



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
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Name: A [REDACTED], A [REDACTED]

A [REDACTED]-632

Date of this notice: 10/25/2018

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:
Guendelsberger, John
Grant, Edward R.
Kendall Clark, Molly

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Falls Church, Virginia 22041

File: A [REDACTED]-632 – Orlando, FL

Date:

OCT 25 2018

In re: A [REDACTED] A [REDACTED] a.k.a. [REDACTED]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Milena Portillo, Esquire

ON BEHALF OF DHS: Alexandra Rivas
Assistant Chief Counsel

APPLICATION: Cancellation of removal

The respondent, a native and citizen of Mexico, appeals from the Immigration Judge's May 10, 2018, decision denying his application for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b). The Immigration Judge concluded that the respondent did not meet his burden of demonstrating that his 2000 conviction for the offense of fleeing or attempting to elude a law enforcement officer in violation of Florida law was not a crime involving moral turpitude (CIMT) for purposes of establishing his eligibility for cancellation of removal. Section 240A(b)(1)(C) of the Act. The Department of Homeland Security (DHS) has filed an opposition to the appeal. The respondent's appeal will be sustained, the Immigration Judge's decision will be vacated, and the record will be remanded for consideration of the respondent's application for relief.¹

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

A crime involves moral turpitude if its elements require reprehensible conduct committed with a corrupt mental state. *Matter of Silva-Trevino* ("Silva-Trevino IIP"), 26 I&N Dec. 826, 834 (BIA 2016). Conduct is "reprehensible" if it 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," while a "culpable" mental state is one which requires deliberation or consciousness, such as intent, knowledge, willfulness, or recklessness. *Id.*; *accord Cano v. U.S. Att'y Gen.*, 709 F.3d 1052, 1053 (11th Cir. 2013).

To determine whether a particular offense involves moral turpitude, we employ the categorical approach, which 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 alien's actual offense conduct. *See id.* at 831-33; *Gelin v. U.S. Att'y Gen.*, 837 F.3d 1236, 1241 (11th Cir. 2016).

¹ The respondent's fee waiver request is granted. *See* 8 C.F.R. § 1003.8(a)(3).

The respondent was convicted, in August 2000, of “fleeing or attempting to elude a law enforcement officer” under Fla. Stat. § 316.1935, which reads as follows:

(1) It is unlawful for the operator of any vehicle, having knowledge that he or she has been ordered to stop such vehicle by a duly authorized law enforcement officer, willfully to refuse or fail to stop the vehicle in compliance with such order or, having stopped in knowing compliance with such order, willfully to flee in an attempt to elude the officer, and a person who violates this subsection commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(2) Any person who willfully flees or attempts to elude a law enforcement officer in an authorized law enforcement patrol vehicle with agency insignia and other jurisdictional markings prominently displayed on the vehicle with siren and lights activated commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(3) Any person who willfully flees or attempts to elude a law enforcement officer in an authorized law enforcement patrol vehicle with agency insignia and other jurisdictional markings prominently displayed on the vehicle with siren and lights activated, and during the course of the fleeing or attempted eluding drives at high speed, or in any manner which demonstrates a wanton disregard for the safety of persons or property commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) Any person who, in the course of unlawfully leaving or attempting to leave the scene of a crash in violation of s. 316.027 or s. 316.061, having knowledge of an order to stop by a duly authorized law enforcement officer:

(a) Willfully refuses or fails to stop in compliance with such an order, or having stopped in knowing compliance with such order, willfully flees in an attempt to elude such officer; and

(b) As a result of such fleeing or eluding, causes injury to another person or causes damage to any property belonging to another person

commits aggravated fleeing or eluding, a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. The felony of aggravated fleeing or eluding constitutes a separate offense for which a person may be charged, in addition to the offense of unlawfully leaving the scene of a crash which the person had been in the course of committing or attempting to commit when the order to stop was given.

(5) The court may revoke, for a period not to exceed 1 year, the driver's license of any operator of a motor vehicle convicted of a violation of subsection (1), subsection (2), subsection (3), or subsection (4).

Fla. Stat. § 316.1935 (2000). As the Immigration Judge noted, the conviction records do not clearly reveal the particular subsection of the statute under which he was convicted. The

Immigration Judge examined Fla. Stat. § 316.1935(3) as an alternative element of the crime of fleeing or attempting to elude a police vehicle and determined that such section, qualifies as a CIMT (IJ at 5).

On appeal, the respondent argues that the record of conviction reflects that he was actually convicted under paragraph (1), the elements of which do not constitute a CIMT because the conduct described is not inherently reprehensible. The DHS contends that all paragraphs of Fla. Stat. § 316.1935 describe a CIMT, because any attempt to willfully flee a law enforcement officer carries a high risk of injury to innocent bystanders and is inherently reprehensible conduct.

As the Immigration Judge noted, the “Final Disposition” of the respondent’s criminal offense does not indicate the subsection under which the respondent was convicted (IJ at 4). However, it does reflect that the respondent pleaded nolo contendere to an offense that carried “60 days max confinement,” which indicates that he was convicted of a misdemeanor under paragraph (1). More significant, the DHS conceded, before the Immigration Judge and the Board, that the respondent was convicted of a “first degree misdemeanor” (IJ at 4 n. 2; DHS Br. at 2). We conclude that the respondent was convicted under paragraph (1) of the statute.

The question is, therefore, whether the least culpable conduct necessary to sustain a conviction under Fla. Stat. § 316.1935(1) meets the standard of a crime involving moral turpitude. There is no disagreement that each paragraph of Fla. Stat. § 316.1935 reflects the requisite mental state for a CIMT. Thus, we address whether the offense involves reprehensible conduct. The respondent argues that *Matter of Ruiz-Lopez*, 25 I&N Dec. 551 (BIA 2011), involving a similar Washington statute, is distinguishable from his case.

We agree with the respondent that *Matter of Ruiz-Lopez*, may be distinguished. In that case, we upheld a CIMT charge premised on an alien’s Washington conviction for driving a vehicle “in a manner indicating a wanton or willful disregard for the lives or property of others while attempting to elude a pursuing police vehicle.” Section 316.1935(1) does not require that the accused act in such a manner. Insofar as the accused is merely resisting arrest, the Board and the Eleventh Circuit have recognized that resistance of or interference with a law enforcement officer is not inherently “reprehensible” conduct to qualify as a CIMT. *See Cano v. U.S. Att’y Gen.*, 709 F.3d 1052, 1054-55 (11th Cir. 2013) (concluding that Fla. Stat. § 843.01 is a CIMT because it requires intentional violence against the officer, rather than mere resistance); *Matter of Danesh*, 19 I&N Dec. 669, 670-73 (BIA 1988); *see also Laryea v. Sessions*, 871 F.3d 337 (5th Cir. 2017) (intentionally fleeing from a police officer, without a vehicle, does not rise to the level of moral turpitude).

Certainly, there have been prosecutions under section 316.1935(1) where the conduct of the accused was not inherently base, vile, or depraved, or displayed wanton disregard for the lives or property of others. *See, e.g., State v. Kirer*, 120 So. 3d 60 (Fla. 4th DCA 2013) (despite the siren, lights, and orders, appellee kept driving and made five turns while the deputy followed one or two car lengths behind. Neither appellee nor the deputy went over approximately “10 miles an hour”); *Jackson v. State*, 463 So.2d 372 (Fla. Dist. Ct. App. 1985) (court found sufficient evidence to support a jury’s determination that the accused had knowledge that the officers had directed him to stop his vehicle and he willfully refused).

Accordingly, we conclude that the minimum conduct that has a realistic probability of being prosecuted under section 316.1935(1) is not morally turpitudinous. Thus, the respondent has not been convicted of an offense that qualifies as a CIMT. We will vacate the Immigration Judge's decision premitting the respondent's application for cancellation of removal, and remand for consideration of the merits of the application.

Finally, insofar as the respondent argues he is no longer subject to detention and requests a bond hearing before the Immigration Judge, we note that removal proceedings are separate and apart from bond proceedings. *See* 8 C.F.R. § 1003.19(d). Thus, we lack jurisdiction to adjudicate the respondent's request in the instant removal proceedings, which are the only proceedings presently before us.

The following orders will be entered.

ORDER: The respondent's appeal is sustained, and the Immigration Judge's decision is vacated.

FURTHER ORDER: The record is remanded for further proceedings consistent with this decision.



FOR THE BOARD