an "aggravated felony" based on one of the statutory definitions: "a crime of violence (as defined in section 16 of title 18 . . .) for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(F). But there are several other definitions of "aggravated felony," including "a . . . burglary offense for which the term of imprisonment [is] at least one year." *Id.* § 1101(a)(43)(G). Though the district court used the definition in § 1101(a)(43)(F), we may affirm "on any basis supported by the record." *United States v. Roussel*, 705 F.3d 184, 195 (5th Cir. 2013).

In *Quarles*, the Supreme Court held that Michigan home invasion in the third degree is a generic burglary offense because it criminalizes the "unlawful or unprivileged entry into, *or remaining in*, a building or structure, with intent to commit a crime." 139 S. Ct. at 1875 (quoting *Taylor v. United States*, 495

U.S. 575, 599 (1990)); *see also United States v. Herrold*, 941 F.3d 173, 177 (5th Cir. 2019) (en banc) (applying *Quarles* in the context of Texas's burglary statute). Vega was convicted of the more serious offense of Michigan home invasion in the second degree, which applies when a defendant commits or intends to commit "a felony, larceny, or assault in the dwelling." Mich. Comp. Laws Ann. § 750.110a(3). Both parties agree that this distinction makes no difference to the "aggravated felony" analysis; because a nearly identical offense was deemed a generic burglary offense in *Quarles*, Vega's 2004 Michigan conviction satisfies the statutory definition of "aggravated felony" under § 1101(a)(43)(G). Moreover, Quarles's indeterminate sentence of six months to 15 years satisfies the statutory requirement that the burglary offense must result in a term of imprisonment greater than one year. *See Pichardo v. INS*, 104 F.3d 756, 759 (5th Cir. 1997) (construing an indeterminate sentence as a sentence for the maximum term imposed).

Accordingly, Vega's 2004 conviction qualifies as an "aggravated felony," thus justifying the district court's sentencing enhancement and the entry of judgment under § 1326(b)(2).[4] We therefore AFFIRM the district court's sentence and judgment.

[4] As Vega acknowledges, his vagueness challenge to the Sentencing Guidelines' definition of "crime of violence" fails for the separate and distinct reason that "[t]he Guidelines are not subject to vagueness challenges." *United States v. Godoy*, 890 F.3d 531, 537 (5th Cir. 2018).