U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: KERR, CHRISTOPHER CHARLES **A044-857-956**

Date of this notice: 12/15/2011

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.
Greer, Anne J.
Pauley, Roger

File: A044 857 956 - San Antonio, TX

Date: DEC 15 2011

In re: CHRISTOPHER CHARLES KERR

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Javier N. Maldonado, Esquire

ON BEHALF OF DHS: Warren R. Kaufman
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

APPLICATION: Termination

This case has been remanded to us twice by the United States Court of Appeals for the Fifth Circuit. The respondent's case was originally terminated by an Immigration Judge on April 27, 2007, due to insufficiency of proof that the respondent, who was convicted of false imprisonment in violation of section 787.02 of the Florida Statutes, was sentenced to more than one year of imprisonment and, therefore, that he had been convicted of an aggravated felony. *See* section 101(a)(43)(F) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(F) (referencing the definition for crime of violence in 18 U.S.C. § 16); *see also* section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii).

In a decision dated August 15, 2007, we disagreed with the Immigration Judge's decision, instead finding the evidence to be sufficient to establish that the respondent was sentenced to 21 months for his conviction and also finding that the respondent's conviction qualifies categorically as a crime of violence under 18 U.S.C. § 16(b). Therefore, we concluded that the respondent was removable for having been convicted of an aggravated felony under section 237(a)(2)(A)(iii) of the Act. Upon our remand, the Immigration Judge found the respondent ineligible for relief and ordered the respondent removed to Jamaica on August 31, 2007; we dismissed the respondent's subsequent appeal on December 10, 2007, because no new arguments had been raised on appeal.

On November 10, 2009, the Fifth Circuit vacated our determination that the respondent's conviction for false imprisonment categorically qualified as a crime of violence as defined under 18 U.S.C. § 16(b). The court found that since the statute under which the respondent was convicted included both forcible imprisonments and confinement of a child without the consent of his or her legal guardian, even if the child consents to the confinement, the false imprisonment offense was not categorically a crime of violence since it does not necessarily involve the substantial risk that

physical force may be used against the person or property of another. *Kerr v. Holder*, 352 Fed.App'x 958, 963-64 (5th Cir. 2009); 18 U.S.C. § 16(b). The court remanded proceedings to the Board for it to apply the modified categorical approach to determine whether the respondent's conviction constituted an aggravated felony after looking to certain additional documents. *See Larin-Ulloa v. Gonzales*, 462 F.3d 456, 464 (5th Cir. 2006).

In a decision dated May 26, 2010, we applied the modified categorical approach to assess the respondent's conviction; we reviewed the charging document and the judgment and found that the respondent's false imprisonment offense by its nature involved a substantial risk that physical force against another would be used and, therefore, it qualified as a crime of violence. We relied primarily on the fact that the respondent had been convicted of 3 other criminal violations occurring on the same day as the false imprisonment charge which, taken together, satisfied us that he had committed a crime of violence.

The respondent appealed to the Fifth Circuit again. On or about December 14, 2010, the Fifth Circuit granted the government's unopposed motion to remand proceedings back to the Board. The motion noted that we had incorrectly stated that the respondent had been convicted for resisting an officer *with violence*, when in fact the conviction was for resisting an officer *without violence*. In addition, the motion noted that the misdemeanor battery for which the respondent was convicted can either be violent or not; it is a divisible statute (citing *Larin-Ulloa v. Gonzales*, *supra*). Since this and our misstatement about the resisting an officer charge could affect the outcome of this case, the government asked that the case be remanded for further consideration and examination.

In addition, our prior May 26, 2010, order mistakenly indicated that, because the false imprisonment charge to which the respondent pled tracked the language of Fla. Stat. § 787.02(1)(a), and not 787.02(1)(b), the respondent was convicted under the former section (May 26, 2010, BIA Dec. at 2). As pointed out by the Fifth Circuit, *Kerr, supra*, at 963 n.4, and by both parties on appeal (DHS's Br. at 17; Respondent's Br. at 3), section 787.02(1)(b) is not a separate offense involving false imprisonment; rather, it "provides only a means of proving the 'against his or her will' element of the false imprisonment crime" for cases involving children under the age of 13.

Specifically, section 787.02(1)(a) of the Florida Statutes provides that the "term 'false imprisonment' means forcibly, by threat, or secretly confining, abducting, imprisoning, or restraining another person without lawful authority and against her or his will." Subsection (1)(b) then adds to that definition and provides that "[c]onfinement of a child under the age of 13 is against his or her will within the meaning of this section if such confinement is without the consent of her or his parent or legal guardian." Therefore, our focus should be on the respondent's conviction under section 787.02(1)(a), with reference to subsection (1)(b), as necessary.

In determining whether the respondent's violation of section 787.02(1)(a), by its nature, involved a substantial risk that physical force against a person or property may be used, as per 18 U.S.C. § 16(b), we "look to the *elements* and the *nature* of the offense of conviction, rather than to the particular facts relating to the alien's crime." *Larin-Ulloa, supra*, at 465 (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004)); *see also United States v. Chapa-Garza*, 243 F.3d 921, 924 (5th Cir. 2001). When applying the modified categorical approach, to determine whether a conviction under a divisible statute was necessarily for an offense which falls within section 16(b), we may also

examine certain documents from the record of conviction, including "'the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or . . . some comparable judicial record of this information,' . . . but we may not look to less-conclusive documents like a complaint application or a police report." *Larin-Ulloa, supra*, at 468 (quoting *Shepard v. United States*, 544 U.S. 13, 26 (2005)); *see also Omari v. Gonzales*, 419 F.3d 303 (5th Cir. 2005).

The charging document in the respondent's criminal case indicates that he did "forcibly, by threat or secretly confine, abduct, imprison, or restrain . . . [the victim] without lawful authority and against her will, contrary to F.S. 787.02." In addition, as noted in our May 26, 2010, order, the respondent was charged with and pled guilty to three other charges: carrying a concealed weapon, actually and intentionally touching or striking the victim against her will, or causing her bodily harm, and refusing the lawful order of a police officer to get off the victim (Exh. 2).

In his most recent brief, the respondent asserts that our decision to look to the other counts on which the respondent was convicted was in error because there is no precedent in the Fifth Circuit to support this approach (Respondent's Br. at 5, 18-19). Moreover, the respondent asserts that our prior reliance on *United States v. Flores-Navarro*, 267 Fed.App'x 830 (11th Cir. 2008), which we relied on because it read several charges in conjunction to determine whether false imprisonment had been done by force, was inappropriate because *Flores-Navarro* was a sentencing case where findings and conclusions are made under a lower standard than in removal proceedings and because the court in that case relied on the factual circumstances of the offense which is improper in the Fifth Circuit (Respondent's Br. at 5, 14, 20-21).

The respondent asserts that Fifth Circuit precedent emphasizes that factual allegations in the record of conviction are not relevant when applying the modified categorical approach (Respondent's Br. at 5 (citing *United States v. Andino-Ortega*, 608 F.3d 305 (5th Cir. 2010); *Perez-Munoz v. Keisler*, 507 F.3d 357 (5th Cir. 2008); *Larin-Ulloa v. Gonzales*, *supra*; *Omari v. Ashcroft*, *supra*); *see also* Respondent's Br. at 18-19). According to the respondent, we previously erred in lumping all of charges together to "reconstruct" what occurred on the day he falsely imprisoned the victim because the fact that all of the offenses – false imprisonment, battery, carrying a concealed weapon, and resisting a police officer – occurred on the same day is not clear and convincing evidence that the offenses occurred at the same time or during the commission of the false imprisonment offense (Respondent's Br. at 19). "And, the fact that the Respondent pleaded guilty to these offenses does not preclude, by clear and convincing evidence, that he was still convicted of *only secretly confining* a person or confining a minor" (Respondent's Br. at 19). Furthermore, the respondent argues that our reliance on the respondent's battery conviction to "bootstrap" an element of force into his false imprisonment conviction is inappropriate because Florida's battery statute, Fla. Stat. § 784.03, has been found to be divisible and may not necessarily involve the use of force (Respondent's Br. at 5-6 (citing *Johnson v. United States*, 130 S. Ct. 1265, 1269 (2010)); *see also* Respondent's Br. at 21-23). Even if the respondent had used force in committing a battery, he argues that this would not rule out that he has falsely imprisoned someone in secret or someone who is a minor and, therefore, his false imprisonment conviction would not constitute a crime of violence (Respondent's Br. at 6, 15, 23-24).

We are persuaded by the respondent's arguments that our prior decision does not conform with Fifth Circuit precedent and that it was not appropriate for us to consider the other counts of which

the respondent was convicted in order to find that his false imprisonment conviction involved the substantial risk of force against another person. Since the record of conviction here does not indicate which part of the false imprisonment statute formed the basis for the respondent's conviction and we cannot discern whether the imprisonment was by force or in secret or whether it involved a child, we cannot find clear and convincing evidence that the respondent is removable as charged for having been convicted of a crime of violence. *See, e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (noting the "longstanding principle of construing any lingering ambiguities in deportation proceedings in favor of the alien"). Accordingly, the proceedings will be terminated.

ORDER: The proceedings are terminated.

FOR THE BOARD

Board Member Roger A. Pauley respectfully dissents without opinion.