U.S. Department of Justice

Executive Office for Immigration Review

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Name: ARREDONDO-AVENDANO, JOR... **A 034-507-033**

Date of this notice: 6/28/2019

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:
Noferi, Mark
Greer, Anne J.
Donovan, Teresa L.

Userteam: Docket

File: A034-507-033 – Florence, AZ Date: JUN 28 2019

In re: Jorge Luis ARREDONDO-AVENDANO a.k.a. Jorge Luis Arredondo

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Hugo F. Larios, Esquire

ON BEHALF OF DHS: Troy E. Larkin
Assistant Chief Counsel

APPLICATION: Termination of proceedings

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

The respondent, a native and citizen of Mexico, has been a lawful permanent resident of the United States since 1974. In March 2017, the DHS charged the respondent with removability from the United States under section 237(a)(2)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(B)(i), based on his 2015 conviction for "Attempted Possession of Narcotic Drugs for Sale" in violation of ARIZ. REV. STAT. ANN. § 13-3408(A)(2) (hereafter "§ 13-3408(A)(2)") (Exh. 1).[1] The Immigration Judge terminated the removal proceedings (IJ at 3, 5–8), however, finding that § 13-3408(A)(2) is overbroad and indivisible vis-à-vis section 237(a)(2)(B)(i), which authorizes the removal of an alien "convicted of a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)." The DHS appeals.

We employ the categorical approach to determine whether the respondent's Arizona conviction renders him removable under section 237(a)(2)(B)(i) of the Act. *Mellouli v. Lynch*, 135 S. Ct. 1980, 1986-87 (2015). That approach requires a focus on the "elements" of the respondent's crime and the minimum conduct that has a realistic probability of being prosecuted under those elements, rather than upon his actual offense conduct. *Matter of Chairez*, 26 I&N Dec. 819, 821 (BIA 2016).

At the outset, we agree with the Immigration Judge that under controlling circuit law § 13-3408(A)(2) is categorically overbroad relative to section 237(a)(2)(B)(i) of the Act because

[1] There is a categorical match between the elements of Arizona's attempt statute and the elements of generic attempt. *Alvarado v. Holder*, 759 F.3d 1121, 1128 (9th Cir. 2014) (citing *United States v. Taylor*, 529 F.3d 1232, 1234 (9th Cir. 2008)). Thus, the Immigration Judge properly focused her categorical analysis on the elements of the underlying offense, § 13-3408(A)(2) (IJ at 5).

Arizona defines the term "narcotic drug" to include benzylfentanyl and thenylfentanyl, neither of which qualified as a "controlled substance" under federal law when the respondent was convicted (IJ at 5). *Compare* Ariz. Rev. Stat. Ann. § 13-3401(20) (defining "narcotic drug"), *with* 21 U.S.C. §§ 802(6), 812 and 21 C.F.R. §§ 1308.11-1308.15 (defining "controlled substance" for purposes of federal law). *See Mellouli v. Lynch*, 135 S. Ct. at 1990-91 ("[C]onstruction of [section 237(a)(2)(B)(i)] must be faithful to the text, which limits the meaning of 'controlled substance,' for removal purposes, to the substances controlled under [the federal schedules].").

The DHS argues that Arizona offenses involving benzylfentanyl and thenylfentanyl should be considered removable offenses under section 237(a)(2)(B)(i) of the Act, despite the exclusion of those substances from the federal controlled substance schedules, because benzylfentanyl and thenylfentanyl "relate to" fentanyl, which is federally controlled (DHS Br. at 6-7). However, that argument misconceives the scope of section 237(a)(2)(B)(i)'s "relating to" clause. For removal purposes, it is the "law or regulation" the respondent violated that must "relat[e] to" a federally controlled substance, and as the Supreme Court made clear in *Mellouli v. Lynch*, a State law does not categorically "relate to" a federally controlled substance if it prohibits conduct involving *non*-federally controlled substances. *See* 135 S. Ct. at 1991 ("to trigger removal under § 1227(a)(2)(B)(i), the Government must connect an element of the alien's conviction to a drug 'defined in [21 U.S.C. § 802].'").

The DHS also contends that the over-inclusiveness of Arizona's "narcotic drug" definition does not render § 13-3408(A)(2) categorically overbroad unless there is a "realistic probability" that Arizona would actually prosecute someone under that section for conduct involving non-federally controlled substances (DHS Br. at 12–14). *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). That argument is consistent with the Board's understanding of the realistic probability standard. *Matter of Ferreira*, 26 I&N Dec. 415 (BIA 2014); *see also United States v. Castillo-Rivera*, 853 F.3d 218, 222–23 (5th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 501 (2017).

However, the United States Court of Appeals for the Ninth Circuit—in whose jurisdiction this case arises—takes a narrower view of realistic probability analysis, holding that when a "'state statute's greater breadth is evident from its text ... [an alien] need not point to an actual case applying the statute of conviction in a nongeneric manner'" in order to establish the requisite "realistic probability." *United States v. Werle*, 815 F.3d 614, 622–23 (9th Cir. 2016) (quoting *Chavez-Solis v. Lynch*, 803 F.3d 1004, 1010 (9th Cir. 2015) (quoting in turn *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007))); *see also United States v. Brown*, 879 F.3d 1043, 1050 (9th Cir. 2018). As Arizona's definition of "narcotic drug" includes benzylfentanyl and thenylfentanyl, § 13-3408(A)(2)'s "greater breadth" is evident from its text under applicable Ninth Circuit law. Thus, the Immigration Judge properly determined that § 13-3408(A)(2) is overbroad vis-à-vis section 237(a)(2)(B)(i) of the Act.

Because § 13-3408(A)(2) is overbroad, the respondent's conviction cannot trigger his removability under section 237(a)(2)(B)(i) of the Act unless: (1) § 13-3408(A)(2) is "divisible" as to the identity of the particular "narcotic drug" that can be possessed for sale; and (2) admissible portions of the respondent's conviction record prove that he was convicted of attempting to possess

a federally controlled substance. *Matter of Chairez*, 26 I&N Dec. at 819–20 (clarifying that "the understanding of statutory 'divisibility' embodied in *Descamps v. United States*, 570 U.S. 254 (2013), and *Mathis v. United States*, 136 S. Ct. 2243 (2016), applies in immigration proceedings nationwide to the same extent that it applies in criminal sentencing proceedings").

Under *Descamps* and *Mathis*, § 13-3408(A)(2) is divisible only if the identity of a "narcotic drug" is an element of the offense that must be proved to a unanimous jury beyond a reasonable doubt. *Matter of Chairez*, 26 I&N Dec. at 822–23, 824–25. The statute is indivisible if the identity of a "narcotic drug" is merely a "brute fact" about which the jury can disagree while still finding a defendant guilty. *See Lopez-Valencia v. Lynch*, 798 F.3d 863, 869 (9th Cir. 2015) (quoting *Rendon v. Holder*, 764 F.3d 1077, 1086 (9th Cir. 2014) ("[A] statute is indivisible if 'the jury may disagree' on the fact at issue 'yet still convict.'")).

In support of its divisibility argument, the DHS points to a number of cases where Arizona courts have upheld multiple convictions under § 13-3408(A)(2) against a single defendant who possessed or delivered more than one type of drug on a single occasion (DHS Br. at 16–17). According to the DHS, the existence of such multiple convictions compels the conclusion that drug identity must be an "element" requiring jury agreement; if drug identity were a mere factual means by which the broader "narcotic drug" element could be proved, multiple convictions of that kind would be barred by constitutional double jeopardy principles.

In a recent unpublished opinion, however, the Ninth Circuit addressed a similar double jeopardy argument with respect to § 13-3408 and found it "unpersuasive," for two reasons. *Madrid-Farfan v. Sessions*, 729 F. App'x 621 (9th Cir. July 9, 2018) (Mem.).[2] First, the court observed that "in none of [the cited Arizona] cases was the propriety of multiple convictions at issue." *Id.* at 622. And second, the court noted that the cited Arizona cases merely "show[ed] that proof of multiple drug types is *sufficient* to sustain multiple convictions, but … [did] not resolve whether it is *necessary* for a jury to agree on a single drug type to convict." *Id.* The Ninth Circuit's analysis in *Madrid-Farfan* persuades us that double jeopardy considerations are not dispositive here.

In further support of its argument, the DHS asserts that the identity of a "narcotic drug" must be an element under § 13-3408(A)(2) because some Arizona courts have apparently required jury agreement about that fact (DHS Br. at 17–19). As the *Madrid-Farfan* court explained, however, other Arizona courts have upheld drug convictions *without* requiring jury agreement about drug identity. *Id.* at 622 (citing *State v. Prescott*, No. 1 CA-CR 15-0188, 2016 WL 611656, at *2 (Ariz. Ct. App. Feb. 16, 2016) (unpublished) (stating that "even if the jury convicted Defendant without agreeing on which dangerous drug was involved in the offense, Defendant was not denied his constitutional right to a unanimous jury verdict."), and *State v. Castorina*, No. 1 CA-CR 08-0816, 2010 WL 2450117, at *4 (Ariz. Ct. App. June 17, 2010) (unpublished) (finding it sufficient for a state to show that the defendant knew he possessed a narcotic or dangerous drug without proving

[2] Unpublished opinions are not precedential, but their reasoning may be relied upon as persuasive authority.

that the defendant knew which *particular* drug he possessed)). Under the circumstances, we find Arizona case law inconclusive on the issue.

The *Madrid-Farfan* court also looked to the Arizona model jury instructions to hold that "[d]rug type is not a necessary element of conviction," noting that Arizona's criminal jury instructions—unlike the California instructions addressed in *Martinez-Lopez*, 864 F.3d at 1041—do not require a jury to fill in a blank explicitly identifying the substance. *See* 729 F. App'x at 622; *see also Vera-Valdevinos v. Lynch*, 649 F. App'x 597, 598 n.1 (9th Cir. 2016) ("Arizona's jury instructions do not require the jury to make a finding of fact regarding the specific substance at issue.").

In light of the foregoing, we conclude that the DHS has not established by clear and convincing evidence that the identity of the "narcotic drug" a defendant possesses for sale under § 13-3408(A)(2) is an offense "element" rather than a "brute fact" under *Descamps* and *Mathis*. Thus, the Immigration Judge was precluded from resorting to the "modified categorical approach," *Ramirez v. Lynch*, 810 F.3d 1127, 1138 (9th Cir. 2016), and properly dismissed the section 237(a)(2)(B)(i) charge, resulting in termination of the proceedings.

The following order will be entered.

ORDER: The DHS's appeal is dismissed.

Teresit Donner

FOR THE BOARD