U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: E[redacted] H[redacted] F[redacted] **A [redacted]193**

Date of this notice: 9/2/2016

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:
Cole, Patricia A.
Pauley, Roger
Wendtland, Linda S.

Userteam: Docket

File: A[redacted]193 – Dallas, TX

Date: SEP - 2 2016

In re: F[redacted]E[redacted]-H[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: David L. Sobel, Esquire

ON BEHALF OF DHS: Melissa A. Warburton
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled

APPLICATION: Cancellation of removal

The respondent appeals from an Immigration Judge's January 6, 2015, decision ordering him removed from the United States. The Department of Homeland Security ("DHS") opposes the appeal. The appeal will be sustained and the record will be remanded.

The respondent—a native and citizen of Mexico—concedes that he is removable from the United States by virtue of his unlawful presence. *See* section 212(a)(6)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(6)(A)(i). Thus, the only issue presented on appeal is whether the Immigration Judge properly found the respondent ineligible for cancellation of removal under section 240A(b)(1) of the Act, 8 U.S.C. § 1229b(b)(1).

Section 240A(b)(1)(C) of the Act requires an applicant for cancellation of removal to prove that he has "not been convicted" of certain crimes, including crimes involving moral turpitude ("CIMT") under sections 212(a)(2)(A)(i)(I) and 237(a)(2)(A)(i) of the Act, 8 U.S.C. §§ 1182(a)(2)(A)(i), 1227(a)(2)(A)(i). *See generally Matter of Cortez*, 25 I&N Dec. 301, 303-04 (BIA 2010). The Immigration Judge found that the respondent did not carry his burden of proof in that regard because he sustained a 2012 Oklahoma conviction for a CIMT—namely, "resisting an executive officer" in violation of OKLA. STAT. ANN. tit. 21, § 268 (Exh. 3). On appeal, the respondent argues that OKLA. STAT. ANN. tit. 21, § 268 does not define a CIMT and that the Immigration Judge erred by denying his application for cancellation of removal on that basis. Upon de novo review, *see* 8 C.F.R. § 1003.1(d)(3)(ii), we agree with the respondent.

The statutory phrase "crime involving moral turpitude" is broadly descriptive of a class of offenses involving "reprehensible conduct" committed with some form of "scienter"—that is, with a culpable mental state, such as specific intent, deliberateness, willfulness, or recklessness. *See Matter of Louissaint*, 24 I&N Dec. 754, 756-57 (BIA 2009). Conduct is "reprehensible" in the pertinent sense if it is "inherently base, vile, or depraved, and contrary to the accepted rules

of morality and the duties owed between persons or to society in general." *See, e.g., Matter of E.E. Hernandez*, 26 I&N Dec. 397, 398 (BIA 2014). To determine whether the respondent's conviction was for a CIMT, we employ the "categorical approach," which is focused upon the elements of the crime rather than upon the respondent's specific offense conduct. *See, e.g., Cisneros-Guerrerro v. Holder*, 774 F.3d 1056, 1058-59 (5th Cir. 2014).

The statute under which the respondent was convicted provides that "[e]very person who knowingly resists, by the use of force or violence, any executive officer in the performance of his duty, is guilty of a misdemeanor." OKLA. STAT. ANN. tit. 21, § 268.[1] According to Oklahoma's *Uniform* Criminal Jury Instructions, "resisting an executive officer" has five elements that must be proven beyond a reasonable doubt: (1) a "knowing" mental state; (2) the use of "force/violence"; (3) resisting; (4) a peace/executive officer; (5) in the performance of his/her official duties. Vernon's Okla. Forms 2d, OUJI-CR 6-47. We conclude that a "knowing" mental state is sufficient to satisfy the culpable "scienter" requirement of our CIMT case law, and thus the dispositive question is whether the elements of OKLA. STAT. ANN. tit. 21, § 268 define conduct that is sufficiently "reprehensible" to qualify the offense as a CIMT.

Over the years this Board and the federal courts have established some ground rules for determining when an offense involving forcible interference with a law enforcement officer is "reprehensible" enough to qualify as a CIMT. The baseline rule is that knowingly resisting arrest or otherwise interfering with a law enforcement officer by committing a simple assault and battery—i.e., an offensive but non-injurious "touching" committed with general intent—is *not* a CIMT. *See Matter of B-*, 5 I&N Dec. 538 (BIA 1953); *Garcia-Meza v. Mukasey*, 516 F.3d 535, 537 (7th Cir. 2008); *United States ex rel. Zaffarano v. Corsi*, 63 F.2d 757, 758 (2d Cir. 1933); *Ciambelli ex rel. Maranci v. Johnson*, 12 F.2d 465, 466 (D. Mass. 1926); *see also Vaquero-Cordero v. Holder*, 498 F. App'x 760, 764-67 (10th Cir. 2012).

When an alien is convicted of resisting arrest or interfering with a law enforcement officer under a statute that includes elements more serious than those associated with a simple assault or battery, however, the moral turpitude inquiry is less straightforward and requires a weighing of the gravity of the danger contemplated by the offense as well as the offender's degree of mental culpability. Thus, we have held that knowingly resisting arrest or interfering with a police officer *does* involve moral turpitude if the statute of conviction requires either: (1) injury to the

[1] As an Oklahoma misdemeanor, "resisting an executive officer" is punishable by a maximum term of imprisonment of 1 year. *See* OKLA. STAT. ANN. tit. 21, § 10. The offense is codified in chapter 6 of the Oklahoma Criminal Code, which pertains to "Crimes Against the Executive Power." Chapter 20 of the Criminal Code, pertaining to "Assault and Battery," also prohibits "assault" of a peace officer—a misdemeanor punishable by not more than 6 months' imprisonment, *see* OKLA. STAT. ANN. tit. 21, § 649(A); "battery" of a peace officer—a felony punishable by up to 5 years' imprisonment, *see* OKLA. STAT. ANN. tit. 21, § 649(B); and "aggravated assault and battery" of a peace officer—a felony punishable by up to life imprisonment, *see* OKLA. STAT. ANN. tit. 21, § 650.

officer, *see Matter of Danesh*, 19 I&N Dec. 669, 670-73 (BIA 1988),[2] or (2) use of a deadly weapon, *see Matter of Logan*, 17 I&N Dec. 367, 368-69 (BIA 1980). We have also held that moral turpitude inheres in the act of driving a motor vehicle in "willful or wanton disregard for the lives or property of others" while fleeing to elude a pursuing police vehicle. *See Matter of Ruiz-Lopez*, 25 I&N Dec. 551 (BIA 2011). Conversely, we have held that infliction of injury upon an officer does not involve moral turpitude if the statute defining the offense does not require knowledge on the part of the offender that the victim was an officer. *See Matter of O-*, 4 I&N Dec. 301, 311 (BIA 1951).[3] With this background in mind, we return to the elements of the respondent's offense.

As noted previously, OKLA. STAT. ANN. tit. 21, § 268 includes as an element the requirement that the accused resist an executive officer "by the use of force or violence." The Oklahoma Court of Criminal Appeals has long held that this "use of force or violence" element requires a prosecutor to "show some act of aggression on the part of the accused from which the court and jury can reasonably infer forcible resistance or interference" with the officer's performance of his or her duty. *Cummins v. State*, 117 P. 1099, 1100 (Okla. Crim. App. 1911). As intervening Oklahoma case law has demonstrated, however, an "act of aggression" can satisfy the "use of force or violence" element even if it does not involve the use of physical violence or the actual or intended infliction of injury upon the officer. In one case, for instance, threatening language and gestures were sufficient. *See Reams v. State*, 551 P.2d 1168, 1170 (Okla. Crim. App. 1976) (holding that the accused "used force or violence" by refusing to cooperate with an officer and by pointing at the officer and stating, 'I'm tired of your bull s**t. You are either going to get out of here or I'll put you out.'). In another case, the offender "used force or violence" merely by creating physical impediments to his own arrest. *See Gille v. State*, 743 P.2d 654, 658 (Okla. Crim. App. 1987) (holding that the accused resisted arrest through the "use of force or violence" by handcuffing himself to the steering wheel of his car, locking his car doors to prevent the officers from seizing him, and struggling vigorously enough to bend a handcuff key).

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[2] Several federal courts have taken a slightly different tack, concluding that the crucial question for moral turpitude purposes is not whether the officer was injured in fact, but rather whether the offender *intended* to injure the officer by violence. *See Cano v. U.S. Atty. Gen.*, 709 F.3d 1052, 1054-55 (11th Cir. 2013) (Florida offense of resisting an officer with violence held a CIMT, even if the officer is uninjured, because the statute requires use or threatened use of violent physical force against the officer); *Partyka v. U.S. Atty. Gen.*, 417 F.3d 408, 413-15 (3d Cir. 2005) (New Jersey offense of aggravated assault of law enforcement officer held not a CIMT, despite requiring injury to the officer, because such injury can be inflicted unintentionally); *Zaranska v. Dep't of Homeland Sec.*, 400 F. Supp. 2d 500, 517 (E.D.N.Y. 2005) (New York offense of causing physical injury to a police officer held not a CIMT because the offense "is strict liability in terms of causing physical injury").

[3] We emphasize, however, that an assault statute requiring both the specific intent to injure and the actual infliction of bodily harm upon a victim defines a categorical CIMT, regardless of whether the victim was a police officer. *See Matter of Solon*, 24 I&N Dec. 239 (BIA 2007).

"Resisting an executive officer" is a serious crime and we do not minimize the dangers posed to police officers by hostile or uncooperative suspects. Indeed, there may be many individual violations of OKLA. STAT. ANN. tit. 21, § 268 that involve moral turpitude. Under the categorical approach, however, we are concerned only with the elements of the offense, and when those elements are considered within the context of our precedents and those of the federal courts, we conclude that they do not define sufficiently reprehensible conduct to justify CIMT treatment. More precisely, the elements of OKLA. STAT. ANN. tit. 21, § 268 require neither the use of a deadly weapon—as in *Matter of Logan*—nor the actual or intended infliction of injury upon the officer—as in *Matter of Danesh* and federal court precedents—nor a "wanton or willful disregard for the lives or property of others"—as in *Matter of Ruiz-Lopez*. Accordingly, we will reverse the Immigration Judge's determination that the respondent is ineligible for cancellation of removal by virtue of having been convicted of a CIMT.[4]

In conclusion, although the respondent is removable by virtue of his unlawful presence in the United States, his 2012 Oklahoma conviction for "resisting an executive officer" is not a CIMT conviction that renders him ineligible for cancellation of removal under section 240A(b)(1)(C) of the Act. Accordingly, the Immigration Judge's removal order will be vacated and the record will be remanded for a determination whether the respondent is otherwise eligible for, and deserving of, cancellation of removal or other relief.

ORDER: The appeal is sustained, the Immigration Judge's decision is vacated in part, and the record is remanded for further proceedings consistent with the foregoing opinion.

FOR THE BOARD

Board Member Patricia A. Cole respectfully dissents without opinion.

[4] The parties agree that OKLA. STAT. ANN. tit. 21, § 268 is not a "divisible" statute vis-à-vis the CIMT concept, and thus we have no occasion to apply the "modified categorical approach."