U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: RAMOS BAUZA, YOHANDRA **A 073-774-001**

Date of this notice: 11/29/2019

Enclosed is a copy of the Board's decision in the above-referenced case. If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of this decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Greer, Anne J.

MalikAr
Userteam: Docket

File: A073-774-001 – Miami, FL

Date: NOV 29 2019

In re: Yohandra RAMOS BAUZA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Riya Resheidat
Assistant Chief Counsel

APPLICATION: Termination

The Department of Homeland Security (DHS) appeals from the Immigration Judge's January 16, 2018, decision terminating removal proceedings. The respondent has not filed a brief in opposition to the DHS's appeal, which we will dismiss.

We review the Immigration Judge's factual findings, including credibility determinations, under the clearly erroneous standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under the de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The DHS charged the respondent, a returning lawful permanent resident, with inadmissibility under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I) (IJ at 1; Exh. 1). The DHS specifically argued that the respondent's convictions for theft in violation of FLA. STAT. ANN. § 812.014, constitute crimes involving moral turpitude ("CIMT").[1] Nevertheless, the Immigration Judge concluded that the DHS did not sustain the charge of inadmissibility, and terminated removal proceedings (IJ at 5).

On appeal, the DHS argues that the Immigration Judge erroneously relied on Florida's decision not to adopt the Model Penal Code's (MPC) definition of theft when determining that the respondent's statute of conviction is not a categorical match to a CIMT (DHS's Br. at 5-6). The DHS also contends that there is not a realistic probability that Florida would convict a defendant under FLA. STAT. ANN. § 812.014 for offenses that do not constitute CIMTs (DHS's Br. at 6-22). Alternatively, the DHS asserts that we should review the respondent's criminal record to determine whether her actual conduct constitutes a CIMT (DHS Brief at 23-33).

Turning to DHS's first argument, we review whether the Immigration Judge misinterpreted *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847 (BIA 2016), to hold that states must adopt the MPC's

[1] The respondent was also convicted of violating FLA. STAT. ANN. § 812.015. On appeal, however, the DHS does not argue this conviction constitutes a CIMT. As such, we deem the issue waived. *See, e.g., Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012).

definition of theft, which Florida has not done, in order for the state statute to constitute a CIMT (DHS's Br. at 5-6). However, the Immigration Judge did not do so. Rather, he contrasted Florida's theft statute with the MPC's definition of theft to support his conclusion that a realistic probability exists that Florida would convict defendants under FLA. STAT. ANN. § 812.014 for offenses that do not constitute CIMTs (IJ at 3).

We next consider the DHS's contention that the respondent's convictions for theft, in violation of FLA. STAT. ANN. § 812.014, constitute convictions for CIMTs. To make this determination, we apply the "categorical approach," analyzing whether the elements of the respondent's statute of conviction match the elements of a CIMT. *See Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016); *Gelin v. U.S. Att'y Gen.*, 837 F.3d 1236, 1241 (11th Cir. 2016). Elements are the "the things the 'prosecution must prove to sustain a conviction.'" *Mathis v. United States*, 136 S. Ct. at 2248 (citing *Black's Law Dictionary* 634 (10th ed. 2014)). If the elements of the respondent's statute of conviction do not match the elements of a CIMT, the respondent has not been convicted of a CIMT, even if her "actual conduct (i.e., the facts of the crime) fits within the . . . boundaries" of a CIMT. *See id.* at 2248. Nevertheless, the categorical approach "is not an invitation to apply legal imagination"; rather, "there must be a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside" the definition of a CIMT. *See Moncrieffe v. Holder*, 569 U.S. 184, 188 (2013) (internal quotations omitted); *see also Bourtzakis v. United States Att'y Gen.*, 940 F.3d 616, 620 (11th Cir. 2019).

A CIMT has two elements–reprehensible conduct and a culpable mental state. *Matter of Diaz-Lizarraga*, 26 I&N Dec. at 849. A culpable mental state is one which requires deliberation or consciousness, such as intent, knowledge, willfulness, or recklessness. *Id.* at 849. Reprehensible conduct includes theft offenses if they "involve[] an intent to deprive the owner of his property either permanently or under circumstances where the owner's property rights are substantially eroded." *Id.* at 852-53. Thus, property that is "taken 'temporarily' but returned damaged or after its value or usefulness to the owner has been vitiated" is a CIMT. *Id.* at 854. However, theft that involves "mere de minimis takings in which the owner's property rights are compromised little, if at all" does not establish the reprehensible conduct required for a CIMT. *Id.* at 851; *see id.* at 853.

Next, we consider the elements required to sustain conviction under FLA. STAT. ANN. § 812.014. The statues provides, in pertinent part:

> A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently (a) [d]eprive the other person of a right to the property or a benefit from the property [or] (b) appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.

FLA. STAT. ANN. § 812.014(1). According to the text's plain language, the mens rea of this statute is met if the defendant "knowingly" obtains, uses, or endeavors to obtain or use, someone else's property, with the specific "intent" either to deprive the owner of the property or to appropriate it to her own (or someone else's) use. *See also State v. G.C.*, 572 So. 2d 1380, 1381 (Fla. 1991), *receded from on other grounds*, *I.T. v. State*, 694 So. 2d 720 (Fla. 1997); *see also Daniels v. State*, 587 So. 2d 460, 462 (Fla. 1991); *T.L.M v. State*, 755 So. 2d 749, 751 (Fla. Dist. Ct. App. 2000).

Because knowledge and specific intent are "culpable" mental states for a CIMT, the mens rea for the respondent's statute of conviction is a categorical match that of a CIMT. Thus, we must analyze whether the conduct proscribed in this statute is "reprehensible."

The plain language of the statute criminalizes the temporary taking of property without requiring that such taking involve substantial deprivation to the owner. FLA. STAT. ANN. § 812.014(1); *see also Matter of Diaz-Lizarraga*, 26 I&N Dec. at 852, 852 n.8 (acknowledging that Florida expressly permits a conviction for theft on a showing of intent to temporarily deprive). Thus, the plain language of the statute is not a categorical match to a CIMT because it is facially overbroad. Moreover, case law confirms that a realistic probability exists that Florida would convict a defendant under § 812.014 for some forms of "joyriding," which constitute de minimis taking. *See id.* at 850-51 (explaining that "'joyriding'--the nonconsensual taking of a motor vehicle with the intent to return it to the owner shortly thereafter--or other short-term takings of property" is an offense that does not involve the requisite level of reprehensible conduct). We base our conclusion on three Florida judicial opinions–(1) *Dunmann v. State*, 427 So. 2d 166 (Fla. 1983), *receded from on other grounds by Daniels v. State*, 587 So. 2d at 460; (2) *Stephens v. State*, 444 So. 2d 498 (Fla. Dist. Ct. App. 1984); and (3) *G.C. v. State*, 560 So. 2d 1186 (Fla. Dist. Ct. App. 1990), *approved*, 572 So. 2d 1380 (Fla. 1991), *receded from in part on other grounds, I.T. v. State*, 694 So.2d at 720 (Fla. 1997).

In *Dunmann*, the Florida Supreme Court held that the 1977 enactment of § 812.014—defining felony theft to include "any unauthorized use" of another's property, including a motor vehicle—had the effect of implicitly repealing Florida's "joyriding" statute, which had theretofore treated temporary "use" of a motor vehicle as a misdemeanor. *See* 427 So. 2d at 167-68.[2] As the court explained, the theft statute's application to "*any* unauthorized use" left the joyriding statute "with no valid field of operation." *Id.* at 168. Approximately 1 year later, Florida's Second District Court of Appeal decided *Stephens*, which interpreted *Dunmann* to hold that "the 'joyriding' statute has been subsumed within the omnibus theft statute," because "the offenses of theft and temporary unauthorized use of a motor vehicle possess identical elements." *See* 444 So. 2d at 499.

The DHS contends, however, that *Stephens*' interpretation of *Dunmann* was "outright rejected" by Florida's Third District Court of Appeals in *G.C. v. State*, which was approved by the Florida Supreme Court in 1991 (DHS Br. at 21 n.16). In *G.C.*, the court observed that theft under § 812.014 does not subsume *all* conduct formerly punishable as joyriding under former § 812.041; however, the court did *not* hold that the theft definition excludes *all* conduct previously punishable as joyriding. *See id.* at 1188. On the contrary, it held that the theft definition excludes the *subset* of joyriding offenses that are committed by *passengers*. 560 So. 2d at 1188 ("*Dunmann* did not address the question presented here: the application of the theft statute to a passenger in a stolen car."). Indeed, *G.C.* quite clearly says that *Dunmann*, properly construed, *does* treat joyriding as theft when the joyrider is "accused of actively operating the vehicle[] in question." *Id.*

The DHS also claims support for its argument in *Lewellen v. State*, 682 So. 2d 186 (Fla. Dist. Ct. App. 1996), where Florida's Second District Court of Appeals held that petit theft

[2] The *Dunmann* court also observed in a footnote that the Legislature formally repealed the joyriding statute in 1982. *Id.* at 168 n.*.

is not a valid lesser-included offense of grand theft of a motor vehicle (DHS Br. at 21 n.16). Asserting that joyriding—a misdemeanor under prior law—could only be understood as a form of petit theft, the DHS argues that *Lewellen* compels the conclusion that joyriding must have "evolved into a wholly distinct offense" that could only be prosecuted as a form of "trespass" under FLA. STAT. ANN. § 810.08. However, this argument is unconvincing because the DHS has not explained why the Florida Legislature could not treat joyriding as a form of grand theft, just as it does in cases involving theft of a vehicle of minimal monetary value. *See Johnson v. State*, 380 So. 2d 1024, 1026 (Fla. 1979). Moreover, the DHS has presented no evidence that anyone in Florida has ever been convicted of "trespass" based on a "joyriding" offense.

Because *Dunmann*, *Stephens*, and *G.C.* all indicate that joyriding by a driver is subsumed within the definition of theft under § 812.014, the least culpable conduct necessary to sustain a conviction under § 812.014 includes at least one offense involving temporary taking of property without requiring that such taking involve substantial deprivation to the owner. Therefore, the conduct proscribed under § 812.014 does not constitute "reprehensible conduct." Because the Court "must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized" under § 812.014, the respondent was not convicted of a CIMT. *See Moncrieffe v. Holder*, 133 S. Ct. 1678,1684 (2013) (alterations in original) (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)).[3]

Alternatively, the DHS argues that we should abandon the categorical approach when analyzing CIMTs, and determine whether the respondent's actual conduct, which led to her conviction under § 812.014, constitutes a CIMT (DHS Brief at 23-33). However, the DHS's argument is foreclosed by controlling circuit law. *Gelin v. U.S. Att'y Gen.*, 837 F.3d at 1241 (applying the categorical approach to determine whether an alien's conviction constituted a CIMT, and emphasizing that under this approach, adjudicators are prohibited from considering the "specific facts underlying the defendant's case"). For these reasons, we affirm the Immigration Judge's decision terminating removal proceedings.

ORDER: The appeal is dismissed.

FOR THE BOARD

[3] The Immigration Judge concluded, and we agree, that the respondent's statute of conviction is indivisible (IJ at 4-5). Thus, we will not apply the modified categorical approach identified in *Mathis v. United States*, 136 S. Ct. at 2249, in this case. Even if this were not the case, the DHS does not challenge the statute's indivisibility, and as such, has waived the right to appeal the issue. *See, e.g., Matter of R-A-M-*, 25 I&N Dec. at 658 n.2.