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

Spurgin, Steve
Spurgin Law Group
310 North Mesa, Suite 300
Cortez on the Plaza
El Paso, TX 79901

DHS/ICE Office of Chief Counsel - ELP
1545 Hawkins Blvd.
El Paso, TX 79925

Name: SORIA ESCOBEDO , JUAN GAB... **A 091-381-609**

Date of this notice: 12/1/2015

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:
Cole, Patricia A.
Guendelsberger, John
Geller, Joan B

Userteam: Docket

File: A091 381 609 - El Paso, TX

Date: DEC - 1 2015

In re: JUAN GABRIEL SORIA-ESCOBEDO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Steve Spurgin, Esquire

ON BEHALF OF DHS: Alla M. Taher
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony (withdrawn)

Lodged: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Removability

The respondent is a native and citizen of Mexico. This case comes to us from a remand of the United States Court of Appeals for the Fifth Circuit. The case was last before the Board on October 7, 2014, when we affirmed the Immigration Judge's March 20, 2013, determination that the respondent was removable as charged because the respondent's conviction for obstruction or retaliation under TEX. PENAL CODE § 36.06 was an aggravated felony under section 101(a)(43)(S) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(S), because the offense was one relating to obstruction of justice, perjury, or subornation of perjury, or bribery of a witness, for which the term of imprisonment was at least 1 year.

On March 10, 2015, the Fifth Circuit granted the government's unopposed motion to remand the record to the Board. In the motion, the government argued that a remand was warranted for the Board to consider what effect, if any, Texas state law has on the Board's determination that the respondent's statute of conviction categorically qualified as an offense "relating to obstruction of justice" because it included the essential element of an "affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice."

In reaching our prior conclusion we relied on our decisions in *Matter of Espinoza*, 22 I&N Dec. 889 (BIA 1999), and *Matter of Valenzuela Gallardo*, 25 I&N Dec. 838 (BIA 2012). In *Matter of Espinoza*, *supra*, we concluded that "an offense relating to obstruction of justice" as set forth in section 101(a)(43)(S) of the Act has two defining elements: (1) interference with the proceedings of a tribunal or intent to harm or retaliate against others who cooperate in the process of justice; and (2) a specific intent to interfere with the process of justice. *Id.* at 893-94.

The Fifth Circuit has deferred to this conclusion. *United States v. Gamboa-Garcia*, 620 F.3d. 546, 549 (5th Cir. 2010). In *Matter of Valenzuela Gallardo*, *supra*, we clarified that an offense is one "relating to obstruction of justice" if it includes the critical element of an affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice, irrespective of the existence of an ongoing criminal investigation or proceeding.

In our prior decision we also concluded that pursuant to *Descamps v. United States*, 133 S. Ct. 2276 (2013), TEX. PENAL CODE § 36.06 was divisible because subsections (a)(1) and (a)(2) of set forth separate, discrete offenses.[1] We determined, however, that both subsections contained the "critical element of an affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice" as contemplated by *Matter of Valenzuela Gallardo*, *supra*. We determined that the elements of subsection (a)(1) are consistent with the intent to harm or retaliate against others who cooperate in the process of justice, and the elements of subsection (a)(2) are consistent with the interference with the proceedings of a tribunal. Hence, we concluded that the respondent's conviction under TEX. PENAL CODE § 36.06 rendered him removable as an aggravated felon under section 101(a)(43)(S) of the Act.

In its motion to remand before the Fifth Circuit, the government cited Texas case law in which the court held that the plain language of TEX. PENAL CODE § 36.06 does not require the State to prove a specific intent to inhibit or influence the behavior of the public service types listed in the statute. *See Raybon v. State*, 2013 WL 4129126 (Tex. Crim. App. 2013); *Lindsey v. State*, 2011 WL 2739454 (Tex. Crim. App. 2011); *Arceneaux v. State*, 2009 WL 857624 (Tex. Crim. App. 2009). Our prior interpretation of TEX. PENAL CODE § 36.06 is at odds with Texas state law because we read into both subsections of the statute an affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice.

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[1] Section 36.06 of the Texas Penal Code provides as follows:

(a) A person commits an offense if he intentionally or knowingly harms or threatens to harm another by an unlawful act:

(1) in retaliation for or on account of the service or status of another as a:

(A) public servant, witness, prospective witness, or informant; or

(B) person who has reported or who the actor knows intends to report the occurrence of a crime; or

(2) to prevent or delay the service of another as a:

(A) public servant, witness, prospective witness, or informant; or

(B) person who has reported or who the actor knows intends to report the occurrence of a crime.

Upon further consideration, we conclude that TEX. PENAL CODE § 36.06 is not categorically an offense related to the obstruction of justice under section 101(a)(43)(S) of the Act, and thus, is not a categorical aggravated felony. In *Matter of Valenzuela Gallardo*, we concluded that accessory to a felony under CAL. PENAL CODE § 32 was an offense related to obstruction of justice. We found it critical that the statute, which we determined was analogous to accessory after the fact under 18 U.S.C. § 3, required that the offender harbor, conceal or aid a principal "with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment." *Id.* at 841-42. Thus, the statute had the element of an affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice.

In contrast, TEX. PENAL CODE 36.06(a)(1) does not have this requirement. Although subsection (a)(1) requires the State to prove that the harm or threat was intentional or knowing, and was in retaliation for the public service or public service status outlined in the statute, the statute does not require that the retaliation be made with the *specific intent* to interfere with the process of justice.

Subsection (a)(2) requires the State to prove that the intentional or knowing harm or threat was done to prevent or delay the public service or the service of one who holds a public service status outlined in the statute. We can conceive of situations in which the harm or threat is intended to delay or prevent the process of justice, such as with a witness, prospective witness, or informant. However, harming or threatening a public servant to delay or prevent the service of the public servant may or may not impact the process of justice, depending on the type of public servant. *See* TEX. PENAL CODE § 1(a)(41).[2] In any event, the statute does not require that the delay or prevention of service be done with the specific intent to interfere with the process of justice.

Hence, for these reasons we now conclude that the respondent is not removable as charged. Inasmuch as section 237(a)(2)(A)(iii) of the Act is the only charge of removability, we will terminate these removal proceedings.

Accordingly, the following orders will be entered.

ORDER: The appeal is sustained.

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[2] Pursuant to TEX. PENAL CODE § 1(a)(41), "public servant" means a person elected, selected, appointed, employed, or otherwise designated as one of the following, even if he has not yet qualified for office or assumed his duties: (A) an officer, employee, or agent of government; (B) a juror or grand juror; (C) an arbitrator, referee, or other person who is authorized by law or private written agreement to hear or determine a cause or controversy; (D) an attorney at law or notary public when participating in the performance of a governmental function; (E) a candidate for nomination or election to public office; or (F) a person who is performing a governmental function under a claim of right although he is not legally qualified to do so.

FURTHER ORDER: The respondent's removal proceedings are terminated.

FOR THE BOARD