U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: ARELLANO-CASAS, CONRADO **A 078-898-817**

Date of this notice: 3/17/2020

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:
Creppy, Michael J.

Userteam: Docket

File: A078-898-817 – Aurora, CO Date: MAR 17 2020

In re: Conrado ARELLANO-CASAS a.k.a. Eddie Arellano-Casas a.k.a. Lalo Arellano-Casas

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Hans C. Meyer, Esquire

ON BEHALF OF DHS: Elizabeth E. Puskar
Assistant Chief Counsel

APPLICATION: Termination; remand

The Department of Homeland Security ("DHS") appeals from the Immigration Judge's September 4, 2019, decision terminating the removal proceedings against the respondent, a native and citizen of Mexico. The respondent opposes the appeal.[1] The DHS's appeal will be dismissed, and the record will be remanded.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge 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).

On December 2, 2011, the respondent pled guilty to the offense of marijuana—conspiracy—over 100 pounds, in violation of sections 18-18-406(6)(b)(I), (III)(C) of the Colorado Revised Statutes and to the offense of marijuana—special offender—100 pounds, a sentence enhancer provision, in violation of section 18-18-407(1)(e) of the Colorado Revised Statutes. The respondent was ultimately sentenced to 11 years' imprisonment. The DHS charged the respondent with removability as an alien convicted of a crime involving moral turpitude committed within five years after admission for which a sentence of one year or longer may be imposed under section 237(a)(2)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(i) (Exh. 1). The DHS also charged the respondent with removability as an alien, who at any time after admission, has been convicted of a violation of (or a conspiracy or an attempt to violate) any law or regulation of a State, United States, or foreign country relating to a controlled substance under section 237(a)(2)(B)(i) of the Act (Exh. 1). The Immigration Judge found that the respondent was not removable and terminated proceedings (IJ at 2-3). *See* section 240(c)(3) of the Act, 8 U.S.C. § 1229a(c)(3).

In his summary order terminating proceedings, the Immigration Judge referenced his findings made on the record during the respondent's master calendar hearing on September 4, 2019.

[1] We will grant the respondent's motion to accept his reply brief as a matter of discretion. *See* 8 C.F.R. § 1003.3(c).

In considering the plain language of the respondent's statute of conviction and the relevant legislative history, the Immigration Judge found that the respondent's state statute of conviction is overbroad because it contained marijuana stalks and the federal definition of marijuana under the Controlled Substances Act ("CSA") did not include the stalks (Tr. at 11). As such, the Immigration Judge did not sustain the charge of removability under section 237(a)(2)(B)(i) of the Act (Tr. at 11). The Immigration Judge did not sustain the charge of removability under section 237(a)(2)(A)(i) of the Act after determining that the respondent was convicted of his offense on the date of admission and not within 5 years after the date of admission and did not reach the issue of whether the conviction was for a crime involving moral turpitude (Tr. at 12). The DHS now appeals.

The only issue the DHS raises on appeal is that the Immigration Judge erred in terminating removal proceedings, as the respondent's conviction in violation of section 18-18-406(6)(b)(I) of the Colorado Revised Statutes constitutes a controlled substance violation. Thus, we consider any challenge to the issues of whether the respondent's conviction in violation of section 18-18-406(6)(b)(I) of the Colorado Revised Statutes constitutes a crime involving moral turpitude and whether the respondent committed a crime involving moral turpitude within 5 years after the date of his admission to be waived, and we discern no reason to consider them. *See Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012). While the respondent addresses these latter issues on appeal, because the respondent has not filed a cross-appeal, these issues are beyond the scope of our review in these proceedings, and we have no reason to review the Immigration Judge's determinations. *See Matter of R-A-M-*, 25 I&N Dec. at 658 n.2; *Matter of G-A-*, 23 I&N Dec. 336, 367 n.1 (BIA 2002). Upon de novo review, we conclude that the respondent's conviction in violation of section 18-18-406(6)(b)(I) of the Colorado Revised Statutes does not constitute a controlled substance violation under the Act.

To determine whether a conviction "relates to" a controlled substance defined in the Controlled Substances Act, we apply the categorical approach. *See Moncrieffe v. Holder*, 569 U.S. 184, 189-91 (2013). Under the categorical approach, we determine "whether 'the state statute defining the crime of conviction' categorically fits within the 'generic' federal definition of a corresponding [offense]." *Id.* at 190 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186 (2007)). "Accordingly, a state offense is a categorical match to a generic federal offense only if a conviction under the state statute "necessarily involved . . . facts equating to [the] generic [federal offense]." *Id.* (alterations in original) (quoting *Shepard v. United States*, 544 U.S. 13, 24 (2005)). We "must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Id.* at 190-91 (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)); *see also Matter of Ferreira*, 26 I&N Dec. 415, 421 (BIA 2014) (finding that *Moncrieffe* requires courts to focus on the "least culpable conduct" under the categorical approach). There is no categorical match if there is a "realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition." *Gonzales v. Duenas-Alvarez*, 549 U.S. at 193; *see also Matter of Navarro Guadarrama*, 27 I&N Dec. 560 (BIA 2019) (holding that "even where a State statute on its face covers a . . . [controlled] substance not included in a Federal statute's generic definition, there must be a realistic probability that the State would prosecute conduct falling outside the generic crime in order to defeat a charge of removability") (quoting *Matter of Ferreira*, 26 I&N Dec. at 420-21). To establish removability by way of a controlled substance

violation, the DHS must "connect an element" of the alien's conviction to a drug defined in 21 U.S.C. § 802. *See Mellouli v. Lynch*, 135 S. Ct. 1980, 1991 (2015).

There is no dispute on appeal that the controlled substance involved in the instant case is marijuana. The DHS does not dispute the respondent's argument that the minimum conduct criminalized under the respondent's statute of conviction, section 18-18-406(6)(b)(I) of the Colorado Revised Statutes, is the attempted possession of mature stalks of marijuana with intent to offer to sell mature stalks (Respondent's Br. at 19). *See* C.R.S. § 18-18-12(18) (definition of "sale"); C.R.S. § 18-18-102(18); C.R.S. § 18-18-406(6)(b)(I);

In this case, the Immigration Judge determined that the Colorado marijuana statute, section 18-18-102(18) of the Colorado Revised Statutes, is overbroad as compared to the federal CSA definition of marijuana, 21 U.S.C. § 802(16), because the federal CSA definition of marijuana does not criminalize mature stalks of the marijuana plant. Specifically, the DHS contends on appeal that the Colorado marijuana statute is not overbroad of the federal CSA definition, although the state statute does not contain a specific exclusion for mature stalks of marijuana, because there is not a realistic probability that an individual would be prosecuted under the Colorado statute solely for possession of mature stalks of marijuana (DHS's Br. at 2-3). As such, the DHS contends that the Immigration Judge erred in terminating proceedings, as the respondent still has a conviction for a controlled substance offense that renders him removable under section 237(a)(2)(B)(i) of the Act (DHS's Br. at 5).

The respondent bears the burden of proof to establish a realistic probability that an individual can be successfully prosecuted of possession of only mature stalks of the cannabis plant in Colorado unless there is contrary binding circuit court authority with regard to the "realistic probability" test. *See Matter of Navarro Guadarrama*, 27 I&N Dec. at 567. With regard to the "realistic probability" test, the DHS argues that *United States v. Titties*, 852 F.3d 1257 (10th Cir. 2017), is distinguishable from the instant case because *Titties* did not involve a controlled substance but, rather, a conviction for pointing a firearm and whether it categorically matched the generic definition of a violent felony under the Armed Career Criminal Act ("ACCA"). We disagree. In *Titties*, when the Government argued for the "realistic probability" test, the court stated that it was not a case where it needed to imagine hypothetical non-violent facts to take the statute outside ACCA's ambit and that the Government gave no persuasive reason why the court should ignore the plain language of the statute to pretend that the statute is narrower than it is. *United States v. Titties*, 852 F.3d at 1274. As such, the court determined that no legal imagination was required to see that the threatened use of physical force was not necessary for a conviction under Oklahoma law. *Id.* at 1274-75. The United States Court of Appeals for the Tenth Circuit did not explicitly limit its reasoning to the ACCA context. Consequently, in *Titties*, a case that is controlling in the jurisdiction of the instant matter, the court held that the "realistic probability" test does not apply when the statute is overbroad by its plain language. Thus, we adopt the reasoning and underlying principles of *Titties* to the instant case even though *Titties* did not involve a controlled substance violation.

The DHS also argues that Colorado's definition of marijuana does not explicitly exclude the mature stalks of marijuana unlike the federal CSA definition. We agree with the respondent that the Colorado legislature broadened the definition of marijuana to include mature stalks and that

the plain language of the Colorado statute contemplates a conviction for possession of mature stalks of marijuana (Respondent's Br. at 21). The 1983 Colorado General Assembly incorporated all parts of the marijuana plant, including the formerly exempt mature stalks in the prior definition. *See* H.B. 1200, 54th Gen. Assemb., Reg. Sess. (Colo. 1983); Office of Legis. Legal Serv., Digest of Bills, Gen. Assemb., 54, 1st Sess., at 134 (1983). "When a 'state statute's greater breadth is evident from its text,' a [respondent] need not point to an actual case applying the statute of conviction in a nongeneric manner' but "'may simply 'rely on the statutory language to establish the statute as overly inclusive.'" *Matter of Sanchez-Lopez*, 27 I&N Dec. 256, 258-59 (BIA 2018) (citations omitted). The Colorado statute, at the time of the respondent's conviction, criminalized "all parts of the plant cannabis sativa L." and did not include language explicitly excluding the "mature stalks of such plant." *Compare* C.R.S. § 12-22-303(17) (1981) *with* C.R.S. § 18-18-102(18) (2011). While the respondent admits that this plain language alone does not prove that the Colorado legislature contemplated an offense involving mature stalks of marijuana, because the legislative history shows that the Colorado legislature amended its definition of marijuana to include mature stalks, we conclude that there is a "realistic probability" that Colorado would apply the statute to conduct falling outside the federal definition of marijuana. *See Matter of Sanchez-Lopez*, 27 I&N Dec. at 259. Because there is controlling circuit law contrary to *Matter of Navarro Guadarrama*, the Immigration Judge's ultimate conclusion is legally appropriate and the respondent's conviction under the categorical approach cannot be said to be a controlled substance offense under section 237(a)(2)(B)(i) of the Act.

Further, section 18-18-406(6)(b)(I) of the Colorado Revised Statutes is indivisible. The statute of conviction does not provide different punishments depending on whether a defendant manufactured or distributed or offered to sell a controlled substance. *See* C.R.S. § 18-18-406(6)(b)(I) (2011). The relevant jury instructions show that the different actions, such as dispensation, selling, distribution, and possession with intent to manufacture, dispense, sell, or distribute marijuana or marijuana concentrate, are different means of violating the statute, not elements. *See* COLJI 18:18 (2011). A "peek" at the record of conviction "for the sole and limited purpose of determining whether the listed items are elements of the offense" shows that the respondent pled guilty to section 18-18-406(6)(b)(I) by either selling or distributing marijuana. *Mathis v. United States*, 136 S. Ct. 2243, 2256-57 (2016). This suggests that selling and distributing are only means to commit the single, indivisible offense of marijuana—conspiracy—over 100 pounds. *See United States v. McKibbon*, 878 F.3d 967, 876 (10th Cir. 2017) (citation omitted). Moreover, the Colorado definition of marijuana is indivisible with respect to the parts of the marijuana plant and does not list alternative elements. *See* C.R.S. § 18-18-102(18). Colorado also does not provide different penalties based on the part of the marijuana plant involved.

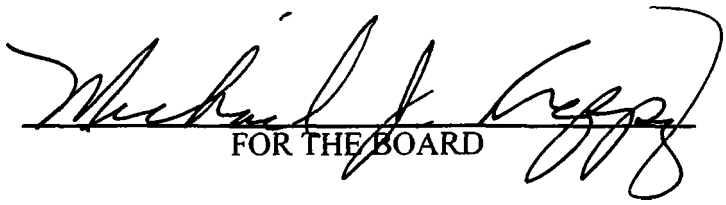
During the pendency of the appeal, the DHS also submitted Additional Charges of Inadmissibility/Deportability (Form I-261) and a motion to remand for further fact finding. We conclude that a remand is necessary in the instant case in order for the Immigration Judge to consider the additional charge pursuant to section 237(a)(1)(A) of the Act filed by the DHS. The DHS may lodge additional charges at any time during proceedings, limited only by the existence of a final administrative order. 8 C.F.R. §§ 1003.30, 1003.39, 1240.10(e). The DHS's appeal of the Immigration Judge's decision preserves the ability to lodge additional charges in these proceedings. Accordingly, the record will be remanded for the Immigration Judge

to consider whether the respondent is removable based on the newly-lodged factual allegations and charge.

Accordingly, the following orders will be entered.

ORDER: The DHS's appeal is dismissed.

FURTHER ORDER: The DHS's motion to remand is granted, and the record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.



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