U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

SUAREZ-CORTES, DANIEL
A093-233-989
C/O CUSTODIAL OFFICER
10250 RANCHO ROAD
ADELANTO, CA 92301

DHS/ICE - Office of Chief Counsel
10400 Rancho Road
Adelanto, CA 92301

Name: SUAREZ-CORTES, DANIEL **A 093-233-989**

Date of this notice: 5/20/2016

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.
Mullane, Hugh G.
Pauley, Roger

Userteam: Docket

File: A093 233 989 – Adelanto, CA

Date: MAY 20 2016

In re: DANIEL SUAREZ-CORTES a.k.a. Daniel Suarez

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Matthew Benham
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(ii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(ii)] - Convicted of two or more crimes involving moral turpitude

Sec. 237(a)(2)(E)(i), I&N Act [8 U.S.C. § 1227(a)(2)(E)(i)] - Convicted of crime of domestic violence, stalking, or child abuse, child neglect, or child abandonment

APPLICATION: Termination

The Department of Homeland Security ("DHS") appeals from an Immigration Judge's January 14, 2016, decision terminating removal proceedings against the respondent. The appeal will be sustained, the removal proceedings will be reinstated, and the record will be remanded.

The respondent is a native and citizen of Mexico and a lawful permanent resident of the United States. In November 2015, the DHS charged the respondent with deportability from the United States as an alien convicted of multiple crimes involving moral turpitude and a crime of child abuse (Exh. 1). *See* sections 237(a)(2)(A)(ii) and 237(a)(2)(E)(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1227(a)(2)(A)(ii), 1227(a)(2)(E)(i). In support of those charges, the DHS initially alleged that the respondent had sustained a 2007 California conviction for "oral copulation" in violation of CAL. PENAL CODE § 288a (Exh. 1). That initial allegation was subsequently withdrawn, however, and a substituted allegation was lodged to the effect that the respondent's 2007 conviction was for "lewd and lascivious acts with a child under 14 years old" in violation of CAL. PENAL CODE § 288(a), rather than for oral copulation (Exh. 1A).

The DHS submitted several documents into evidence as proof of the respondent's conviction, including a copy of the Information, a plea colloquy transcript, a clerk's minute order, and an abstract of judgment (DHS Evidentiary Submission, marked received in Immigration Court on

January 14, 2016 – hereafter cited as "DHS Exh.").[1] As the Immigration Judge determined (I.J. at 3-5), the Information reflects that the respondent was initially charged with eight counts of violating CAL. PENAL CODE § 288(b)(1), which prohibits the commission of lewd and lascivious acts upon the body of a child who is under 14 years old by "use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person."

The respondent was not ultimately convicted under CAL. PENAL CODE § 288(b)(1), however; instead, the plea colloquy transcript (which is printed exclusively in capital letters) reflects that he entered a negotiated guilty plea to three counts of "A VIOLATION OF PENAL CODE SECTION 288.A, WHICH IS THE SAME AS THE CHARGED OFFENSE EXCEPT IT TAKES OUT THE FORCED ARREST [sic] OR MENACE ELEMENT" (I.J. at 4-5; DHS Exh. at 31-33). This portion of the plea transcript supports the DHS's assertion that the respondent's plea was to violations of CAL. PENAL CODE § 288(a), which defines the same basic offense as CAL. PENAL CODE § 288(b)(1)—i.e., lewd and lascivious acts upon the body of a child under 14 years old—while omitting the aggravating force, duress, or menace elements. The trial court accepted the respondent's pleas of guilty and declared that he "IS IN FACT CONVICTED ON THOSE PLEAS" (DHS Exh. at 32).

Notwithstanding the foregoing plea colloquy and the trial court's oral pronouncement that the respondent was convicted on his pleas, the court clerk's minute order and abstract of judgment both identify the respondent's offenses of conviction as "oral copulation" under CAL. PENAL CODE § 288a rather than the "lewd and lascivious acts" offense discussed during the plea colloquy and defined by CAL. PENAL CODE § 288(a). *Cf. People v. Israel*, No. B252966, 2015 WL 481046, at *5 (Cal. Ct. App. Feb. 4, 2015) (ordering correction of a conviction record where the abstract of judgment did not clearly reflect whether the defendant had been convicted under CAL. PENAL CODE § 288(a) or CAL. PENAL CODE § 288a), *review denied* (Apr. 22, 2015). Further, though the "summary" page of the Information was amended by hand to reflect the substituted charges, those amendments do not clearly specify whether the new charges arose under § 288a or § 288(a).

The Immigration Judge found that the foregoing records were inconclusive as to whether the respondent's conviction arose under CAL. PENAL CODE § 288(a) or § 288a, and therefore she terminated the removal proceedings, concluding that the DHS had not proven its allegation that the conviction was for a violation of § 288(a). On appeal, the DHS maintains that the Immigration Judge committed clear error when she determined that the evidence did not establish that the respondent was convicted of violating CAL. PENAL CODE § 288(a). In support of that argument, the DHS relies heavily upon the plea colloquy transcript and asserts that the

[1] These records were not formally admitted into evidence by the Immigration Judge. However, because the court treated the exhibits, without objection, as if they were admitted into evidence, they are deemed admitted for purposes of this appeal. *See, e.g., United States v. Stapleton*, 494 F.2d 1269, 1270 (9th Cir.), *cert. denied*, 419 U.S. 1002 (1974).

various references in the minute order and abstract of judgment to § 288a and "oral copulation" were scrivener errors.

As the DHS asserts, the plea colloquy transcript clearly reflects that the respondent entered his guilty pleas to violations of CAL. PENAL CODE § 288(a)—i.e., violations of CAL. PENAL CODE § 288(b)(1) in which the force, duress, or menace elements had been excised. Further, the transcript contains the trial court's oral pronouncement that the respondent "IS IN FACT CONVICTED ON THOSE PLEAS." There is no discussion in the plea transcript of any conduct corresponding to the elements of "oral copulation" under CAL. PENAL CODE § 288a, nor were the charges to which the respondent pled amended to allege such conduct. Under the circumstances, we conclude that the DHS has presented clear and convincing evidence that the respondent was convicted of violating CAL. PENAL CODE § 288(a). The Immigration Judge's contrary determination is vacated as clearly erroneous. *See* 8 C.F.R. § 1003.1(d)(3)(i).

We recognize that the minute order and the abstract of judgment both reflect that the respondent was convicted of oral copulation under CAL. PENAL CODE § 288a. We also acknowledge that minute orders and abstracts of judgment are presumptively reliable. *People v. Delgado*, 183 P.3d 1226, 1234 (Cal. 2008). However, the California Supreme Court has repeatedly emphasized that minute orders and abstracts of judgment are not the judgment themselves, "and cannot prevail over the court's oral pronouncement of judgment to the extent [they] conflict." *Id.*; *see also People v. Farell*, 48 P.3d 1155, 1156 n.2 (Cal. 2002); *People v. Mesa*, 535 P.2d 337, 340 (Cal. 1975). Indeed, the court has stated that "a discrepancy between the judgment as orally pronounced and as entered in the minutes is presumably the result of clerical error." *People v. Mesa, supra*, at 340. As already noted, the trial judge in this case orally pronounced that the respondent "IS IN FACT CONVICTED ON [his] PLEAS" to offenses that were defined by CAL. PENAL CODE § 288(a). The conflicting references to § 288a on the minute order and abstract of judgment are thus presumed as a matter of California law to be the result of a clerical error. The court's orally pronounced judgment is controlling here.

In conclusion, the DHS proved by clear and convincing evidence that the respondent was convicted of violating CAL. PENAL CODE § 288(a). The Immigration Judge's decision to the contrary will be vacated and the removal proceedings will be reinstated. Because the proceedings were terminated at such an early stage, however, we deem it inadvisable to attempt to resolve issues of removability and eligibility for relief for the first time on appeal. Instead, the record will be remanded for a determination whether the respondent's conviction supports the removal charges and, if so, whether the respondent qualifies for any form of relief or protection from removal.

ORDER: The appeal is sustained, the Immigration Judge's decision is vacated, the removal proceedings are reinstated, and the record is remanded for further proceedings consistent with the foregoing opinion.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
LOS ANGELES, CALIFORNIA

File: A093-233-989 January 14, 2016

In the Matter of

DANIEL SUAREZ-CORTES	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: Section 237(a)(2)(E)(i) of the Immigration and Nationality Act, as amended - in that you are an alien who at any time after entry has been convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment.

Section 237(a)(2)(A)(ii) of the Immigration and Nationality Act, as amended - in that at any time after admission you have been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct.

APPLICATIONS: Motion to terminate.

ON BEHALF OF RESPONDENT: PRO SE

ON BEHALF OF DHS: MATTHEW BENHAM, Assistant Chief Counsel

ORAL DECISION AND ORDER OF THE IMMIGRATION JUDGE

The Department of Homeland Security initiated these removal proceedings against the respondent through the filing of a Notice to Appear filed with the Court on November 6, 2015. See Exhibit 1. On this Notice to Appear the Government alleged the following. You are not a citizen or national of the United

States. You are a native of Mexico and a citizen of Mexico. Your status was adjusted to that of a lawful permanent resident on or about December 1, 1990 at or near Los Angeles, California under Section 245 of the Act. You were on or about September 20, 2007 convicted in the California Superior Court, County of Los Angeles, for three counts of oral copulation, a felony, in violation of Section 288(a) of the California Penal Code. Allegation 5 states these crimes did not arise out of a single scheme of criminal misconduct. Respondent was advised of his rights during these proceedings. Respondent chose to represent himself and proceed with removal proceedings. At that point the Court marked and admitted the Notice to Appear as Exhibit 1 and began to take pleadings from respondent. Respondent admitted to allegations 1, 2, 3, and 4 as just read above and as indicated on Exhibit 1, the Notice to Appear. Before taking a pleading as to allegation 5, the allegation which reads that these crimes did not arise out of a single scheme of criminal misconduct, the Court inquired from the Government whether the Government would be proceeding with allegation 5 as stated. At that point the Department of Homeland Security withdrew allegation 5 and that allegation 5 remains withdrawn at this time. At that point an issue was raised as to allegation 4 as it reads on the Notice to Appear at Exhibit 1. The Government Attorney indicated that the wording of allegation 4 was problematic and he wished to provide an explanation regarding the charges and removability. When it became known to the Immigration Judge that there was an actual problem with the wording of allegation 4, at that point the Court asked for the Government to file a lodged charge to amend allegation 4. The Court then reset the case from the morning calendar to the afternoon calendar on the same date and the Court also accepted documents regarding respondent's conviction and reset the case to the 1:00 p.m. calendar. At 1:00 p.m. on the same date the Government did file a lodged charge and that is marked and admitted Exhibit 1A. The

lodged charge at Exhibit 1A amends only allegation 4. The new allegation 4 reads as follows, you were on or about September 20, 2007 convicted in the California Superior Court, County of Los Angeles, for three counts of lewd or lascivious acts, a felony, in violation of Section 288(a) of the California Penal Code and that is allegation 4 as amended on Exhibit 1A. Just a note as for allegation 4 as it reads on the Notice to Appear at Exhibit 1, the portion that refers to the section of the Penal Code, and just so that it is clear for the record, the way it is listed on the Notice to Appear is 288A. No parenthesis are included and it is simply a capital A. So, 288A. The Court confirmed that respondent received a copy of the lodged charge at Exhibit 1A. The Court also inquired from respondent whether he wished to have more time in order to review the lodged charge and also the conviction documents at Exhibit 2. Respondent declined an opportunity to have additional time to review the lodged charge or any of the conviction documents at Exhibit 2. The Court again inquired from respondent whether he still wished to represent himself and proceed today and the respondent indicated that he did wish to represent himself and proceed today. The Court then reviewed the conviction documents at Exhibit 2 and also allowed the Government an opportunity to explain the discrepancies in the conviction documents for case number NA074188 in order to clarify specifically what penal code section respondent was convicted under. The Court did review the criminal information, the guilty plea, minute orders, abstract of judgment in Exhibit 2. The Court notes different parts of the conviction record for this case number indicate different things. As for the information summary, although it is clear that respondent was first charged under Penal Code 288(B)(1), there are handwritten amendments to allegations 1, 5, and 7. Portions of the charge as listed on charge one, charge five, and charge seven appear to be X'd out and a marking added. It appears that the marking that was added other than the X'd out portion to counts one, five, and

seven may be a small letter a or lower case a. The Court notes that small letter a is not in parenthesis. The Court notes that the marking that appears next to count one may not even be a small or lower case a. See page two of Exhibit 2. And that is on the information summary. Next, as to each of the counts that is listed and described starting on page four of Exhibit 2, each one of these counts refers to the original charges under Penal Code Section 288(b)(1). See pages four through 21 of Exhibit 2.

Next as to the transcript of the guilty plea starting at page 23 of Exhibit 2, at the bottom of page 24 it starts that the following, yes, Your Honor, the people have made an offer to have the defendant admit and plead guilty as opposed to no contest to count 1 which is, dash dash, and count five and count seven. Continuing at the top of page 25, the amendments to those counts would be, and this is exactly what the transcript states, 288.A charge as opposed to its current allegation of 288.B. No parenthesis are indicated and that is a capital B. The Court then states, let me find the information, so one, five, and seven would be 288.A. And the way it is written in the transcript is 288.A, no parenthesis, is that correct? And then it states little a, next line then reads, that is right.

Next the Court also notes page 31 of the transcript of the guilty plea at Exhibit 2 starting at lines nine through 14 it indicates, Mr. Suarez I am now going to ask you to the charge in count one, a violation of Penal Code Section "this is 288 point or period capital A". The Court notes for the record there are no parenthesis and that is a capital A which is the same as the charge defense except it takes out the forced arrest or menace element and the complaining witness, to that charge how do you plead. And the Court has omitted the witness's name. And the defendant responds, no contest. Further, the transcript goes on to say the agreement in this case and diagnostic, you must admit your actions and that would be a guilty plea and you do not have to, do you

wish to enter a plea as to count one? The defendant in English states yes. What is your plea to count one? Yes. Further, at the bottom of page 31 again it indicates as to count five with amendment taking out the force element as to that charge, how do you plead, the defendant, guilty. Continuing on to page 32 of Exhibit 2 the transcript of the guilty plea, lines three through seven, it states, and lastly as to count seven which is the complaining witness the same offense it is alleged except taking out the force or menace, duress, also as a felony to the violation of, and "288.A". The Court notes again no parenthesis and the A is in capital, capital A. As against her, how do you plead, the defendant in English, guilty. Further below it indicates on page 32 the Court therefore accepts the defendant's pleas of guilty and the defendant is in fact convicted on those pleas.

Next on page 36 of the transcript of the minutes, same case number, at Exhibit 2, it provides a list of counts one through six, reference all 288(B)(1), except for count two which references 288(A). And that is for counts two, three, and six. And throughout the transcript and the minutes starting at page 36 through 47 that is how the two penal code sections are referred to, as 288(B)(1), or 288(A).

Starting at page 48, however, of the minute order, for the same case number, the indication of the counts as to the penal code section is different. Count one states 288 A. There are no parenthesis and it is a capital A and it references oral copulation and that is in count one, count five, and count seven. The remaining counts, counts two, three, four, six, and eight, refer to counts 288(B)(1), and this references lewd acts with a child by force or fear. See pages 48 and 49 of the Exhibit 2.

Lastly, the Court reviews the abstract of judgment for the same case, NA074188, starting at page 57 which indicates the following, that for counts one, five, and seven the Penal Code section that is referenced is 288A, no parenthesis, and it is

clearly a capital A. Even more so, the crime that is listed is oral copulation for each one.

Given the confusion as to whether respondent was convicted under California Penal Code 288A or a for oral copulation, or whether he was convicted of 288(a) for lewd or lascivious acts with a child, the Court inquired from the Government whether the Government wished an opportunity to further clarify the issue of exactly what charge respondent was convicted under. The Government declined to further clarify other than to make additional arguments.

So, given the Government's request to proceed with the conviction documents that have been filed as Exhibit 2 and the Government's denial of an opportunity to further clarify the conviction documents in order to clarify what exactly respondent was convicted of, the Court then proceeds with a termination. It is unclear to the Court what respondent was convicted under and therefore the Court finds that the Government has failed to show by clear and convincing evidence that respondent is removable as charged.

As stated, it is not clear to the Court whether respondent was convicted of oral copulation or lewd or lascivious acts. It is unclear what penal code section respondent has been convicted under. The Court cannot sustain either charge of removability under 237(a)(2)(E)(i) or under 237(a)(2)(A)(ii) of the Immigration and Nationality Act and for these reasons the Court terminates these removal proceedings.

ORDERS

IT IS HEREBY ORDERED that these proceedings be terminated.

Please see the next page for electronic signature

ARLENE E. DORFMAN
Immigration Judge

//s//

Immigration Judge ARLENE E. DORFMAN

dorfmana on March 2, 2016 at 7:11 PM GMT