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 20530

SAINZ-RIVERA, RAUL
145971/A091-684-104
PINAL COUNTY JAIL
P.O. BOX 2610
FLORENCE, AZ 85132

DHS/ICE Office of Chief Counsel - FLO
P.O. Box 25158
Phoenix, AZ 85002

Name: SAINZ-RIVERA, RAUL

A 091-684-104

Date of this notice: 3/10/2014

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
Greer, Anne J.
Pauley, Roger

lucasd
Userteam: Docket

File: A091 684 104 – Florence, AZ Date: MAR 10 2014

In re: RAUL SAINZ-RIVERA a.k.a. Jesus Urbieta a.k.a. Manuel Sainz

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled (withdrawn)

Lodged: 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

APPLICATION: Termination

The respondent appeals from an Immigration Judge's October 7, 2013, decision finding him removable from the United States as an alien convicted of two crimes involving moral turpitude not arising from a single scheme of criminal misconduct. Section 237(a)(2)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(ii). The appeal will be sustained and the record will be remanded.

The respondent, a native and citizen of Mexico, has twice been convicted of violating Ariz. Rev. Stat. § 28-1383(A)(1), which prohibits any person from "driving" or exercising "actual physical control" over a motor vehicle while under the influence of intoxicating liquor or drugs if the person knows that his driver license or privilege to drive is suspended, canceled, revoked, refused or restricted. The issue on appeal is whether the Department of Homeland Security ("DHS") has proven by clear and convincing evidence that these offenses qualify as crimes involving moral turpitude ("CIMT") for removal purposes. Upon de novo review, *see* 8 C.F.R. § 1003.1(d)(3)(ii), we conclude that the DHS has not carried that burden.

The United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this matter arises, has concluded that Ariz. Rev. Stat. § 28-1383(A)(1) encompasses some conduct that is morally turpitudinous and other conduct that is not. *Compare Marmolejo-Campos v. Holder*, 558 F.3d 903, 914-17 (9th Cir. 2009) (en banc) (deferring to *Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999), in which this Board found that moral turpitude inheres in the act of "driving" under the influence of alcohol or drugs with knowledge that one's driving privileges have been revoked), *with Hernandez-Martinez v. Ashcroft*, 329 F.3d 1117, 1118-1119 (9th Cir. 2003) (holding that moral turpitude does *not* inhere in the act of exercising "actual physical control" over a vehicle while intoxicated, even if the accused knew his driving privileges had been suspended).

As Ariz. Rev. Stat. § 28-1383(A)(1) encompasses both turpitudinous and non-turpitudinous conduct, the Ninth Circuit has treated it as a "divisible" statute vis-à-vis the CIMT concept, authorizing Immigration Judges to consult aliens' conviction records under the "modified categorical approach" to determine whether the particular alien before the court was convicted of "driving" rather than merely exercising "actual physical control." *See Marmolejo-Campos v. Holder, supra*, at 913 & n. 12. The Immigration Judge conducted such a modified categorical inquiry here and found that the respondent's guilty pleas were to "driving" while intoxicated (I.J. at 2-4).

During the pendency of these removal proceedings, however, the Supreme Court decided *Descamps v. United States*, 133 S. Ct. 2276 (2013), which embraced a conception of "divisibility" that appears substantially narrower than that embodied in *Marmolejo-Campos*. The *Descamps* Court held that a criminal statute is divisible, so as to warrant a modified categorical inquiry, only if: (1) it lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of "elements," more than one combination of which could support a conviction; and (2) at least one (but not all) of those listed offenses or combinations of disjunctive elements is a categorical match to the relevant generic standard. *Id.* at 2281, 2283. In other words, the modified categorical approach does not apply merely because the elements of a crime can sometimes be proved by reference to *conduct* that fits the generic federal standard; under *Descamps*, such crimes are merely "overbroad," they are not "divisible." *Id.* at 2285-86, 2290-92.

The Ninth Circuit has determined that the categorical approach applies in removal cases involving CIMT convictions, *see Olivas-Motta v. Holder*, 716 F.3d 1199 (9th Cir. 2013), and has also concluded that the approach to divisibility announced in *Descamps* applies in the immigration context. *See Aguilar-Turcios v. Holder*, 740 F.3d 1294, 1301-02 (9th Cir. 2014). Accordingly, our present task is to decide whether Ariz. Rev. Stat. § 28-1383(A)(1) remains "divisible" for CIMT purposes within the meaning of *Descamps*.

In light of *Descamps*, Ariz. Rev. Stat. § 28-1383(A)(1) can be considered "divisible" into discrete offenses requiring "driving" and "actual physical control" only if Arizona law defines "driving" and "actual physical control" as alternative "elements" of the offense. Under *Descamps*, the term "element" means a fact about a crime which "[t]he Sixth Amendment contemplates that a jury—not a sentencing court—will find …, unanimously and beyond a reasonable doubt." *Id.* at 2288 (citing *Richardson v. United States*, 526 U.S. 813, 817 (1999)). Thus, if Arizona law does not require both proof beyond a reasonable doubt and jury unanimity as to whether a defendant charged under Ariz. Rev. Stat. § 28-1383(A)(1) was "driving" or exercising "actual physical control" over the vehicle, it necessarily follows that "driving" and "actual physical control" are not alternative "elements" for divisibility purposes, but rather mere alternative "means" by which a defendant can commit aggravated DUI. *See Schad v. Arizona*, 501 U.S. 624, 636 (1991) (plurality opinion) ("[L]egislatures frequently enumerate alternative means of committing a crime without intending to define separate elements or separate crimes.").

The Arizona Supreme Court has held that the State's constitutional requirement of jury unanimity, *see* Ariz. Const., Art. II, § 23, does not entitle a defendant "to a unanimous verdict on the precise manner in which the [criminal] act was committed"). *See State v. Encinas*, 647 P.2d 624, 627 (Ariz. 1982) (citation omitted). Applying that principle to Arizona's DUI statutes, the

Arizona Court of Appeals has squarely determined that a jury need not be unanimous as to whether a defendant was "driving" under the influence or merely in "actual physical control" of a vehicle while under the influence. *State v. Rivera*, 83 P.3d 69, 72-73 (Ariz. Ct. App. 2004). According to the *Rivera* court, "driving" and being in "actual physical control" are merely "two ways of committing a single offense" rather than "two offenses." *Id.* at 73 (citing *Schad v. Arizona, supra*).

State v. Rivera establishes that "driving" and "actual physical control" are not alternative "elements" of the offense defined by Ariz. Rev. Stat. § 28-1383(A)(1) within the meaning of *Descamps*. Accordingly, the distinction between "driving" and "actual physical control" does not render that statute divisible. As the offense defined by Ariz. Rev. Stat. § 28-1383(A)(1) is neither a categorical CIMT nor divisible vis-à-vis the CIMT concept, it follows that the respondent's convictions do not render him removable under section 237(a)(2)(A)(ii) of the Act. Therefore, that removal charge will be dismissed and the record will be remanded to the Immigration Court for further proceedings—including the lodging of substituted removal charges, if appropriate—and for the entry of such further orders as the Immigration Judge deems proper.

ORDER: The respondent's appeal is sustained and the record is remanded for further proceedings consistent with the foregoing opinion and for entry of a new decision.

FOR THE BOARD

IMMIGRATION COURT
3260 NORTH PINAL PARKWAY
FLORENCE, AZ 85132

In the Matter of

Case No.: A091-684-104

SAINZ-RIVERA, RAUL
Respondent

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on 10.07.13.
This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[*] The respondent was ordered removed from the United States to Mexico or in the alternative to .

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to or in the alternative to .

[ ] Respondent's application for voluntary departure was granted until upon posting a bond in the amount of $ _____ with an alternate order of removal to .

Respondent's application for:

[ ] Asylum was ( )granted ( )denied( )withdrawn.

[ ] Withholding of removal was ( )granted ( )denied ( )withdrawn.

[ ] A Waiver under Section _____ was ( )granted ( )denied ( )withdrawn.

[ ] Cancellation of removal under section 240A(a) was ( )granted ( )denied ( )withdrawn.

Respondent's application for:

[ ] Cancellation under section 240A(b)(1) was ( ) granted ( ) denied ( ) withdrawn. If granted, it is ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Cancellation under section 240A(b) (2) was ( )granted ( )denied ( )withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Adjustment of Status under Section ____ was ( )granted ( )denied ( )withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Respondent's application of ( ) withholding of removal ( ) deferral of removal under Article III of the Convention Against Torture was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a _____ until _____.

[ ] As a condition of admission, respondent is to post a $ _____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[ ] Other: _____.

Date: Oct 7, 2013

Silvia R. Arellano

SILVIA R. ARELLANO
Immigration Judge

Appeal: Waived/Reserved Appeal Due By: 11.06.13

Both

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
FLORENCE, ARIZONA

File: A091-684-104 October 7, 2013

In the Matter of

RAUL SAINZ-RIVERA	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES:

APPLICATIONS:

ON BEHALF OF RESPONDENT: PRO SE

ON BEHALF OF DHS: PAUL M. HABICH

ORAL DECISION OF THE IMMIGRATION JUDGE

The procedural history of this case is not in dispute. It is fully set out in the oral decision of the Immigration Judge dated April 18, 2013 which is by this reference incorporated herein. The Board of Immigration Appeals remanded this matter to the Court by order dated August 30, 2013 wherein this Court was instructed to consider and fully set forth on the record its findings and analysis on the issue of whether respondent's two aggravated driving under the influence of intoxicating liquor or drug convictions under ARS 281383(a)(1) are crimes involving moral turpitude utilizing the modified categorical approach. The Court notes that Arizona's aggravated DUI statute

(ARS 281383) is divisible and pursuant to Olivas Motta (2013 9th Circuit) and the United States Supreme Court case Descamps v. U.S., I do not have a complete citation but it was decided on June 20, 2013, the Court will refer only to the cognizable record of conviction in making its determination as to whether respondent's convictions are CIMTs under the modified categorical approach. Exhibits 1 through 4 have been previously admitted into the record and identified and the only additional exhibit which the Court will mark and accept into evidence is Exhibit 5 which is a BIA record on remand. The Court notes that its CIMT analysis was in fact fully set forth on the record at the conclusion of the February 21, 2013 evidentiary hearing. Nonetheless, the Court will proceed as directed by the BIA and once again set forth its analysis and findings.

As to allegations 7 and 8, the Court finds that Exhibit 4 which was admitted into evidence on February 5, 2013 establishes at tab B that in criminal case number 2006005604-001DT in the Maricopa County Superior Court on March 7, 2011 the respondent was convicted of the crime of aggravated driving or actual physical control while under the influence of intoxicating liquor or drugs in violation of ARS 281381A1 et. seq., a class 4 felony committed on April 18, 2003. The change of plea transcript generally referred to as the plea colloquy is set forth in Exhibit 4, tab B, and reads as follows. The Court addresses respondent's criminal counsel and asks that the factual basis be provided. Respondent's criminal counsel responds "in the 2006 case of April 18, 2013 here in Maricopa County my client was operating a motor vehicle while his ability to do so was impaired at least to the slightest degree by alcohol. The police stopped him for a traffic violation and a DUI investigation ensued. It revealed a blood alcohol concentration of a .216. Also during that time he didn't have a valid driver's license because it was suspended, revoked, cancelled, or refuted and he was aware of the status of his driver's license." The Criminal Court then inquires as to the respondent

as follows: "Sir, you heard what your lawyer said. Is that what you did on April 18, 2003?" The respondent responds "yes". Based upon the change of plea colloquy and the evidence herein, the Court finds that on April 18, 2003 respondent drove an automobile while intoxicated to the slightest degree and he knew at that time that his driver's license was suspended, revoked, or refuted. The Court finds these facts sufficient to sustain a finding of the requisite CIMT scienter and accordingly the Court affirms its prior decision sustaining allegations 7 and 8.

As to allegations 9 and 10, the Court finds as follows. Pursuant to Exhibit 4 at tab C the Court finds that in criminal case number 2011005570-001DT in the Maricopa County Superior Court on March 7, 2011 pursuant to the sentencing minute entry on that same date the respondent was convicted of the crime of aggravated driving or actual physical control while under the influence of intoxicating liquor or drugs in violation of ARS 28-1381(A)(1) et. seq., a class 4 felony. The offense was committed on October 30, 2011. The Criminal Court sentencing minute entry further establishes that respondent was sentenced to four months imprisonment, five years probation, and was ordered to pay various fines. The change of plea transcript which appears at Exhibit 4, tab D, page 5, which is generally referred to the plea colloquy, set forth the fact basis for the offense as follows: the Criminal Court to respondent's counsel, "Next factual basis." The respondent's criminal counsel responds as follows: "In the 2011 case on October 30th of 2010 my client was operating a motor vehicle while his ability to do so was impaired by alcohol to the slightest degree. He had a breath alcohol concentration of a .213 within two hours of driving. Also, his driver's license was suspended, revoked, cancelled, or refuted and he was aware of the status of his license. " The Court to respondent: "Sir, you heard what your lawyer said, is that what you did on October 30th of 2010?" Respondent responds: "yes." Based upon the

change of plea colloquy and the evidence herein, the Court finds that on October 30, 2010 the respondent was intoxicated to the slightest degree and at that time he knew his driver's license was suspended, revoked, cancelled, or refuted. The Court finds these facts sufficient to sustain the CIMT scienter requirement. Accordingly, the Court affirms its prior ordering sustaining allegations 9 and 10.

As to allegation 11, as previously and more fully set forth herein the Court finds that respondent's two aggravated DUI offenses were committed on April 18, 2003 and October 30, 2010 respectively. Accordingly, the Court finds that the offenses did not rise out of a single scheme of criminal misconduct. The Court affirms its prior order sustaining allegation 10.

As to the charge at issue, the Court finds that based on its prior findings set forth herein respondent has been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct. Accordingly, the 237(a)(2)(A)(i) charge which was previously sustained is again sustained. The Court finds upon these facts that respondent is not eligible for cancellation of removal for certain non-permanent residents and respondent is not eligible for any other forms of relief as previously set forth herein. Accordingly, the Court affirms its prior order of removal dated April 18, 2013 and no current removal order will be entered simply because this is a BIA remand and no additional order of removal is necessary.

SILVIA R. ARELLANO
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE SILVIA R. ARELLANO, in the matter of:

RAUL SAINZ-RIVERA

A091-684-104

FLORENCE, ARIZONA

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

EVALENA E. CLARK (Transcriber)

DEPOSITION SERVICES, Inc.-2

DECEMBER 14, 2013

(Completion Date)