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

Bonnie M. Youn, Esq.
youn Law Group
4720 Peachtree Industrial Blvd.
Suite 4201
Norcross, GA 30071

DHS/ICE Office of Chief Counsel - ATL
180 Ted Turner Dr., SW, Ste 332
Atlanta, GA 30303

Name: ODIBOH, BLESSING TINA

A 047-117-911

Date of this notice: 1/11/2018

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

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
O'Connor, Blair
Wendtland, Linda S.
Pauley, Roger

Userteam: Docket

File: A047 117 911 – Atlanta, GA

Date: JAN 11 2018

In re: Blessing Tina ODIBOH a.k.a. Tina Blessing Odiboh

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se[1]

ON BEHALF OF DHS: Gene P. Hamilton
Assistant Chief Counsel

APPLICATION: Termination

The Department of Homeland Security ("DHS") appeals from the Immigration Judge's December 16, 2013, decision terminating the respondent's removal proceedings. The respondent has filed a brief in opposition to the appeal. The appeal will be dismissed.

We review findings of fact for clear error, including any credibility findings. *See* 8 C.F.R. § 1003.1(d)(3)(i) (2017); *see also Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review questions of law, discretion, or judgment, and all other issues de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent is a native and citizen of Nigeria and lawful permanent resident of the United States (Exh. 1). The DHS charged the respondent as being removable as an alien convicted of two or more crimes involving moral turpitude and an aggravated felony theft offense (Exhs. 1, 8). *See* sections 237(a)(2)(A)(ii), 237(a)(2)(A)(iii), and 101(a)(43)(G) of the Immigration and Nationality Act, 8 U.S.C. §§ 1227(a)(2)(A)(ii), 1227(a)(2)(A)(iii), and 1101(a)(43)(G) (2012). As relevant to this appeal, these charges stem from the respondent's Georgia conviction for theft by taking in violation of section 16-8-2 of the Official Georgia Code (Exhs. 1, 3, 8).[2] The Immigration Judge terminated the removal proceedings, finding that the respondent's Ga. Code. Ann. § 16-8-2 conviction was not for a crime involving moral turpitude and not an aggravated felony because she was not sentenced to a term of imprisonment of at least 1 year (IJ at 2-3; Tr. at 36-37, 74-76). Upon de novo review, we will affirm the Immigration Judge's determinations.

[1] At the time this appeal was filed and during briefing, the respondent was represented by attorney Bonnie M. Youn. Since Ms. Youn has been suspended from practice before the Board and the Immigration Judges, she is not permitted to practice before the Board at this time. This decision will be sent directly to the respondent and only a copy is being sent to Ms. Youn.

[2] The respondent also sustained a conviction for battery-family violence, which she does not dispute is a crime involving moral turpitude (IJ at 1; Tr. at 46-47; Exh. 1).

As an initial matter, we are unpersuaded by the DHS's argument that the categorical and modified categorical approaches are inapplicable when determining whether a conviction falls within the confines of a crime involving moral turpitude (DHS Br. at 9-26). This argument is foreclosed by precedent of the United States Court of Appeals for the Eleventh Circuit, in whose jurisdiction this case arises, which holds that these approaches are fully applicable in this context. *See Fajardo v. U.S. Att'y Gen.*, 659 F.3d 1303, 1305 (11th Cir. 2011).

Furthermore, in *Matter of Silva-Trevino III*, 26 I&N Dec. 826 (BIA 2016), we concluded that the categorical and modified categorical approaches provide the proper framework for determining whether a conviction is for a crime involving moral turpitude. *Id.* at 830-31. We further held that, unless controlling case law of the governing Federal court of appeals expressly dictates otherwise, the realistic probability test, which focuses on the minimum conduct that has a realistic probability of being prosecuted under the statute of conviction, should be applied in determining whether an offense is a categorical crime involving moral turpitude. *See id.* at 831-33; *see also Walker v. U.S. Att'y Gen.*, 783 F.3d 1226, 1229 (11th Cir. 2015) (adopting the categorical approach, but not expressly addressing the realistic probability test).

Section 16-8-2 of the Official Georgia Code makes it a crime to "unlawfully take[] or, being in lawful possession thereof, unlawfully appropriate[] any property of another with the intention of depriving him of the property, regardless of the manner in which the property is taken or appropriated." The Official Georgia Code in turn defines "deprive" as "[t]o withhold property of another permanently or temporarily" or "[t]o dispose of the property so as to make it unlikely that the owner will recover it." Ga. Code Ann. § 16-8-1(1).

We have revisited our adoption of the requirement that there must be an "intent to permanently deprive" in order for a theft offense to involve moral turpitude. *See Matter of Diaz-Lizarraga*, 26 I&N Dec. 847 (BIA 2016). In *Matter of Diaz-Lizarraga*, we held that a theft offense is a crime involving moral turpitude if it involves a taking or exercise of control over another's property without consent and with an intent to deprive the owner of his property either permanently or under circumstances where the owner's property rights are substantially eroded.[3] *Id.* at 851-55. In so doing, we noted that when evaluating whether a theft offense involves moral turpitude, "it is appropriate to distinguish between substantial and de minimis takings." *Id.* at 851. However, the Georgia statute does not include as a required element that the "theft" occur under circumstances where the owner's property rights are substantially eroded, but rather includes temporary de minimis takings. *See* Ga. Code Ann. §§ 16-8-1, 16-8-2; *see also Smith v. State*, 323 S.E.2d 257 (Ga. Ct. App. 1984) (holding that a conviction under Ga. Code Ann. § 16-8-2 would be proper where the defendant intended to use a battery to get a car started); *Williams v. State*, 707 S.E. 2d

[3] We are not persuaded by the DHS's argument that all theft offenses involve moral turpitude (DHS Br. at 26-38). There is no question, as the DHS properly points out, that a number of states, and even some provisions of Federal law, punish the act of taking or appropriating property where the intent to deprive is less than total or permanent (DHS Br. at 30-32). "That only explains, however, why we choose to criminalize [theft] in the first place. It says nothing about whether [taking of property under circumstances where the owner's property rights are substantially eroded] is worse than any other crimes" or whether such conduct is morally turpitudinous in its nature. *Robles-Urrea v. Holder*, 678 F.3d 702, 710 (9th Cir. 2012).

532 (Ga. Ct. App. 2011) (sustaining a conviction where the defendant drove a car without permission around the block). Thus, the offense of theft by taking under Georgia law is categorically broader than a generic crime involving moral turpitude.

As the statute of conviction includes some crimes that involve moral turpitude and some that do not, the respondent's Ga. Code Ann. § 16-8-2 conviction is not for an offense under section 237(a)(2)(A)(ii) of the Act unless the statute is "divisible," such that the modified categorical approach can be applied. *See Descamps v. United States*, 133 S. Ct. 2276, 2282 (2013). In removal proceedings, we evaluate the divisibility of criminal statutes by employing the standards set forth in *Mathis v. United States*, 136 S. Ct. 2243 (2016), in which the Supreme Court further explained the "divisibility" analysis in *Descamps*. *See Matter of Chairez*, 26 I&N Dec. 819 (BIA 2016).

Under *Mathis*, the divisibility of a statute depends on whether the statutory alternatives are discrete "elements" as opposed to "means" of committing an offense. *Mathis v. United States*, 136 S. Ct. at 2256. The elements of a crime are those "constituent parts" of a crime's legal definition—the things that the "prosecution must prove to sustain a conviction." *Id.* at 2248; *see also United States v. Estrella*, 758 F.3d 1239, 1246 (11th Cir. 2014) ("[W]e should ask ourselves the following question when confronted with a statute that purports to list elements in the alternative: If a defendant charged with violating the statute went to trial, would the jurors typically be required to agree that their decision to convict is based on one of the alternative elements?"). Thus, the divisibility of Ga. Code Ann. § 16-8-2 depends upon whether the taking being temporary or permanent (or substantially eroding an owner's property rights) is an "element" of the offense or merely a "brute fact" about which the jury can disagree while still rendering a guilty verdict. *See Mathis v. United States*, 136 S. Ct. at 2248, 2256. The DHS, however, has identified no authority, nor have we found any, supporting the conclusion that temporary takings or permanent takings are alternative elements of "theft by taking" about which Georgia jurors must agree in order to convict. *See, e.g.*, *Chastain v. State*, 535 S.E.2d 25, 27 (Ga. Ct. App. 2000) ("Once criminal intent at the time of taking is proven, it becomes irrelevant whether the deprivation is permanent or temporary.").

In light of the foregoing, we conclude that the respondent's conviction under Ga. Code Ann. § 16-8-2 is not categorically a crime involving moral turpitude. We also conclude that the statute is not divisible, and thus, the modified categorical approach does not apply. Therefore, the Immigration Judge properly determined that the section 237(a)(2)(A)(ii) charge could not be sustained.

The DHS also argues on appeal that the Immigration Judge erred by not sustaining the aggravated felony theft offense charge of removability (DHS Br. at 41-47; Tr. at 36-37). *See* sections 237(a)(2)(A)(iii) and 101(a)(43)(G) of the Act. However, during the pendency of this appeal, the Eleventh Circuit held that theft by taking under the Ga. Code Ann. § 16-8-2 is not an aggravated felony theft offense. *Vassell v. U.S. Att'y Gen.*, 839 F.3d 1352 (11th Cir. 2016). Thus, we will affirm the Immigration Judge's determination that the respondent's theft by taking conviction cannot serve as a predicate for her removal under section 237(a)(2)(A)(iii) of the Act.

As neither charge of removability can be sustained, the Immigration Judge appropriately terminated proceedings. *See Matter of Sanchez-Herbert*, 26 I&N Dec. 43, 44 (BIA 2012). Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
ATLANTA, GEORGIA

File: A047-117-911 December 16, 2013

In the Matter of:

BLESSING TINA ODIBOH,	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGE: Section 237(a)(2)(a)(ii) of the Immigration and Nationality Act

APPLICATION: Motion to terminate

ON BEHALF OF RESPONDENT: Bonnie Youn, Esq.
4720 Peachtree Industrial Boulevard
4201 Norcross, Georgia 30071

ON BEHALF OF DHS: Randall Duncan
Assistant chief counsel
Department of Homeland Security

ORAL DECISION OF THE IMMIGRATION JUDGE

This case came before the court as a result of the notice to appear issued by the Department of Homeland Security. As amended, the notice to appear alleges that the respondent is removable for having been convicted of two crimes involving moral turpitude.

The first crime involving moral turpitude is not an issue of dispute today. The issue involves respondent's second conviction, which occurred in July of 2013.

The conviction was pursuant to Section 16-8-2 of OCGA, which is the Georgia Criminal Code. The respondent initially conceded that the conviction for theft by taking under OCGA 16-8-2 is a crime involving moral turpitude. However, as prior to the court's hearing of this case on the merits, the Board issued an unpublished decision that addressed specifically the particular statutory provision under which the respondent was convicted. The Board's decision is unpublished, is not precedential. However, the court has reviewed that decision -- that's in the record at Exhibit #13, at Tab 13 -- and finds that the respondent's conviction is not a crime involving moral turpitude.

And the court incorporates by reference a relevant provision in the unpublished decision as if it were the analysis of the court. [indiscernible], the court's nonbinding decision indicates that in order for a conviction to be subject to the modified categorical approach, the underlying statute cannot be one that contains combined charges in one statutory provision. In other words, for the modified categorical approach to apply, the underlying statutory provision must contain a separate and divisible set of elements. Whereas here, the -- there is one single divisible set of elements, the modified categorical approach cannot apply. The Board found that in the case of OCGA 16-8-2, the statute does not lend itself to the application of the modified categorical approach. And, the Board found that the conviction is not a crime involving moral turpitude, because the least culpable conduct was, in fact, not a morally turpitudious [phonetic] offense.

The court agrees with the analysis set forth by the panel of the Board and adopts it as though the Board's analysis were the court's own. In light of that, the court finds that the respondent's conviction in July of 2013, as modified, is not a crime involving moral turpitude. Because of this, the government cannot show that the

respondent was convicted of two crimes involving moral turpitude. The court will, therefore, terminate proceedings and not sustain the charges.

The court will enter the following order:

of that, the court finds that the respondent's conviction in July of 2013, as modified, is not a crime involving moral turpitude. Because of this, the government cannot show that the respondent was convicted of two crimes involving moral turpitude. The court will, therefore, terminate proceedings and not sustain the charges.

The court will enter the following order:

ORDER

IT IS HEREBY ORDERED the proceedings against the respondent be terminated.

Please see the next page for electronic signature

EARLE B WILSON
Immigration Judge

//s//

Immigration Judge EARLE B WILSON

wilsone on March 5, 2014 at 12:44 PM GMT