U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: LOPEZ-HERNANDEZ, ESAU

A 046-620-342

Date of this notice: 7/14/2017

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

Sincerely,

Cynthia L. Crosby
Deputy Chief Clerk

Enclosure

Panel Members:
Cole, Patricia A.

Userteam: Docket

File: A046 620 342 – Tulsa, OK

Date: JUL 14 2017

In re: Esau LOPEZ-HERNDANDEZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Brent A. Hawkins, Esquire

ON BEHALF OF DHS: Elizabeth L. Einhorn
Assistant Chief Counsel

APPLICATION: Termination

The Department of Homeland Security ("DHS") appeals from an Immigration Judge's November 22, 2016, decision to terminate proceedings because the DHS did not establish by clear and convincing evidence that the respondent was removable as charged. The respondent is a lawful permanent resident who is a native and citizen of Mexico. The appeal will be dismissed.

We review an Immigration Judge's findings of fact, including findings regarding witness credibility and what is likely to happen to the respondent, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015). We review all other issues, including questions of law, discretion, and judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent pleaded guilty to larceny from a person for which he was sentenced to 5 years' imprisonment (I.J. at 3; Exh. 1, 3). The parties agree that the criminal judgment mistakenly described the respondent's offense of conviction as being under OKLA. STAT. tit. 21 § 1731 (DHS Br. at 2 n.1; Respondent's Br. at 2 n.1). They agree that the relevant statutory provision is the definition of larceny set forth at OKLA. STAT. tit. 21 § 1701. That statute defines "larceny" as "the taking of personal property accomplished by fraud or stealth, and with intent to deprive another thereof." Pursuant to Oklahoma law, larceny from the person of another is grand larceny. OKLA. STAT. tit. 21 § 1704.

The Immigration Judge terminated proceedings after concluding that the respondent's larceny offense was not an aggravated felony theft offense as contemplated by section 101(a)(43)(G) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(G). A "theft offense" within the scope of section 101(a)(43)(G) of the Act ordinarily requires the taking of, or exercise of control over, property without consent and with the criminal intent to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent (I.J. at 4). *Matter of Garcia-Madruga*, 24 I&N Dec. 436 (BIA 2008). *See also United States v. Sanchez-Rodriguez*, 830 F.3d 168, 172 (5th Cir. 2016).

To determine whether an offense under OKLA. STAT. tit. 21 § 1701 is an aggravated felony theft offense for immigration purposes we begin with the categorical approach. *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Descamps v. United States*, 133 S. Ct. 2276 (2013); *see also Matter of Chairez*, 26 I&N Dec. 819 (BIA 2016). Under this approach, we focus solely on whether the elements of the statute of conviction sufficiently match the elements of generic theft. *See Mathis v. United States, supra*, at 2248; *Descamps v. United States*, *supra*, at 2281; *Matter of Chairez*, *supra*, at 821. If the statute is divisible (*i.e.*, it defines multiple crimes in the alternative, each of which requires a different set of elements to be proven for conviction), and if at least one, but not all, of these offenses qualifies as an aggravated felony within the meaning of section 101(a)(43)(G) of the Act, we can apply the modified categorical approach to attempt to identify the respondent's actual crime of conviction to determine whether it falls within section 101(a)(43)(G) of the Act. *See Mathis v. United States*, *supra*, at 2248-49; *Descamps v. United States*, *supra*, at 2281; *see also Matter of Chairez*, *supra*, at 821-22.

The DHS argues that Oklahoma larceny is a categorical aggravated felony theft offense because a larceny committed by fraud or stealth lacks consent of the property owner. The DHS asserts that the Immigration Judge conceded that larceny by stealth fits the generic definition of theft because the taking occurs without right or consent (I.J. at 4; DHS Br. at 5). With regard to fraud, the DHS argues that because consent is fraudulently obtained, there is no actual consent to the deprivation of the property owner's rights (DHS Br. at 5, 6-7).

We have explained, however, that there is a difference between theft and fraud offenses with respect to the consent element. "Whereas the taking of property without consent is required for a section 101(a)(43)(G) 'theft offense,' a section 101(a)(43)(M)(i) 'offense that involves fraud or deceit' ordinarily involves the taking or acquisition of property with consent that has been fraudulently obtained." *Matter of Garcia-Madruga*, *supra*, at 440. Thus, "the offenses described in sections 101(a)(43)(G) and (M)(i) of the Act ordinarily involve distinct crimes." *Id.*

The Immigration Judge correctly determined that Oklahoma's larceny statute does not require the fact finder to find lack of consent (I.J. at 4; Respondent's Br. at 10). Further, as the Immigration Judge noted, the respondent provided cases in which the defendant who was convicted of larceny had the consent of the victim (I.J. at 4). *See Gibson v. State*, 206 P.2d 238, 241 (Okla. Crim. App. 1949); *Banks v. State*, 578 P.2d 370, 371 (Okla. Crim. App. 1978). Thus, larceny under Oklahoma law is not categorically an aggravated felony theft offense (I.J. at 4; Respondent's Br. at 10).

Given that section 1701 is not categorically an aggravated felony theft offense, we turn to whether the statute is divisible. In *Mathis v. United States*, *supra*, the Supreme Court provided helpful guidance for determining whether a statute of conviction is divisible. A statute that outlines only various means of committing the predicate offense is not divisible, whereas a statute that sets forth alternative elements of each offense is divisible. *See id.* at 2256; *see also Matter of Chairez*, *supra*, at 819 (holding that the approach to divisibility announced in *Mathis v. United States* is applicable in removal proceedings nationwide). A statute remains indivisible even if it "enumerates various factual means of committing a single element." *See Mathis v. United States*, *supra*, at 2249.

The Oklahoma Uniform Jury Instructions provide the following instruction for grand larceny:

> No person may be convicted of grand larceny unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:
>
> First, taking;
> Second, carrying away;
> Third, personal property;
> Fourth, of another;
> Fifth, (valued at more than $500)/(from the person of another);
> Sixth, by fraud/stealth;
> Seventh, with the intent to deprive permanently.

OUJI-CR 5-93.

The "Committee Comments" following the jury instruction reflect that fraud and stealth are alternative means to committing grand larceny: "The fifth element lists the two alternatives which distinguish grand larceny from petit larceny. The word 'stealth,' one of the two alternative means by which the personal property must be obtained for larceny . . . ." *Id.* (emphasis added). Based on this information, we conclude that OKLA. STAT. tit. 21 § 1701 is not divisible (Respondent's Br. at 10). Thus, we are unable to use the modified categorical approach in this case.

Inasmuch as the statute is not categorically an aggravated felony theft offense and it is not divisible, we affirm the Immigration Judge's conclusion that the DHS did not meet its burden to show by clear and convincing evidence that the respondent is removable as charged. The Immigration Judge correctly terminated proceedings.

The DHS additionally requests a remand so that it can "pursue" the charge of removal under section 237(a)(2)(A)(iii) of the Act for a conviction of an aggravated felony crime of violence pursuant to section 101(a)(43)(F) of the Act (DHS Br. at 7). The DHS withdrew this charge on November 22, 2016, stating that it could not meet its burden to prove the charge (I.J. at 3; Tr. at 67). Although the DHS may file additional or substituted charges at any time during removal proceedings, we have affirmed the Immigration Judge's decision to terminate these proceedings. *See* 8 C.F.R. §§ 1003.30, 1240.10(e). The DHS also has not established the prima facie viability of the charge it seeks to reinstate after having acknowledged its inability to meet its burden to prove the charge by clear and convincing evidence (Respondent's Br. at 10).

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
DALLAS, TEXAS

File: A046-620-342 November 22, 2016

In the Matter of

ESAU LOPEZ-HERNANDEZ	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGE: Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (the Act), as amended - in that at any time after admission you have been convicted of an aggravated felony as defined in Section 101(a)(43)(G) of the Act, a law relating to a theft offense (including receipt of stolen property) or a burglary offense for which the term of imprisonment is at least one year was imposed.

APPLICATION: Request for termination.

ON BEHALF OF RESPONDENT: BRENT A. HAWKINS, Esquire
4815 South Harvard Avenue, Suite 395
Tulsa, Oklahoma 74135

ON BEHALF OF DHS: HEIDI J. GRAHAM, Esquire
Assistant Chief Counsel
Dallas, Texas

ORAL DECISION OF THE IMMIGRATION JUDGE

Respondent is a native and citizen of Mexico. He was admitted to the United States at El Paso, Texas, on or about July 31, 1998, as a lawful permanent resident.

On August 8, 2016, he was convicted in the District Court of Tulsa County, Tulsa, Oklahoma, for the offense of larceny from a person in violation of the Oklahoma Statute, Title 21 Oklahoma Statute Section 1731. For that offense, a sentence to a term of imprisonment of five years could have been imposed.

Consequently, the Government initially charged respondent with being subject to being removed pursuant Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (the Act), as amended, in that at any time after admission he has been convicted of an aggravated felony as defined in Section 101(a)(43)(F) of the Act, a crime of violence (as defined in Section 16 of Title 18 United States Code, but not including a purely political offense) for which the term of imprisonment ordered is at least one year, and Section 237(a)(2)(A)(iii) of the Act, as amended, in that at any time after admission he has been convicted of an aggravated felony as defined in Section 101(a)(43)(G) of the Act, a law relating to a theft offense (including receipt of stolen property) or a burglary offense for which the term of imprisonment is at least one year could have been imposed. Exhibit 1.

On November 8, 2016, the respondent, through counsel, admitted that he is not a citizen or national of the United States, that he is a native and citizen of Mexico. The respondent, through counsel, also admitted that he was admitted as a lawful permanent resident on July 31, 1998, at El Paso, Texas. However, respondent denied the allegation that on August 8, 2016, he was convicted of larceny from a person. He also denied the allegation he was sentenced to a term of imprisonment of five years.

The respondent, via counsel, also denied the charge of removal pursuant to Section 237(a)(2)(A)(iii) of the Act in that he has been convicted of an aggravated felony under 101(a)(43)(F), a crime of violence. The respondent, via counsel, also denied the charge of removal pursuant to Section 237(a)(2)(A)(iii) of the Act in that he has been

convicted of an aggravated felony under 101(a)(43)(G), a theft offense.

The Government has the burden of proof to establish the respondent's removal by clear and convincing evidence. See Section 240(c)(3)(A) of the Act; see also 8 C.F.R. Section 1240(a).

To support the allegations and the charges of removal, the Government has submitted a copy of the respondent's conviction document. Exhibit No. 3. Exhibit No. 3 establishes that on August 8, 2016, the respondent was convicted of larceny. It also establishes the respondent was sentenced to a term of imprisonment of five years. Therefore, based upon the evidence, the Court finds that allegations 4 and 5 on the Notice to Appear have been established by clear and convincing evidence.

The next issue are the two charges of removal. At today's hearing on November 22, 2016, the Government withdrew the charge of removal pursuant to Section 237(a)(2)(A)(iii) of the Act in that respondent has been convicted of an aggravated felony under 101(a)(43)(F). Therefore, the remaining charge under Section 237(a)(2)(A)(iii) under 101(a)(43)(G) is left for the Court to decide.

On November 8, 2016, the respondent was represented by counsel. At that time, the Court ordered the Government to submit a brief on the charges of removal. That brief was due on November 18, 2016. The Government failed to submit a brief and did not establish good cause for their failure to do so.

As previously mentioned, the Government has the burden of proof to establish the remaining charge of removal under 237(a)(2)(A)(iii) of the Act and 101(a)(43)(G) by clear and convincing evidence.

FINDINGS OF FACT

AND CONCLUSION OF LAW

A theft offense within the meaning of Section 101(a)(43)(G) consists of the taking

of or exercise of control over property without consent whenever there is a criminal intent to deprive the owner of the rights and benefits of ownership even if such deprivation is less than total or permanent. Matter of Garcia, 24 I&N Dec. 436, 440, 441 (BIA 2008).

The Board of Immigration Appeals (the Board) very recently clarified the crime involving moral turpitude context in that the theft is still met if the intent is to deprive the owner of his property, either permanently or under circumstances where the owner's property rights are substantially eroded. Matter of Diaz, 26 I&N Dec. 847, 853 (BIA 2016).

Oklahoma's larceny statute is categorically overbroad compared to the generic theft offense. Oklahoma does not require proof of the elements of without consent. Rather, theft can be accomplished by fraud (with consent) or stealth (which includes without leave or consent of the owner). See Hagen v. State, 76 Okla. Cr. 127, 134 P.2d 1042, 1044 (1943).

Respondent submitted two Oklahoma cases where the defendant was convicted of larceny which involved consent by the victim. See Gibson v. State, 89 Okla. Cr. 188, 195, 206 P.2d 238, 241 (1949); see also Banks v. State, 1978 Okla. Cr. 45, 578, P.2d 370, 371. Although older cases, these do present a realistic probability that the statute is applied in the non-generic theft way.

The next question is whether or not the statute is divisible on the element of fraud or stealth as arguably stealth (defined as without right or without consent) would fit the generic definition of theft, but fraud would not. The same case the respondent cites seems to suggest that fraud and stealth are distinct elements, particularly as they discuss larceny by fraud. However, the Oklahoma Uniform Jury Instructions listed element five as fraud or stealth. The Oklahoma Court of Criminal Appeals case listed

these same statutes under Grissom v. State, 2011 Okla. Cr. 3 Section 49 253 P.3d 969, 987.

The committee notes on grand larceny, jury instructions also stated that fraud and stealth are two alternative means by which personal property must be obtained for larceny. The committee goes on to note that fraud or stealth simply indicates that the taking is trespassory.

Interestingly to this Court, before the Uniform Jury Instruction, the Oklahoma Criminal Court of Appeals stated the central elements of larceny as that there must be a taking and carrying away from the possession of another, that the thing taken away must be the property of another, that the taking was against the will of the owner and that the taking was with a felonious intent. See Lamascus v. State, 1973 Okla. Cr. 404, 516 P.2d 279, 281; also Hagen v. State, 76 Okla. Cr. 127 134 P.2d 1042, 1044 (1943).

The Oklahoma Courts noted that "it is a well settled general rule that the requirement of a felonious taking against the will of the owner is sufficiently met and that larceny is committed where a person intending to steal another's personal property obtains possession of it although by or with the consent of the owner by means of fraud or through a fraudulent trick or device and feloniously converts it pursuant to such intent."

These older decisions address larceny with the same language of fraud or stealth, but making no real distinction between them. One older case the Court has come upon upheld a conviction that charged the defendant with knowingly, willfully, unlawfully, feloniously, wrongfully, fraudulently and stealthily take, steal and carry away the personal property of another. Wellshire v. State, 23 Okla. Cr. 281, 214 P.563, 564 (1923). This is despite the distinction between fraud occurring with consent and stealth occurring without consent.

In conclusion, at a minimum, there is sufficient ambiguity whether or not the statute is divisible under 21 OSC 731 on the fraud/stealth issue. State law does not fully answer this question. The statute prescribes the same punishment for larceny generally and the current conviction documents do not help particularly as respondent was charged with robbery.

As Mathis noted, with an unclear record, a sentencing Judge would not be able to satisfy the court's demand for certainty or determine whether a defendant was convicted or a generic offense. See Mathis v. United States, 15-6092, 2016 WL 3434400 at 11 (U.S. June 23, 2016). Thus, the Government cannot prove by clear and convincing evidence the respondent was convicted of a theft offense under 101(a)(43)(G).

Accordingly, the following orders will be entered:

ORDERS

IT IS HEREBY ORDERED that the proceedings against the respondent be terminated with prejudice as the Court has addressed the issue on the merits.

Dated this 22nd day of November 2016.

DEITRICH H. SIMS
United States Immigration Judge
Dallas, Texas