U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: PEREYRA RAMIREZ, JOSE RAF... **A 030-313-775**

Date of this notice: 7/29/2020

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Greer, Anne J.
MONSKY, MEGAN FOOTE
Donovan, Teresa L.

Userteam: Docket

File: A030-313-775 – Batavia, NY

Date: JUL 29 2020

In re: Jose Rafael PEREYRA RAMIREZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Channa M. Gordon, Esquire

ON BEHALF OF DHS: Jack Niejadlik
Assistant Chief Counsel

APPLICATION: Termination

The respondent is a native and citizen of Peru and a lawful permanent resident of the United States. The respondent appeals the Immigration Judge's determination that he is removable under section 237(a)(2)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii), for having been convicted of two crimes involving turpitude not arising out of a single scheme of criminal misconduct. The respondent's removal proceedings will be terminated.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under the de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

On July 16, 2007, the respondent was convicted of Aggravated Unlicensed Operation of a Motor Vehicle in the First Degree in violation of N.Y. Veh. & Traf. Law § 511.3(a)(i) (Exh. 1). On November 2, 2016, the respondent was again convicted of the same offense. The respondent admitted that the crimes did not arise out of a single scheme of a criminal misconduct (Exh. 1; Tr. at 7). Based on these convictions, the Department of Homeland Security (DHS) charged the respondent as removable under section 237(a)(2)(A)(ii) of the Act, for having committed two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct (Exh. 1). The Immigration Judge determined that DHS met its burden to prove that the respondent is removable as charged (IJ at 2-5).

The respondent argues on appeal that the Immigration Judge erred in determining that he is removable under section 237(a)(2)(A)(ii) of the Act for having been convicted of two crimes involving moral turpitude. To determine whether a state criminal conviction is a crime involving moral turpitude, we must follow the categorical approach and compare the state statute of conviction with the generic definition for a crime involving moral turpitude, such that every violation of that statute qualifies as a crime involving moral turpitude. *Matter of Silva Trevino*, 26 I&N Dec. 826, 830-31 (BIA 2016) (applying the categorical approach and, if necessary, the modified categorical approach in determining whether a crime involves moral turpitude under the Act). "The term 'moral turpitude' generally refers to conduct that is 'inherently base, vile, or

depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.'" *Id.* at 833 (citation omitted). "To involve moral turpitude, a crime requires two essential elements: reprehensible conduct and a culpable mental state." *Id.* at 834. The categorical approach requires a focus upon the elements of the offense and the minimum conduct that has a realistic probability of being prosecuted thereunder, rather than upon the respondent's actual conduct. *Id.* at 831-33.

Relevant to our analysis, N.Y. Veh. & Traf. Law § 511.3(a)(i) details that an individual can be convicted of the offense of Aggravated Unlicensed Operation of a Motor Vehicle in the First Degree when he 1) commits the offense of aggravated unlicensed operation of a motor vehicle in the second degree; and 2) operates a motor vehicle while under the influence of alcohol or drug in violation. Aggravated Unlicensed Operation of a Motor Vehicle in the Second Degree provides that the individual must commit unlicensed motor vehicle operation in the third degree, with additional aggravating factors. *See also* N.Y. Veh. & Traf. Law § 511.2(a). Therefore, the relevant analysis for our purpose is to determine whether Aggravated Unlicensed Operation of a Motor Vehicle in the Third Degree under N.Y. § 511.1(a) involves moral turpitude. Aggravated Unlicensed Operation of a Motor Vehicle in the Third Degere under N.Y. § 511.1(a) states in pertinent part that a person is guilty of the offense when he "operates a motor vehicle upon a public highway while knowing or having reason to know that such person's license or privilege of operating such motor vehicle in this state . . . is suspended, revoked, or otherwise withdrawn by the commissioner."

The respondent argues in his appeal that his statute of conviction is not a crime involving moral turpitude because it does not necessitate the requisite mens rea (Respondent's Br. at 5-10). We agree. The New York statute in question requires that the government prove the offender knew or had "reason to know" that his driving privileges had been revoked, suspended, or otherwise withdrawn. *See Aguilar v. Holder*, 576 F. App'x 13, 17-18 (2d Cir. 2014); *see also People v. Pacer*, 6 N.Y.3d 504, 508 (N.Y. 2006).

We have previously noted that, under New York law, to act "knowingly," the respondent must have been aware of the nature of his conduct and the fact that his actions had the potential for harm. *Matter of Mendoza Osorio*, 26 I&N Dec. 703, 706 (BIA 2016). However, the alternate mens rea for the offense—"having reason to know"—is substantially different from "knowing." *See Aguilar v. Holder*, 576 F. App'x at 18. Case law in New York indicates that a "reason to know" mens rea in the criminal context is equivalent to criminal negligence. *People v. Tate*, 382 N.Y.S.2d 941 (N.Y. Sup. Ct. 1976) (dismissing a defendant's charges from criminal negligence when he did know or have reason to know his actions were highly dangerous); N.Y. Penal Law § 15.05(4) ("A person acts with criminal negligence . . . when he fails to perceive a substantial and unjustifiable risk."). We have held that "criminal negligence" in New York law is an insufficient mens rea to constitute moral turpitude, because "a perpetrator need only to fail to perceive a substantial and justifiable risk, while recklessness requires that the perpetrator consciously disregard such a risk." *Matter of Tavdidishvili*, 27 I&N Dec. 142, 144-45 (BIA 2017). Although the definition is not clearly defined by statute, it is clear that the mens rea of "reason to know" falls below recklessness.

The Immigration Judge, in determining the respondent removable, relied upon *Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999), which held that an Ariz. Rev. Stat § 28-697(A)(1) for Aggravated Driving under the Influence is a crime involving moral turpitude. In that statute, the mens rea required that the defendant "knew, at the time that he was driving under the influence of alcohol, that his driver's license had bene suspended and that he was not permitted to drive." *Id.* at 1185. In *Matter of Lopez-Meza*, we recognized that simple driving under the influence, without more is not a crime involving g moral turpitude, because it does not require intent or knowledge. *Id.* at 1194. However, we noted that a defendant convicted under Aggravated Driving under the Influence in violation of Ariz. Rev. Stat. § 28-697(A)(1) must have the knowledge that he or she should not be driving under either circumstance, which is an aggravating factor that adheres moral turpitude. *Id.* at 1196.

Although the Immigration Judge relied on our statement in *Matter of Lopez-Meza* that the state, when prosecuting a violation of Ariz. Reg. Stat. § 28-697(A)(1), must prove that the defendant knew or should have known that his license was suspended, in Arizona, the standard for "should have known" is a higher mens rea than New York's "have reason to know" (IJ at 3). *Compare State v. William*, 698 P.2d 732 (Ariz. 1985) (stating that in Arizona a driver "needs to know" that he does not have a license before he can be published for driving without one, and the state proves this by showing that the defendant received notice of his license being suspended), *with People v. Cleveland*, 660 N.Y.S.2d. 771 (N.Y. Sup. Ct. 1997) (stating that a defendant had reason to know his license was suspended when he failed to pay the termination of suspension fee, when informed that he has to pay $25 to have his license restored). Additionally, we later clarified in *Matter of Torres-Varela*, 23 I&N Dec. 78, 87 (BIA 2001), that the aggravating factor that rendered the statute at issue in *Lopez-Meza* a crime involving moral turpitude was that the "defendant knew, at the time he was driving while under the influence of alcohol, that his driver's license had been suspended and that he was not permitted to drive."

Therefore, the respondent's conviction for Aggravated Unlicensed Operation of a Motor Vehicle in the First Degree in violation of N.Y. Veh. & Traf. § 511.3(a)(i) does not include the requisite mental state to categorically qualify as a crime involving moral turpitude, and cannot support DHS's charge of removability under section 237(a)(2)(A)(ii) of the Act. Thus, termination of the respondent's removal proceedings is warranted. Given our disposition, we find it unnecessary to address the respondent's other appellate arguments.

Accordingly, the following order will be entered.

ORDER: The respondent's removal proceedings are terminated.

FOR THE BOARD