U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: ALONSO, ANNI

A 096-724-265

Date of this notice: 1/23/2018

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:
Liebowitz, Ellen C
Creppy, Michael J.
Mullane, Hugh G.

Userteam: Docket

File: A096 724 265 – Miami, FL

Date: JAN 23 2018

In re: Anni ALONSO a.k.a. Anni Alonso Reyes

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Wilfredo O. Allen, Esquire

ON BEHALF OF DHS: Diana Alvarez
Assistant Chief Counsel

APPLICATION: Termination

The Department of Homeland Security ("DHS") appeals the Immigration Judge's March 22, 2017, decision terminating removal proceedings. The respondent opposes the appeal. The appeal will be dismissed.

We review findings of fact determined by the Immigration Judge, including credibility findings, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment, and all other issues in appeals from decisions of Immigration Judges de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent, a native and citizen of Cuba, was admitted to the United States as a lawful permanent resident on December 5, 2004 (IJ at 1; Exh. 1). On January 25, 2008, the respondent was convicted of grand theft in violation of FLA. STAT. § 812.014 (IJ at 1; Exh. 2). On August 21, 2015, upon returning from a trip abroad, the DHS served the respondent with a Notice to Appear ("NTA") (IJ at 2; Exh. 1). In the NTA, the DHS charged the respondent as an "arriving alien" who was inadmissible because she had been convicted of a crime involving moral turpitude ("CIMT") 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 1-2; Exh. 1). *See* section 101(a)(13)(C)(v) of the Act, 8 U.S.C. § 1101(a)(13)(C)(v). The Immigration Judge determined that the respondent's theft offense did not qualify as a CIMT and terminated proceedings (IJ at 2-5). For the following reasons, we affirm the Immigration Judge's decision.

As an initial matter, we are unpersuaded by the DHS's appellate argument that the categorical and modified categorical approaches, as established by *Taylor v. United States*, 495 U.S. 575 (1990), are inapplicable when determining whether a conviction qualifies as a CIMT (DHS's Br. at 20-26). This argument is foreclosed by precedent of the United States Court of Appeals for the Eleventh Circuit, in whose jurisdiction this case arises, which holds that these approaches are fully applicable in the CIMT context. *See Fajardo v. U.S. Att'y Gen.*, 659 F.3d 1303, 1305 (11th Cir. 2011); *see also Walker v. U.S. Att'y Gen.*, 783 F.3d 1226, 1229 (11th Cir. 2015) (citing *Fajardo* with approval).

To determine whether FLA. STAT. § 812.014 qualifies as a CIMT, we employ the "categorical approach," which "requires us to focus on the minimum conduct that has a realistic probability of being prosecuted under the statute of conviction, rather than on the facts underlying the respondent's particular violation of that statute." *Matter of Silva-Trevino* ("*Silva-Trevino III*"), 26 I&N Dec. 826, 831 (BIA 2016) (citing *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013)); *see also Gelin v. U.S. Att'y Gen.*, 837 F.3d 1236, 1241 (11th Cir. 2016) (explaining that the categorical approach "asks whether the least culpable conduct necessary to sustain a conviction under the statute meets the standard of a [CIMT]") (internal citation and quotation marks omitted). To involve moral turpitude, a crime requires two essential elements: reprehensible conduct and a culpable mental state. *Silva-Trevino III*, 26 I&N Dec. at 834.

The respondent's statute of conviction provided, in relevant part:

> (1) 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) Deprive the other person of a right to the property or a benefit from the property.
>
> (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. § 812.014 (2008). A conviction under this statute is considered "grand theft of the third degree and a felony of the third degree" if the property stolen was of either a certain value (e.g., "[v]alued at $300 or more, but less than $5,000") or of a certain type (e.g., "a firearm" or "a motor vehicle"). FLA. STAT. § 812.014(2)(c) (2008). For purposes of this statute, moreover, the phrase "obtains or uses" was defined as "any manner of":

> (a) Taking or exercising control over property.
>
> (b) Making any unauthorized use, disposition, or transfer of property.
>
> (c) Obtaining property by fraud, willful misrepresentation of a future act, or false promise.
>
> (d) 1. Conduct previously known as stealing; larceny; purloining; abstracting; embezzlement; misapplication; misappropriation; conversion; or obtaining money or property by false pretenses, fraud, or deception; or
>
> 2. Other conduct similar in nature.

FLA. STAT. 812.012(2) (2008).

A theft or larceny offense is a CIMT if it involves a taking or exercise of control over another's property without consent and with an intent to deprive the owner of the property either permanently

or under circumstances where the owner's property rights are substantially eroded. *See Matter of Diaz-Lizarraga*, 26 I&N Dec. 847, 852-53 (BIA 2016). That said, "[w]e continue to believe that it is appropriate to distinguish between substantial and *de minimis* takings when evaluating whether theft offenses involve moral turpitude." *Id.* at 851. A non-consensual taking of property is "*de minimis*" if it is in the nature of "borrowing"—i.e., taken by a person who "intends and has the means to return [it] to the rightful owner, unconditionally and promptly." *Id.* at 853-54, n.10.

In concluding that section 812.014 does not qualify as a CIMT, the Immigration Judge focused, in part, on the statute's criminalization of the appropriation of another's property, which he determined would not qualify as a CIMT (IJ at 3-5; DHS's Brief at 6-11). *See Jaggernauth v. U.S. Att'y Gen.*, 432 F.3d 1346, 1353-55 (11th Cir. 2005). Notwithstanding that section 812.014 criminalizes both the intent to deprive and the intent to appropriate, we believe the critical issue in this case is whether section 812.014, which explicitly permits a conviction for theft upon a showing that the defendant intended to *temporarily* obtain or use another's property, includes the non-turpitudinous *de minimis* takings, or joyriding, as distinguished in *Matter of Diaz-Lizarraga. See Matter of Diaz-Lizarraga*, 26 I&N Dec. at 852 n.8 (noting that Florida is only one of two states that explicitly permits a conviction for theft on a showing of an intent to temporarily deprive an owner of property). On appeal, the DHS argues that section 812.014 does not criminalize *de minimis* takings or joyriding (DHS's Brief at 11-19).[1] We disagree.

In *Dunmann v. State*, 427 So. 2d 166, 167-68 (Fla. 1983), *receded from on other grounds by Daniels v. State*, 587 So. 2d 460 (Fla. 1991), the Florida Supreme Court held that the 1977 enactment of section 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.[2] In *Stephens v. State*, 444 So. 2d 498, 499 (Fla. Dist. Ct. App. 1984), which was decided about 1 year later, Florida's Second District Court of Appeal interpreted *Dunmann* as having held that "the 'joyriding' statute has been subsumed within the omnibus theft statute," meaning "that the offenses of theft and temporary unauthorized use of a motor vehicle possess identical elements."

On appeal, the DHS argues that *Dunmann* is not controlling in this case and has been limited by the decision of Florida's Third District Court of Appeals in *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 720 (Fla. 1997) (DHS's Br. at 17 n.9). In *G.C.*, a juvenile was found delinquent based on a charge of automobile theft under section 812.014 because he accepted

[1] On appeal, the DHS asserts that section 812.014 is a CIMT because it requires the specific intent to steal (DHS's Br. at 15-16). We agree with the DHS that section 812.014 criminalizes a sufficient culpable mental state for CIMT purposes. As explained below, however, Florida's inclusion of temporary takings in its theft statute makes section 812.014 overbroad with regard to its actus reus, or reprehensible conduct, for CIMT purposes.

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

a ride as a passenger in a stolen car driven by a friend. *Id.* at 1187. On appeal the reviewing court found that, although the juvenile had "used" the stolen car by accepting a ride in it, he was not guilty of theft because the evidence did not prove that he had "an intent, in substance, to work a deprivation or appropriation of the owner's property." *Id.* In arriving at this conclusion, the *G.C.* court emphasized that "[u]se alone ... is not enough" for theft. *Id.* Of relevance here, moreover, the court made the following observations about the effect of *Dunmann* on conduct previously prosecuted as "joyriding":

> We have not overlooked the Florida Supreme Court's decision in *State v. Dunmann*. There the court concluded that the 'obtains or uses' terminology of the theft statute includes an intent to temporarily deprive an owner of his property. In so holding, the court determined that the theft statute had left the joy-riding statute ... with no valid field of operation. Arguably, of course, G.C.'s conduct was joy-riding, which former section 812.041 proscribed, and if all conduct described by former section 812.041 has been subsumed in the current theft statute, it would follow that G.C. is guilty of theft. The most logical interpretation of *Dunmann*, however, is that it involved only the prosecution of persons accused of actively operating the vehicles in question ... *Dunmann* did not address the question presented here: the application of the theft statute to a passenger in a stolen car ...

Id. at 1188 (internal citations and footnotes omitted).

This passage in *G.C.* is in tension with *Stephens*, in which the Second District Court of Appeals' interpreted *Dunmann* as having held that "the 'joyriding' statute has been subsumed within the omnibus theft statute" and "that the offenses of theft and temporary unauthorized use of a motor vehicle possess identical elements." *Stephens v. State*, 444 So. 2d at 499. Because *G.C.* was specifically approved by the Florida Supreme Court in 1991, however, we deem it controlling as against *Stephens*, which the Supreme Court did not review. Thus, the DHS has persuasively argued that theft under section 812.014 does not subsume *all* conduct formerly punishable as joyriding under former section 812.041.

The difficulty for the DHS, however, is that *G.C.* did *not* hold that theft and joyriding are mutually exclusive—i.e., that the theft definition excludes *all* conduct previously punishable as joyriding. On the contrary, it held only that the theft definition excludes the *subset* of joyriding offenses that are committed by *passengers*. *See G.C. v. State*, 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."). Notably, *G.C.* clearly says that *Dunmann*, properly construed, *does* treat joyriding as theft when the joyrider is "accused of actively operating the vehicle[] in question." *Id.*

If joyriding *by a driver* is subsumed within the definition of theft under section 812.014—and the Florida cases cited above seem to indicate that it is—then the question here reduces to whether joyriding by a driver involves moral turpitude under *Diaz-Lizarraga*. Because joyriding, even by

a driver, effects only a *de minimis* taking of the rightful owner's property, we conclude that it does not involve moral turpitude.[3]

Accordingly, we will affirm the Immigration Judge's decision terminating the removal proceedings.

ORDER: The appeal is dismissed.

Ellen Rieboldt
FOR THE BOARD

[3] The DHS does not argue on appeal that section 812.014 is divisible or that the modified categorical approach applies.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
MIAMI, FLORIDA

File: A096-724-265) March 22, 2017
)
In the Matter of)

ANNI ALONSO) IN REMOVAL PROCEEDINGS
)
RESPONDENT)

CHARGES: Section 212(a)(2)(A)(i)(I) of the INA

APPLICATIONS: N/A

ON BEHALF OF RESPONDENT: Mr. Wilfredo Oscar Allen, Esquire

ON BEHALF OF DHS: Ms. Diana Alvarez, Esquire
Assistant Chief Counsel, DHS-ICE

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a native and citizen of Cuba, and a lawful permanent resident of the United States. On August 21st, 2015, the Department of Homeland Security issued the Notice to Appear (NTA) alleging that the respondent was removable from the United States as an arriving alien who had been convicted of a crime involving moral turpitude stemming from one conviction in Miami Dade County, Florida on January 25th, 2008 for theft in violation of Florida Statute Section 812.014. See Exhibit 1. Department of Homeland Security submitted the conviction records in support of the

respondent's removability. See Exhibit 2. The court notes that in order to establish that a returning lawful permanent resident alien is to be treated as an applicant for admission to the United States, Department of Homeland Security has the burden of proving by clear and convincing evidence that one of the six exceptions to the general rule for lawful permanent residents set forth at Section 101(a)(3)(c) of the Immigration and Nationality Act applies. See Matter of Benno Rivens, 25 I&N Dec. 623 (BIA 2011). DHS provided a brief in support of their decision, and the court has reviewed that brief.

Recent case law has significantly changed the way the court analyzes theft convictions to determine whether the crime is an aggravated felony or a crime involving moral turpitude (CIMT). The Florida~~Board's~~ statute Section 812.014 states in relevant part that "a person commits theft if he or she knowingly obtains, or uses, or endeavors to obtain or to use the property of another with the intent to either temporarily or permanently: (a) deprive the other person of a right to the property or a benefit from the property, or (b) appropriate the property for his or her own use, or for the use of any other person not entitled to the use of the property." Therefore, to prove the crime of theft in Florida, the state must prove the following two elements beyond a reasonable doubt: (1) the defendant knowingly and unlawfully (obtained or used) (endeavored to obtain or to use) the property of the alleged victim; (2) he did so with the intent to either temporarily or permanently: (a) deprive the victim of his or her rights to the property, or any benefit from it, or (b) appropriate the property of the victim to his or her own use, or to the use of any other person not entitled to it.

To determine whether a crime qualifies as a CIMT in cases arising within the 11th Circuit, where the instant matter arises, the court must apply the traditional categorical approach, under which the focus is on the statutory definition of the crime, rather on the facts underlying he particular offense. See Fajardo v U.S. Attorney

General, 659 F.3d 1303 (11th Cir. 2011). The categorical approach requires the court analyze whether the least culpable conduct necessary to sustain a conviction under the statute meets the standard of a CIMT. See Canno v. U.S. Attorney General, 709 F.3d 1052 (11th Cir. 2013).

The statute by its terms encompasses offenses in which only a temporary taking or appropriation of property is intended. Appropriations, temporary or otherwise, the least culpable conduct, are not CIMTs. Under recent Board of Immigration appeals precedent, Matter of Diaz Lizarraga, 26 I&N Dec. 847 (BIA 2016), ~~.—T~~temporary takings of property could be CIMTs, but this decision does not address appropriations under the statute, and as that is the least culpable conduct necessary to support a conviction for theft under Florida Statute section 812~~2~~.014, does not involve moral turpitude~~;~~, the statute does not categorically define a CIMT.

Furthermore, on June 20th, 2013, the United States Supreme Court held ~~in~~ in Descamps v. United States, 133 Supreme Court 2276 (2013), that courts may not apply the modified categorical approach and look to the underlying court record when the statute of conviction has a single, indivisible set of elements. The Supreme Court clarified that the modified categorical approach is a tool in applying the categorical approach when a defendant was convicted of violating a divisible statute - one that sets out multiple alternative ***elements***, thus defining more than one crime - for example, stating that burglary involves entry into a building or an automobile. A s~~S~~tatute is only divisible if it lists elements in the alternative. The key is elements, not means or facts. In a typical case brought under the statute, the prosecutor charges one of those two or more alternatives, and the judge instructs the jury accordingly. Therefore, the categorical approach is in alternative elements versus alternative means test. It is an element of the crime that the jury had to find a fact beyond a reasonable doubt; it is a

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means of the crime, ~~but~~if the defendant would still have been convicted regardless of the fact.

In light of Descamps, the argument that Florida Statute section 812.014 is divisible because it covers temporary takings or appropriations is no longer applicable or persuasive. Permanent and temporary takings or appropriations are alternative means of committing theft~~s~~ in Florida, not alternative elements. A jury is not required to make a determination as to whether the taking was temporary, or permanent, or merely an appropriation, in order to convict.

Notably, the statute encompasses two distinct mens rea: intent to deprive, and intent to appropriate. See Jaggernauth v. U.S. Attorney General, 432 F.3d 1346 (11th Cir. 2005). Although in Jaggernauth, the 11th Circuit analyzed the elements of Florida Statute Section 812.014 to determine whether this provision described a theft offense for purposes of Section 101(a)(43)(G) of the Act, the analysis is relevant to the context of crimes involving moral turpitude. In Jaggernauth, the 11th Circuit Court of Appeals determined that the statute's attempt to appropriate clause did not include a criminal intent to deprive the owner of the rights and benefits of ownership, as the generic definition of that requires. The court noted that an appropriation is defined as an exercise of control over property by taking of possession which does not necessarily entail that the property owner be deprived of the rights to the property's use or benefits. To interpret those sub-parts to involve an intent to deprive would make sub-part D, "intent to appropriate," superfluous, thereby violating the rule of statutory construction. The courts must give effect, if possible, to every clause and every word of a statute. Jaggernauth v. U.S. Attorney General, supra at 1354.

The record of conviction in the instant matter tracks the general language of the Florida statute and does not specify which, if either, specific subsection the

respondent was convicted. Specifically, the record of conviction in the instant matter does not establish that the respondent was convicted for intent to permanently deprive, as opposed to an intent to temporarily deprive, or to merely appropriate. The court's inquiry ends there.

In Ramos v. U.S. Attorney General, 709 F.3d 1066 (11th Cir. 2013), the 11th Circuit Court of Appeals reaffirmed its prior holding in Jaggernauth. The court reiterated that the intent to appropriate does not encompass the intent to deprive, as the generic definition of theft requires. The record of conviction fails to show that the respondent in the instant matter was convicted of a theft offense for immigration purposes.

The court must therefore conclude that the Department of Homeland Security has not met its burden to demonstrate by clear and convincing evidence that the respondent is removable as charged under Section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude. ~~However,~~ There are no other charges ~~are~~ pending against the respondent. Therefore, the removal proceedings will be terminated.

It is hereby ordered that the respondent's removal proceedings are terminated.

Done and ordered this 22nd day of March, 2017.

Please see the next page for electronic signature

~~GEORGE W.~~ WILLIAM RIGGS
U. S. Immigration Judge

APPEAL RIGHTS:

A notice of appeal must be filed with the Board of Immigration Appeals within 30 calendar days of the issuance date of this decision. If the final date for filing a notice of appeal occurs on a Saturday, Sunday, or even holiday, the time period for filing will be extended to the next business day. If the time period expires and no appeal has been filed, this decision becomes final. 30 days from today is April 21st, 2017.

//s//

Immigration Judge GEORGE W. RIGGS

riggsg on June 19, 2017 at 12:33 PM GMT