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Defending Illegal Re-entry Cases

Miguel Nogueras

Author Contact Information:
Miguel Nogueras
Federal Public Defenders Office
McAllen, TX

miguel_nogueras@fd.org

Defending Illegal Re-entry Cases

By Miguel Nogueras

The McAllen Division for the Southern District of Texas has been for decades one of the highest prosecuting districts in illegal entry and re-entry cases in the country. Moreover, McAllen became ground zero for the administration's zero tolerance policy. And now we faced our greatest threat, COVID-19 which has affected hundreds of clients in the Rio Grande Valley and claimed the lives of many.

The purpose of this short article is to guide you through the very basic issues our Federal Defender's Office often encounters during the defense of re-entry cases and hopefully assist you in obtaining a favorable result for your client. The article is limited to defenses, and not to sentencing, which in itself is another hot topic.

I. Elements of Illegal Re-entry Cases Under 8 U.S.C. § 1326

In order for an individual to be found guilty of illegal re-entry, the Government must prove beyond a reasonable doubt the following four elements established by the Fifth Circuit Pattern Jury Instructions:

1. That the defendant was an alien at the time alleged in the indictment;
2. That the defendant had previously been denied admission [excluded] [removed] [deported] from the United States;
3. That thereafter the defendant knowingly entered [attempted to enter] [was found in] the United States; and
4. That the defendant had not received the consent of the Secretary of the Department of Homeland Security [Attorney General of the United States] to apply for readmission to the United States since the time of the defendant's previous deportation.

The Supreme Court held in *Almendarez-Torres v. United States*, 118 S. Ct. 1219 (1998), that proof of the defendant's commission of a felony or an "aggravated" felony prior to deportation is not an element of the offense but is a punishment provision in addressing recidivism. So, although there might be an allegation related to criminal history in the indictment, it is not an element of the offense. It is only a matter for sentencing.

According to the Fifth Circuit, specific intent is not an element of this crime; it is a general intent crime. *See United States v. Berrios-Centeno*, 250 F.3d 294, 297-98 (5th Cir. 2001); *United States v. Guzman-Ocampo*, 236 F.3d 233 (5th Cir. 2000); *United States v. Montes-De Oca*, No. 19-50770, 2020 WL 3621278 (5th Cir. July 2, 2020). This means that the defendant does not have to intend to break the law; he must only intend to do the acts that constitute the law violation, *i.e.*, enter or be found in the United States.

II. The Penalties

The penalties for this offense could be up to two (2) years under § 1326(a), up to ten (10) years under § 1326(b)(1) if subsequent to a conviction of three or more misdemeanors involving drugs, crimes against a person, or both, or a non-aggravated felony; and up to 20 years if the defendant was removed subsequent to conviction of an aggravated felony under 1326(b)(2).

Whether a prior offense is an "aggravated felony" is determined under 8 U.S.C. § 1101(a)(43). There are many crimes on this list that surprise both attorneys and defendants. So, it is always advisable to check this section. Even though the defendant's prior criminal history may only be used at sentencing, the attorney should file a motion to strike the allegation of a prior crime if research shows that the defendant's prior crime does not qualify as a felony or "aggravated felony" under these provisions. It makes a difference in terms of the statutory maximum about which the defendant would be admonished at a rearraignment.

III. Defenses and Trial or Pre-Trial Considerations

A. No Valid Proof of Deportation

In *United States v. Wong Kim Bo*, 466 F.2d 1298 (5th Cir. 1972), the Fifth Circuit held that in order for the Government to prove a charge under § 1326, at the very least, the Government must present actual proof of deportation in the form of an executed warrant of deportation. An executed warrant of deportation is a warrant ordering any officer of the United States Immigration and Naturalization Service to deport or remove an individual from the United States, based upon a final order from (1) an immigration judge, (2) a district director, (3) the Board of Immigration Appeals, or (4) a United States Article III Judge or Magistrate Judge. The warrant contains a second page that should have the picture of your client, his/her right thumb fingerprint, the client's signature as well as the departure witness' signature, and a notation by the removing officer stating the date and manner or removal *(i.e.,* by foot at port of entry, or by plane). Under Wong Kim Bo, without the executed

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