U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: SHIFERAW, TADESSE NEGATU **A 028-205-485**

Date of this notice: 8/7/2020

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:
Goodwin, Deborah K.
Donovan, Teresa L.
Greer, Anne J.

Userteam: Docket

File: A028-205-485 – Chicago, IL

Date: AUG - 7 2020

In re: Tadesse Negatu SHIFERAW a.k.a. Shiferaw Tadesse

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Robert Vinikoor, Esquire

ON BEHALF OF DHS: Michelle M. Venci
Assistant Chief Counsel

APPLICATION: Remand

The respondent, a native and citizen of Ethiopia and a lawful permanent resident of the United States, appeals from an Immigration Judge's September 25, 2019, decision ordering him removed from the United States. The Department of Homeland Security ("DHS") opposes the appeal, in part. The appeal will be sustained in part and the record will be remanded.

In a notice to appear issued in August 2019, the DHS charged the respondent with removability as an alien convicted of an "aggravated felony" and a controlled substance violation (Exh. 1). *See* sections 237(a)(2)(A)(iii) and 237(a)(2)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1227(a)(2)(A)(iii), (B)(i) (2019). In support of those charges, the DHS alleged that the respondent has a November 2016 conviction for possessing marijuana with intent to deliver or manufacture in violation of 35 PA. CONS. STAT. ANN. § 780-113(a)(30) (2016) (hereafter "section 780-113(a)(30)") and a 2003 conviction of trafficking in marijuana, less than 8 ounces, in violation of KY. REV. STAT. § 218A.1421(2) (2003) (Exh. 1). The respondent admitted he has been convicted under Pennsylvania law but denied the conviction under Kentucky law. The Immigration Judge sustained both charges of removability and ordered the respondent removed to Ethiopia in an order dated September 25, 2019. This timely appeal followed.

The primary legal issue on appeal is whether the respondent's Pennsylvania conviction for possession with intent to deliver a controlled substance under section 780-113(a)(30) is an aggravated felony under the Act, as referenced in section 101(a)(43)(B) of the Act, 8 U.S.C. § 1101(a)(43)(B).[1] The respondent contends that the conviction is not an aggravated felony under 101(a)(43)(B) of the Act.[2]

[1] The respondent does not dispute that he is removable from the United States under section 237(a)(2)(B)(i) of the Act. Whether he has been convicted of an aggravated felony is relevant to his eligibility for relief from removal, including cancellation of removal under section 240A(a) of the Act, 8 U.S.C. § 1229b(a).

[2] The DHS does not specifically address the respondent's arguments on appeal that he has not been convicted of an aggravated felony. The DHS opposes the respondent's claim that his right

To determine whether the respondent's conviction under section 780-113(a)(30), which prohibits, "the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance . . . or knowingly creating, delivering or possessing with intent to deliver, a counterfeit controlled substance," is an aggravated felony under the Act, we employ the categorical approach by comparing the elements of the state offense to the generic federal definition of the pertinent offense listed in the Act. *See Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016); *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013); *Matter of Chairez*, 26 I&N Dec. 819, 821 (BIA 2016). We focus on the elements defining the offense of conviction and the minimum conduct that has a "realistic probability" of being prosecuted under those elements. *See Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013) (stating that to show a "realistic probability," it must be demonstrated that the State "actually prosecutes" conduct outside the generic definition of the crime). A state crime is not a categorical match with a federal offense if its elements are broader than those of a listed generic offense. *See Mathis v. United States*, 136 S. Ct. at 2251.

As explained in *Mathis*, an "element" of a statute is what the "prosecution must prove to sustain a conviction" and the jury must unanimously find beyond a reasonable doubt. *Mathis v. United States*, 136 S. Ct. at 2248. To identify an element, the Supreme Court instructed parties to look first at the statute itself and sources such as case law and jury instructions. *Id.* at 2256. The Supreme Court also stated it may be permissible to "peek at the [record] documents . . . for the sole and limited purpose of determining whether [the listed items are] element[s] of the offense." *Id.*

The generic offense contained within section 101(a)(43)(B) of the Act provides two possible routes for a state drug felony to qualify as an aggravated felony. *Gamero v. Barr*, 929 F.3d 464, 468-69 (7th Cir. 2019). First, the offense is an "aggravated felony" under the "illicit trafficking in a controlled substance" prong if the crime contains a trafficking element. *Id.* Second, the offense is an "aggravated felony" under the "hypothetical federal felony route," as defined in section 924(c) of Title 18, if it would be punishable under the Controlled Substance Act ("CSA"). *Id.*

The respondent's conviction would therefore constitute an aggravated felony if it satisfies either prong. In this case, the Immigration Judge found that the respondent's conviction is an aggravated felony because the record of conviction establishes that the offense is a "drug trafficking crime" based on the facts and circumstances of the offense (IJ at 2).

We will begin our analysis with section 101(a)(43)(B)'s "illicit trafficking" prong. The phrase "illicit trafficking" is not defined in the Act, but we have held that an "illicit trafficking" offense under the Act must involve a commercial transaction. *Matter of Davis*, 20 I&N Dec. 536, 541 (BIA 1992) (concluding that a "business or merchant" element or the commonly understood aspect of "trading or dealing" must be involved for an offense to be "illicit trafficking"); *Matter of L-G-H-*, 26 I&N Dec. 365, 371 n.9 (BIA 2014) (noting that "trafficking involves a commercial transaction, or passing of goods from one person to another for money or other consideration");

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to due process was violated and that this case should be remanded to a different Immigration Judge (DHS Br. at 5-9). However, the DHS also indicates it does not oppose a remand "to further examine the respondent's eligibility for relief" (DHS Br. at 9).

see also Gamero v. Barr, 929 F.3d at 468 (noting the requirement that an offense must involve unlawful trading or dealing of a controlled substance in order to contain a "trafficking element").

When comparing this concept to the provision at issue, we observe that Pennsylvania's statutory definition of "delivery" does not include an explicit reference to a trafficking element. *See* 35 PA CONS. STAT. ANN. § 780-102(b) (defining "deliver" or "delivery" as "the actual, constructive, or attempted transfer from one person to another of a controlled substance, other drug, device or cosmetic whether or not there is an agency relationship"). We also notice the absence of any consideration or remuneration in the relevant jury instructions. *See* Pennsylvania Suggested Standard Criminal Jury Instructions sections 16.01(4) and 16.30(a)(30) (3d ed. 2016).

Moreover, our observation that a person may be guilty of delivery in Pennsylvania without compensation is supported by case law. *See Commonwealth v. Morrow*, 650 A.2d 907, 912 (Pa. Super. Ct. 1994) ("Section 780-113(a)(30) does not require that a party make a profit, it simply prohibits 'delivery.'"); *Commonwealth v. Jones*, 586 A.2d 433, 436 (Pa. Super. Ct. 1991) (explaining that under Pennsylvania law it is "no longer necessary to establish an exchange of money took place, since offensive conduct is simply actual, constructive, or attempted transfer from one person to another of the prohibited substance") (internal quotations omitted).

Notably, while Pennsylvania has a different statute that specifically punishes possession with intent to distribute a small amount of marijuana for no remuneration, *see* section 780-113(a)(31), distributing a small amount of marijuana for no remuneration could also be prosecuted under section 780-113(a)(30). *See Evanson v. U.S. Att'y Gen.*, 550 F.3d 284, 289 (3d Cir. 2008); *Jeune v. U.S. Att'y Gen.*, 476 F.3d 199, 205 (3d Cir. 2007).[3] Moreover, the Pennsylvania Superior Court has reasoned that "[t]here is nothing in The Controlled Substance, Drug, Device and Cosmetic Act which requires that an accused be prosecuted under any particular subsection of the Act based upon the amount of controlled substances he or she is alleged to possess. Rather, an accused can be charged with, and prosecuted for, any offense which the Commonwealth thinks it can prove." *Commonwealth v. Pagan*, 461 A.2d 321, 322 n.1 (1983).

For these reasons, we conclude that section 780-113(a)(30) does not categorically involve a trafficking element. The full range of conduct covered by the statute is broad enough to encompass both remunerative and non-remunerative exchanges, and this factor is not an element of the statute. In the absence of such distinction, we conclude that the Pennsylvania statute is overbroad and indivisible and therefore not categorically an "illicit trafficking" offense under Act.

We now turn our attention to the hypothetical federal felony route, in which we examine the elements of the Pennsylvania statute and compare them to those enumerated in the CSA. The CSA makes it a felony to knowingly or intentionally ". . . possess with intent to . . . distribute . . . ," any amount of marijuana, *except* that "distributing a small amount of marihuana for no remuneration" is a misdemeanor. 21 U.S.C. §§ 841(a), (b)(1)(D), (b)(4). A state marijuana conviction is therefore

[3] While not controlling in this case, we consider the Third Circuit jurisprudence regarding the Pennsylvania statute at issue in this matter as persuasive authority.

only equivalent to a federal drug felony if the offense involved payment or more than a small amount of marijuana. *See e.g. Evanson v. U.S. Att'y Gen.*, 550 F.3d at 290.

By comparison, the elements of section 780-113(a)(30) are almost identical to the federal offense, except that, Pennsylvania's definition of "delivery" criminalizes conduct without any regard to remuneration and the amount of a controlled substance. *Compare* section 780-102(b) *with* 21 U.S.C. §§ 802(8), 802(11), 841(b)(4); *see also Jeune v. U.S. Att'y Gen.*, 476 F.3d at 205.

As discussed, the statute does not categorically include a remuneration element. *See Commonwealth v. Morrow*, 650 A.2d at 912; *Commonwealth v. Jones*, 586 A.2d at 436. Additionally, Pennsylvania prosecutes this offense when a defendant possesses only a small amount of marijuana, *see Commonwealth v. Bundy*, No. 989 MDA 2016, 2017 WL 781661, at *1, 6 (Pa. Super. Ct. Feb. 28, 2017) (5.9 grams of marijuana). While it is possible that the respondent's conviction falls outside of the exception contained in 21 U.S.C. § 841(b)(4) as a matter of fact, we are unable to make that determination based on the statutory elements. "Ambiguity on this point means that the conviction did not necessarily involve facts that correspond to an offense punishable as a felony under the CSA." *Moncrieffe v. Holder*, 569 U.S. at 194-95 (internal quotations omitted). Moreover, the amount of controlled substance at issue is not an element of the offense, and we therefore cannot apply the modified categorical approach.

The statute is thus overbroad and indivisible with respect to the conduct encompassed within Pennsylvania's offense of "delivery" and the amount of the controlled substance. In other words, the respondent was not convicted of a crime analogous to the federal felony of possession with intent to deliver marijuana as prohibited under the CSA. Because there is a realistic probability that Pennsylvania would prosecute conduct that falls outside of the generic definition of aggravated felony, we cannot conclude that the respondent's drug conviction, in violation of section 780-113(a)(30), would bar him from seeking cancellation of removal.

Therefore, we will remand this matter to the Immigration Judge for the purpose of evaluating the respondent's eligibility for cancellation of removal and to conduct any further proceedings deemed necessary.[4]

Additionally, in light of the respondent's contention on appeal that he was not provided with an opportunity to apply for asylum, withholding of removal under the Act, and Convention Against Torture below based on his fear of returning to Ethiopia, and the DHS's non-opposition to a remand for that purpose, the Immigration Judge should also provide the respondent with the opportunity to file these applications for relief. We express no opinion on the ultimate resolution of the respondent's case. *Matter of L-O-G-*, 21 I&N Dec. 413, 422 (BIA 1996).[5]

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[4] The Immigration Judge did not make any findings regarding whether the respondent has been convicted as alleged under Kentucky law.

[5] Although the respondent asserts that this case should be remanded to a different Immigration Judge, our disposition of the legal issues related to his eligibility for relief resolves any concerns in the case about the opportunity to apply for relief.

Accordingly, the following order will be entered.

ORDER: The appeal is sustained, and the record is remanded the Immigration Court for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

FOR THE BOARD