U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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DROBYSH, DZIANIS
[redacted]

DHS/ICE Office of Chief Counsel - EAZ
Eloy Detention Ctr,1705 E. Hanna Rd
Eloy, AZ 85131

Name: DROBYSH, DZIANIS

A 055-034-890

Date of this notice: 11/29/2018

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:
Crossett, John P.

Userteam: Docket

File: A055-034-890 – Eloy, AZ Date: NOV 29 2018

In re: Dzianis DROBYSH a.k.a. Dennis Drobysh

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Jeremy Martinez
Assistant Chief Counsel

APPLICATION: Termination of proceedings

The Department of Homeland Security ("DHS") appeals from an Immigration Judge's July 27, 2017, decision terminating removal proceedings against the respondent.[1] The appeal will be dismissed.

We review the Immigration Judge's findings of fact, including credibility findings, for clear error, and we review all other issues de novo. 8 C.F.R. §§ 1003.1(d)(3)(i), (ii).

In 2017, the respondent—a native and citizen of Belarus and a lawful permanent resident of the United States—was convicted of possession of drug paraphernalia in violation of Ariz. Rev. Stat. Ann. § 13-3415(A) (hereafter "section 13-3415(A)") and possession or use of dangerous drugs in violation of Ariz. Rev. Stat. Ann. § 13-3407(A) (hereafter "section 13-3407(A)"). The issue on appeal, which we review de novo, is whether this conviction renders the respondent removable under section 237(a)(2)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(B)(i) (2012), as an alien "convicted of a violation of ... any law or regulation of a State ... relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))."

As the Supreme Court has explained, a State drug conviction can support a removal charge under section 237(a)(2)(B)(i) of the Act only "when the elements that make up the state crime of conviction relate to a federally controlled substance." *Mellouli v. Lynch*, 135 S. Ct. 1980, 1990 (2015). Thus, an Arizona drug conviction can support a section 237(a)(2)(B)(i) charge only if an "element" of the statute of conviction is connected to a substance listed in the Federal controlled substance schedules. *Id.* at 1991.

Section 13-3407(A) provides that "[a] person shall not knowingly possess or use a dangerous drug," with the term "dangerous drug" being defined by reference to a long statutory list of substances, including "methamphetamine." Ariz. Rev. Stat. Ann. § 13-3401(6).

[1] The DHS also filed a motion to reconsider, which was denied by the Immigration Judge on August 8, 2017.

Section 13-3415(A) provides as follows:

> It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a drug in violation of this chapter. Any person who violates this subsection is guilty of a class 6 felony.

For purposes of this section, the term "drug" means "any narcotic drug, dangerous drug, marijuana or peyote." Ariz. Rev. Stat. Ann. § 13-3415(F)(1). In turn, "dangerous drug" and "narcotic drug" are defined by reference to long lists of substances. *See* Ariz. Rev. Stat. Ann. §§ 13-3401(6), (20).

It is undisputed that sections 13-3415(A) and 13-3407(A) are overbroad vis-à-vis section 237(a)(2)(B)(i) of the Act because Arizona defines the term "drug" and "dangerous drug" to include several substances that are not "controlled substances" under federal law (IJ at 4-5; DHS Br. at 8-9). *Compare* Ariz. Rev. Stat. §§ 13-3415(F) (defining "drug"), 13-3401(6), (20) (defining "dangerous drug" and "narcotic drug") *with* 21 U.S.C. §§ 802(6), 812 and 21 C.F.R. §§ 1308.11-1308.15 (defining "controlled substance"). Nevertheless, the DHS contends that neither section 13-3415(A) nor section 13-3407(A) are categorically overbroad because there is no "realistic probability" that Arizona would actually prosecute anyone under those sections for an offense involving a non-federally controlled substance (DHS Br. at 7, 12-13). That argument is consistent with the Board's understanding of the "realistic probability" standard. *See Matter of Ferreira*, 26 I&N Dec. 415, 420-21 (BIA 2014); *see also United States v. Castillo Rivera*, 853 F.3d 218, 222-23 (5th Cir.) (en banc), *cert. denied*, 138 S. Ct. 501 (2017).

However, the United States Court of Appeals for the Ninth Circuit—in whose jurisdiction this proceeding arises—has rejected *Matter of Ferreira*. *See Lorenzo v. Sessions*, 902 F.3d 930, 937 (9th Cir. 2018). Instead, the Ninth Circuit holds that "[w]hen '[t]he state statute's greater breadth is evident from its text,' a defendant may rely on the statutory language to establish the statute as overly inclusive." *Id.* (quoting *United States v. Vidal*, 504 F.3d 1072, 1082 (9th Cir. 2007) (en banc) (citation omitted)). As the "greater breadth" of sections 13-3415(A) and 13-3407(A) is evident from their texts within the meaning of controlling Ninth Circuit law, the Immigration Judge properly found them overbroad with respect to section 237(a)(2)(B)(i) of the Act (IJ at 4-5).

The DHS further argues that the respondent's convictions render him categorically removable under section 237(a)(2)(B)(i) of the Act because they involved a federally controlled substance (methamphetamine), as evidenced by the sentencing court's reliance on Ariz. Rev. Stat. Ann. § 13-901.01(H)(4) (hereafter "section 13-901.01(H)(4)") (DHS Br. at 7-13). Section 13-901.01(H)(4) provides: "A person is not eligible for probation under this section . . . if the court finds the person . . . [w]as convicted of the personal possession or use of a controlled substance or drug paraphernalia and the offense involved *methamphetamine*" (DHS Br. at 9–10, 24–25). This argument necessarily proceeds from the understandable assumption that Arizona law and Federal law define "methamphetamine" the same way. However, the Ninth Circuit's intervening decision

in *Lorenzo v. Sessions* convinces us that this assumption is unjustified, at least in the present jurisdiction. 902 F.3d at 937.

In *Lorenzo*, the Ninth Circuit held that Cal. Health & Safety Code §§ 11378 and 11379—which prohibit the possession of methamphetamine for sale and the transportation or sale of methamphetamine, respectively—are overbroad and indivisible vis-à-vis section 237(a)(2)(B)(i) of the Act because California's definition of methamphetamine covers both "geometric and optical isomers" of methamphetamine, whereas the Federal definition of methamphetamine covers only "optical isomers," not "geometric" ones. *See* 902 F.3d at 934–40.

Application of *Lorenzo*'s reasoning to the present facts leads to the inevitable conclusion that Arizona's definition of methamphetamine is also overbroad and indivisible vis-à-vis the Federal definition of methamphetamine, which section 237(a)(2)(B)(i) incorporates by reference. Specifically, Arizona defines methamphetamine even more broadly than California, to encompass "isomers, whether optical, positional or geometric...." Ariz. Rev. Stat. Ann. §§ 13-3401(6)(c), 13-3401(6)(c)(xxxviii). Further, there is no indication that an Arizona jury, considering whether to sustain a criminal charge predicated on a defendant's possession of drug paraphernalia for use with an isomer of methamphetamine, or possession or use of an isomer of methamphetamine, would need to render a unanimous verdict about the particular type of isomer (i.e., "optical, positional or geometric") in question. Thus, it follows that the respondent's conviction under sections 13-3415(A) and 13-3407(A) cannot support a section 237(a)(2)(B)(i) charge in the Ninth Circuit *even if* the underlying "drug" or "dangerous drug" was "methamphetamine."

As *Lorenzo* is outcome-determinative of the respondent's removability in the Ninth Circuit, we need not decide at this time whether sections 13-3415(A) and 13-3407(A) are otherwise "divisible" with respect to the identity of a "drug" or "dangerous drug." The following order shall be issued.

ORDER: The appeal is dismissed.

FOR THE BOARD