U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: SANCHEZ-ESQUIVEL, RUBEN D... **A 035-727-884**

Date of this notice: 7/19/2013

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:
Pauley, Roger

williame
Userteam: Docket

File: A035 727 884 – Tucson, AZ

Date: JUL 19 2013

In re: RUBEN DARIO SANCHEZ ESQUIVEL a.k.a. Ruben Dario Sanchez

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jose A. Bracamonte, Esquire

ON BEHALF OF DHS: Matthew W. Kaufman
Senior Attorney

CHARGE:

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

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 Department of Homeland Security ("DHS") appeals from an Immigration Judge's November 29, 2011, decision terminating the removal proceedings. The appeal will be dismissed.

The respondent, a native and citizen of Panama and a lawful permanent resident of the United States, has sustained two Arizona convictions for aggravated driving under the influence of liquor or drugs ("DUI"). *See* AZ. REV. STAT. § 28-1383(A)(1). The question on appeal is whether the DHS has carried its burden to prove that these convictions render the respondent removable from the United States as an alien convicted of two crimes involving moral turpitude. Section 237(a)(2)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(ii). Like the Immigration Judge, we answer that question in the negative.

It is undisputed that the offense defined by AZ. REV. STAT. § 28-1383(A)(1) is not a categorical crime involving moral turpitude. *Hernandez-Martinez v. Ashcroft*, 329 F.3d 1117 (9th Cir. 2003). Furthermore, the DHS acknowledges on appeal that consideration of the respondent's conviction record does not resolve the moral turpitude question. However, the DHS argues that the Immigration Judge erred because he declined to consider the factual circumstances surrounding the respondent's offenses pursuant to the "third step" of the analytical framework described in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008). That argument is foreclosed by *Olivas-Motta v. Holder*, 716 F.3d 1199 (9th Cir. 2013), which invalidated the third step of *Silva-Trevino* in Ninth Circuit cases and held that evidence outside the record of conviction could not be used to determine whether an alien had been "convicted of" a crime involving moral turpitude.

In light of the foregoing, we conclude that the DHS has not carried its burden of proving that the respondent is removable pursuant to section 237(a)(2)(A)(ii) of the Act. No other removal charges are currently pending against the respondent,[1] moreover, and therefore the proceedings were properly terminated.

ORDER: The appeal is dismissed and the removal proceedings are terminated.

FOR THE BOARD

[1] The DHS initially charged the respondent with removability under section 237(a)(2)(A)(iii) of the Act, but the Immigration Judge dismissed that charge. The DHS does not presently challenge that aspect of the Immigration Judge's decision.

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

File: A035-727-884 November 29, 2011

In the Matter of

RUBEN DARIO SANCHEZ-ESQUIVEL	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (Act): alien at any time after admission has been convicted of an aggravated felony as defined in Section 101(a)(43)(F) of the Act, crime of violence (as defined in Section 16 of Title 18, United States Code, but not including a purely political offense) for which a term of imprisonment ordered is at least one year; Section 237(a)(2)(A)(ii) of the Immigration and Nationality Act, that any time after admission respondent has been convicted of two crimes involving moral turpitude which did not arise from a single scheme of criminal misconduct.

APPLICATIONS: Motion to terminate.

ON BEHALF OF RESPONDENT: JOSE A. BRACAMONTE

ON BEHALF OF DHS: MATTHEW KAUFMAN

ORAL DECISION OF THE IMMIGRATION JUDGE

Respondent appears to be an adult male alien, native and citizen of Panama who was placed into removal proceedings by the issuance of a Notice to Appear dated March 22, 2001. That document was served upon respondent on March 26, 2001 and has been admitted into the record of proceedings as Exhibit 1.

The Government has had cause to introduce an additional charging document, a form I-261 which makes further allegations and lodges an additional charge. That document is dated November 6, 2001 and was served on the respondent on November 6, 2001.

The respondent, who is a citizen or national of Panama, was admitted as a lawful permanent resident of the United States on April 20, 1979. Thereafter, on January 11, 1999, the respondent was convicted of aggravated driving or being in actual physical control of a vehicle while under the influence of intoxicating liquor or drugs ("aggravated DUI"), in violation of Arizona Revised Statute Sections 28-1383(a)(1) and was sentenced to a term of imprisonment of six years.

As a result of that conviction, the former Immigration and Naturalization Service, on March 22, 2001 issued a Notice to Appear charging the respondent with removability under Section 237(a)(2)(A)(iii) of the Act, in that, at any time after admission, he was convicted of an aggravated felony pursuant to Section 101(a)(43)(F) - a crime of violence.

Following the issuance of the NTA, the INS then

charged the respondent with an additional ground of removability under Section 237(a)(2)(A)(ii), in that at any time after admission, he was convicted of two or more crimes involving moral turpitude which did not arise from a single scheme of criminal misconduct.

As the Board discharged the INS and pointed to a May 30, 1999 conviction for "aggravated DUI", again in violation of Arizona Revised Statute Section 28-1383(a)(1). For this conviction, respondent received a sentence of a term of imprisonment for 10 years.

On December 18, 2001, a prior Immigration Judge dismissed the charge of removability under Section 237(a)(2)(A)(iii) of the Act, aggravated felony - crime of violence, but sustained the charge under Section 237(a)(2)(A)(ii), two or more crimes involving moral turpitude not arising out of a single scheme of criminal misconduct.

This Order, in conjunction with subsequent precedent issued by both the Board of Immigration Appeals (the "BIA") and the Ninth Circuit, caused a litany of appellate adjudication in respondent's case.

Ultimately the respondent, who was moving to have his case reconsidered in light of the Ninth Circuit's decision in Hernandez-Martinez vs. Ashcroft, 329 F.3d 1117 (9th Cir. 2003), prevailed, resulting in the present remand. Thus, the determinative issue is whether respondent's two aggravated DUI

convictions constitute crimes involving moral turpitude under Hernandez-Martinez, supra, thus rendering removal under Section 237(a)(2)(A)(ii) of the Act.

ANALYSIS

The respondent's statute of conviction, in pertinent part, provides that: [a] person is guilty of aggravated of driving or actual physical control while under the influence of intoxicating liquor or drugs if the person commits a simple DUI offense while the person's driver's license or privilege to drive is suspended, cancelled, revoked, or refused, or while a restriction is placed on the person's driver's license or privileges as a result of a prior DUI offense or offenses.

ARIZONA REVISED STATUTE SECTION 28-1383(a)(1)

To properly define the parameters of the present discussion it is necessary to examine the history of litigation leading up to Hernandez-Martinez, supra. First, in Lopez-Mesa, the Board of Immigration Appeals held that the offense described under Arizona Revised Statute Section 28-1383(a)(1), aggravated DUI, was categorically a crime involving moral turpitude. See Lopez-Mesa, 22 I&N Dec. 1196-97.

Unlike a simple DUI offense, which requires proof of nothing more than the act of driving while intoxicated, the offense described under Section 28-1383(a)(1) requires an act "aggraving factor" that enhances the crime to the level of malum in se: proof that the driver committed a DUI offense while he

had knowledge that his license was either suspended, cancelled, revoked, or refused because of a required DUI offense. See Id. at 1194-96; See also State v. Williams, 698 P.2d 732 at 734 (Arizona 1985) (holding that there is or implies mens rea element of "knowing" to sustain a conviction under Section 28-1383(a)(1)). Thus, while simple DUI does not rise to the level of conduct involving moral turpitude, the aggravated offense under Section 28-1383(a)(1) does. U.

Following that in Torres-Varela, the Board of Immigration Appeals said that an offense committed under a parallel provision of Arizona Revised Statute 28-1383 was not "crime involving moral turpitude." Torres-Varela, 23 I&N Dec. 86, sub-section A2.

Sub-section A2, which was at issue in Torres-Varela, supra, makes it an aggravated offense based upon a certain number of prior convictions for simple DUI. Section 28-1383(a)(2).

Accordingly, the Board of Immigration Appeals recognized that an offense under Sub-section A2, like a simple DUI offense and unlike an offense under Sub-section A1, does not require proof of a "culpable mental state." Torres-Varela, 23 I&N Dec. 85.

Without such an element, the offense proscribed under Sub-section A2 is nothing more than a simple DUI offense which is deemed an aggravated offense based upon the number of prior

convictions. See Id.

Because non-turpitudinous conduct is not rendered turpitudinous through multiple criminal convictions for the same offense, the Board of Immigration Appeals held that an offense under Sub-section A2 was not a CIMT. See also Matter of Short, 20 I&N Dec. 136 at 139 (BIA 1989) (stating that "moral turpitude cannot be viewed to arise from some undefined synergism by which two offenses are combined to create a crime involving moral turpitude, where each crime individually does not meet moral turpitude conduct").

In 2003, the Ninth Circuit added a distinction to the CIMT analysis under Arizona Revised Statute 28-1383. See Hernandez-Martinez, 329 F.3d 1119 (decided under former Section 28-692).

This held that a conviction under Section 28-1383(a)(1) is not categorically a CIMT; the Court focused on the fact that a person who has violated this section when either they are "driving" or "have actual physical control of a vehicle." Id. 1118-1119: Arizona Revised Statute 28-1383(a).

As the Court pointed out, "one may be convicted under this Statute ellipsis for sitting in one's one car in one's own driveway with the key in the ignition and a bottle of beer in one hand." Hernandez-Martinez, 329 F.3d 1118-19.

Just having physical control over a vehicle while under the influence of alcohol is not the type of despicable

conduct that rises to the level of being a CIMT, the Court held that 28-1383 is divisible, and thus cannot categorically constitute a "CIMT".

The modified categorical approach requires that an examination of the limited sets of documents, or the so-called "record of conviction," generally including "the indictment, the judgment of conviction, the jury instructions, a signed guilty plea, and the transcript from the plea proceedings." Malilia v. Holder, 632 F.3d 598 at 603 (9th Cir. 2011).

As with all matters of removability, the Department of Homeland Security must demonstrate that the record of conviction clearly, convincingly, and unequivocally satisfies the requirements of a generic Federal offense. See Pagayon v. Holder, 642 F.3d 1226 at 1233 (9th Cir. 2011).

In other words, the modified categorical analysis must demonstrate that the respondent was convicted for "actually driving" a vehicle while under the influence. See Id., Hernandez-Martinez, 329 F.3d 1118-19.

In support of its charge of removability, the Department of Homeland Security has submitted substantial documentation for each of the respondent's aggravated DUI convictions. They include a jury verdict, an indictment, a pre-sentence, and a sentencing order. It goes to the limited nature of the modified categorical approach, a pre-sentence report is only appropriate to determine if the fact of conviction, not the

facts of circumstances underlining. Reina-Rodriguez v. United States, 655 F.3d 1182 at 1191 (9th Cir. 2011). The Government in this case submits that the case of Silva-Trevino indicates that the Board of Immigration Appeals has allowed Immigration Judges to consider the pre-sentence report to determine if the respondent was actually driving the vehicle.

Additionally, the indictments, although probably supported by verdicts that found the respondent guilty as charged in the indictment, unfortunately are of little import because the charges were not limited to the act of driving. Indictment CR-61773, Exhibit 48A, and Indictment CR-61774, Exhibit 48B. See also Young v. Holder, 634 F.3d 1014 at 1022 (9th Cir. 2011) (examining a charge or indictment where the conviction document contains a critical phase "as charged in the indictment").

Accordingly, the respective verdicts and pre-sentence report may not be only documents that cannot or should be used to satisfy this inquiry.

Collectively, the verdicts and sentencing orders appear to properly limit the respondent's conviction so as to permit a determination that they constitute CIMT's. Specifically, these documents in each respective case contain generic language reflecting that he was convicted of aggravated driving under the influence.

Thus, if take on their faces, these documents appear

to limit the respondent's conviction to the act of driving.

However, allowing these documents to reflect the respondent's convictions necessarily rested on the act of driving and thus constitutes CIMT could likely be misleading.

It is important to recognize the interplay of the phases "driving", "driving under the influence", and "DUI" as they pertain to the operative provisions of Section 28-1383(a)(1).

The term DUI - i.e., driving under the influence - is used synonymously with a conviction under Section 28-1383(a)(1). This would be true regardless of whether the conviction rested solely on the conduct of driving or also on the conduct of physical control.

For example, the synonymous nature of these terms are demonstrated by simply examining the underlining indictments, which reflect the [indiscernible] the respondent was being charged for the generic offense of aggravated driving under the influence in that he either "drove or was in actual physical control of the vehicle" while intoxicated. See Indictment CR-61773 and Indictment CR-61774.

Similarly, the Ninth Circuit acknowledged in Hernandez-Martinez a conviction for aggravated DUI under Section 28-1383(a)(1) - i.e., aggravated driving while under the influence - can occur when one either drives or has physical control of a vehicle while intoxicated. See generally

Hernandez-Martinez, 329 F.3d 1119; See Id. 1118 (using the phrase aggravated DUI to refer to a conviction for "aggravated driving or being in physical control of a vehicle while under the influence").

Unfortunately, this ambiguity is only made more uncertain by thoroughly examining the respective verdicts. On top of the declarations that the respondent was being found guilty for aggravated driving under the influence, each verdict goes to ponder if a likely determination of guilt was for the offense "as charged in the indictment."

Again, as noted above, the respondent as charged in the indictment was charged with the offense of aggravated DUI and that he either drove or had physical control of a vehicle while intoxicated.

Accordingly, the verdict forms declaration that the respondent was guilty of "aggravated DUI" demonstrates nothing more than, as charged in the indictment, and that the respondent was convicted for his act of driving a vehicle while having physical control thereof. See U.S. v. Flores-Ortega, 152 Fed. Appx. 656 at 657 (9th Cir. 2005) (finding the generic terms in a verdict form were not sufficient when the verdict was reached "as charged in the indictment" and "that the indictment failed to limit the offense to the terms".

Thus, the argument can be made that the verdict forms fail to clearly, convincingly, and unequivocably establish that

the respondent was convicted for conduct in actually driving a vehicle while intoxicated. See U.S. v. Navidad-Marcos, 367 F.3d 903 at 909 (9th Cir. 2004) (finding that a generic reference to a statute or conviction in an abstract of judgment failed to demonstrate "a conscious judicial narrowing" of the offense any more that it did a clerical attempt to abbreviate the offense).

An argument can be made that the sentencing orders therefore are inadequate to satisfy the modified categorical analysis. As noted above and similar to the verdicts, these orders reflected a formal judgment of guilt was entered for aggravated driving under the influence.

In addition to the concern that a conviction for aggravated DUI refers to one who either drives or has physical control of a vehicle, the sentencing order is inadequate to establish the basis of the respondent's conviction for another important reason. Under Arizona law, a trial Court's pronouncement of guilt is made on the conduct of the jury has found the defendant guilty of committing. See generally State v. Bolding, 253 P.3d 279 at 284 (Arizona Ct. App. 2011) (explaining process for obtaining judgment of conviction); Arizona R. Crim. P. 26.16(a).

Accordingly, the authority of a trial Court to pronounce guilt and ultimately create a final judgment of conviction is limited strictly to determinations made by the jury. State v. Meador, 645 P.2d 1257, at 1261 (Arizona Ct. App.

1982) (stating that it is the function of the jury to determine innocence or guilt of the defendant on a charge).

In this case, the jury's determination of guilt demonstrates that the respondent was convicted of aggravated DUI as charged in the indictment - a determination that is binding on the trial Court's pronouncement of guilt. See Flores-Corea, 152 Fed. Appx. 657.

As a result of sentencing orders for the same reason as the verdicts do not necessarily support the Department of Homeland Security's position that respondent's conviction is necessarily rested on him or his driving the vehicle.

However, an argument could be made that if the record of conviction was supplemented by additional documentary evidence, the result would be different. See e.g., Flores-Corea, 152 Fed. Appx. 657 "stating that had the record of conviction been supplemented with the information and/or jury instructions limiting the predicate acts necessarily found by the jury, the result could have been different".

For instance, if there were jury instructions to the effect that the jury were ordered to find either that the respondent was driving or had physical control of the vehicle, then it would be plausible to assume that the verdict's declaration that the respondent was guilty of aggravated driving under the influence truly meant driving and not the short-hand generic offense of aggravated DUI.

However, even assuming this to be true a conclusion may still be misleading whereas in certain cases, the verdicts go on to state that the convictions were for the offenses as charged in the indictment and the indictment has failed to reflect whether [indiscernible] was driving or physically controlling the vehicle while intoxicated.

The Court will note that in this case the Government has presented a document which is of substantial use for the Court in making a determination as to whether respondent was driving for a certain conviction. For Cause CR-61774 there is a minute entry that indicates in chambers re: clarification of verdict. It also indicates that neither defendant nor counsel were present. It does not indicate whether the Government's counsel was present.

However, it does clearly indicate that for the benefit of the Adult Probation Department, the parties have stipulated that if the defendant was convicted on counts one and two, the element of driving under suspended or revoked license and the element of two prior DUI convictions would automatically be included as part of the offense for which the defendant is convicted as originally as in counts one and two of the indictment.

It indicates very clearly "as the record will reflect, both counsel and the defendant agreed that the defendant was driving while his license was suspended or revoked and that he

did in fact have two prior DUI convictions."

Thus, it was specifically agreed that the jury was not to be advised of these two elements and that the State need not have these elements proven by the jury inasmuch as the defendant stipulated and agreed that these elements would be included in the verdicts rendered by the jury.

Therefore, the actual charges and classification for which the defendant stands convicted are aggravated driving under the influence while license is suspended or revoked, (or with two prior DUI convictions), a Class Four felony (count one); and aggravated driving with an alcohol concentration of .10 or more while license is suspended, or revoked (or with two prior DUI convictions), a Class Four felony (count two).

The document is not signed but there is an indication of Ruthann Wiggins, Deputy Clerk. Thus there is an Order by the Court from there that the Court will conduct a hearing on April 28, et cetera, et cetera, indicating whether the defendant will be subject to enhanced punishment.

Thus, based upon the evidence in the record, the Court will make the following findings of fact. The respondent was born in Panama and can claim citizenship from Panama. The respondent is not a citizen or national of the United States and cannot claim citizenship by birth, naturalization, derivation or acquisition.

The respondent was admitted to the United States at

San Juan, Puerto Rico on or about April 20, 1979 as a lawful permanent resident.

Respondent was convicted on January 11, 1999 in the Arizona Superior Court, Maricopa County for the counts of Count One: aggravated driving under the influence of alcohol while license is suspended or revoked, in violation of ARS 28-1383(a)(1), (d), (g)(1), (h), and (i); 28-1381(a)(1); 13-604.

Respondent was sentenced to a term of imprisonment of six years in the Arizona Department of Corrections. The Court makes the conclusion of law that the respondent has not been convicted of an aggravated felony as this cannot constitute a crime of violence under Section 101(a)(43)(F) of the Act and therefore, the Court will not sustain the charge in the original Notice to Appear.

The Court finds that on May 30, 1999 in the Superior Court of Arizona, Pima County, the respondent was convicted of aggravated driving with an alcohol concentration of .10 or more while license was suspended with two prior convictions in violation of Arizona Revised Statute Section 28-1383(a)(1), (d), (g)(1), (h) and (i), Section 28-1381(a)(1) and Section 13-604(c), for which the term of imprisonment imposed was 10 years. The Court finds that the crimes that were alleged both in the original charging document and the additional charging document did not arise from a single scheme of criminal misconduct.

The Court makes the conclusion of law that the offense

for which the respondent was convicted on January 11, 1999 does constitute a crime involving moral turpitude. The Court makes this conclusion based upon the fact that Exhibit 56 in the record clearly indicates that the jury did not need to determine whether the respondent was driving or was in actual physical control as the parties stipulated to that fact and the defendant was bound by that stipulation and therefore the issue of driving was not an issue for the jury to determine. So while the jury may have indicated as charged in the indictment, the conviction clearly indicates that the respondent was driving and therefore that crime involves a crime involving moral turpitude.

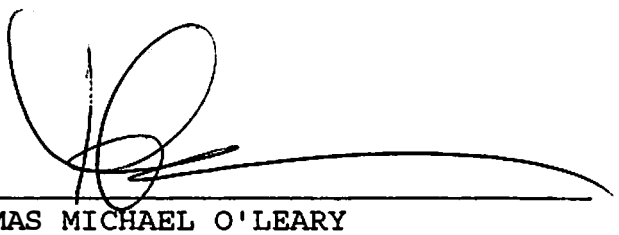
However, the evidence is not as clear for the conviction on May 30, 1999. This involves an offense which occurred on March 5, 1998. And the Government would ask that the Court consider the pre-sentence report in conjunction with the case of Silva-Trevino, supra to determine that based upon the statement of the offense on page 14 of Exhibit 48, Sub-exhibit A, that the respondent, based upon the pre-sentence report can be found to have been driving the vehicle.

In this case, however, there is no clear indication of what the jury determined. The statement of the offense is for the basis of the Adult Probation Department and other State agencies. There is no specific clarification in the record or in the minute entry such as for the previous conviction that clearly indicates that the defendant either stipulated that he

was driving or that the jury made a specific finding that the respondent was driving the vehicle. Therefore, the Court finds that this offense does not constitute a crime involving moral turpitude.

Based upon the fact that the Court at this time can only find that the respondent has been convicted of one crime involving moral turpitude, the Court at this time must not sustain the charge under Section 237(a)(2)(A)(ii) of the Act and therefore the Court, at this point in time, will issue the following order:

THEREFORE IT IS ORDERED that the respondent's motion to terminate these proceedings be and is hereby GRANTED.



THOMAS MICHAEL O'LEARY
United States Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE THOMAS MICHAEL O'LEARY, in the matter of:

RUBEN DARIO SANCHEZ-ESQUIVEL

A035-727-884

TUCSON, ARIZONA

is an accurate, verbatim transcript of the recording as provided by the Executive Office for Immigration Review and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

JOAN DEROSA (Transcriber)

DEPOSITION SERVICES, Inc.

FEBRUARY 10, 2012

(Completion Date)