U.S. Department of Justice

Executive Office for Immigration Review

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Name: BASTIAN-MOJICA, JAVIER

A 074-908-814

Date of this notice: 7/10/2018

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:
Adkins-Blanch, Charles K.
Snow, Thomas G
Kelly, Edward F.

Userteam: Docket

File: A074 908 814 – Hartford, CT

Date: JUL 10 2018

In re: Javier BASTIAN-MOJICA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Holli B. Wargo, Esquire

ON BEHALF OF DHS: Leigh Mapplebeck
Senior Attorney

APPLICATION: Termination

This matter was last before the Board on August 31, 2016, when we dismissed the respondent's appeal from the Immigration Judge's July 28, 2015, decision denying his motion to terminate proceedings. Our prior decision found that the respondent was subject to removal because his conviction for fourth degree larceny in violation of Connecticut General Statutes section 53-124 was a categorical aggravated felony theft offense under sections 101(a)(43)(G) and 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(43)(G) and 1227(a)(2)(A)(iii). The United States Court of Appeals for the Second Circuit has remanded the case to the Board to explain whether the respondent's conviction is an aggravated felony in light of its precedent in *Matter of Garcia-Madruga*, 24 I&N Dec. 436 (BIA 2008) (holding that alien's offense of welfare fraud did not qualify as an aggravated felony theft offense because theft occurs when there is a taking without consent, while fraud occurs with the victim's consent). Upon further consideration, we will sustain the respondent's appeal and terminate the proceedings.

Our prior decision in this matter relied upon the Second Circuit's precedent decisions holding that larceny under Connecticut law is categorically an aggravated felony theft offense.[1] *See Almeida v. Holder*, 588 F.3d 778 (2d Cir. 2009) (holding that second degree larceny under Conn. Gen. Stat. § 53a–123 is categorically an aggravated felony theft offense); *see also Abimbola v. Ashcroft*, 378 F.3d 173 (2d Cir. 2004) (holding that third degree larceny under Conn. Gen. Stat. § 53a–124 is categorically an aggravated felony theft offense). The respondent argued that a violation of Conn. Gen. Stat. § 53a-124 is not a categorical theft offense because larceny is defined under Connecticut law to include takings which occur with an owner's consent, wrongfully obtained, as through fraud. We rejected that argument, citing various Connecticut cases holding that a non-consensual taking is a necessary element for a larceny conviction.

The Second Circuit indicated in its order of remand that its decisions in *Almeida* and *Abimbola* are not controlling because those cases did not consider arguments based on the distinction between takings of property both without and with consent. *But see Forbes v. Lynch*,

[1] In Connecticut, all degrees of larceny use the definition of larceny in Conn. Gen. Stat. § 53a-119, and are distinguished primarily by the value of the property taken.

642 F. App'x. 29 (2d Cir. 2016) (holding that the Board's failure to analyze alien's third degree larceny conviction under its precedent decision in *Matter of Garcia-Madruga* was harmless error because all Connecticut larceny offenses require a non-consensual taking under Second Circuit and Connecticut case law). In view of that clarification, we have re-examined Connecticut case law concerning the elements of larceny.

Although some Connecticut cases state generally that a lack of consent is a necessary element of the crime of larceny, other cases specify that a taking of property must be without the *knowing* consent of the owner. *See State v. Calonico*, 256 Conn. 135, 153-54 (2001) (collecting cases and concluding that larceny requires a lack of knowing consent). A lack of "knowing" consent is a qualification which may include takings with consent obtained through fraud, and is consistent with the expansive definition of larceny found at Conn. Gen. Stat. § 53a-119 (providing a non-exhaustive list of means by which the offense may be committed, such as obtaining property by false pretenses or false promises). Therefore, we find that the scope of larceny under Connecticut law includes both theft and fraud offenses.

We have previously acknowledged that there may be instances in which a taking with consent wrongfully obtained may still constitute a theft offense. *See Matter of Garcia-Madruga*, 24 I&N Dec. at 440 n. 5; *see also Matter of Ibarra*, 26 I&N Dec. 809, 811 (BIA 2016) (stating that, because "consent" in extortion offenses is coerced, it "does not constitute the kind of 'consent' that exempts an offense from aggravated felony treatment under section 101(a)(43)(G) of the Act"). However, given the clear distinction between theft and fraud recognized in *Matter of Garcia-Madruga*, we conclude that the Connecticut statute defining larceny is overbroad, and that the crime is not a categorical theft offense.

Inasmuch as the statute defines larceny through a list of alternative means by which the offense may be committed, it is indivisible and a modified categorical analysis cannot be employed to determine whether the respondent was convicted for conduct which qualifies as a theft offense. *See Mathis v. United* States, 136 S. Ct. 2243, 2256 (2016). Therefore, the aggravated felony charge in this case cannot be sustained.

Accordingly, the following orders will be entered.

ORDER: The August 31, 2016, decision of the Board, and the July 28, 2015, decision of the Immigration Judge, are hereby vacated.

FURTHER ORDER: The proceedings are terminated.

FOR THE BOARD