



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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Name: MARTINEZ-GUZMAN, MIGUEL A... A 092-617-875

Date of this notice: 11/13/2017

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:
Pauley, Roger

Userteam: Docket

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Falls Church, Virginia 22041

File: A092 617 875 – Tulsa, OK¹

Date:

NOV 13 2017

In re: Miguel Angel MARTINEZ-GUZMAN

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Michael A. Abdoveis, Esquire

ON BEHALF OF DHS: Joshua S. Levy
Assistant Chief Counsel

APPLICATION: Termination

The Department of Homeland Security (DHS) appeals from the Immigration Judge's January 10, 2017, decision terminating the instant removal proceedings. The respondent has filed a brief opposing the appeal. The appeal will be dismissed.

We review findings of fact, including credibility findings, for clear error. *See* 8 C.F.R. § 1003.1(d)(3)(i); *see also Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review questions of law, discretion, or judgment, and all other issues de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

This appeal presents a single issue: whether the Immigration Judge erred in finding a realistic probability that Oklahoma would apply the offense of carrying a firearm while under the influence of alcohol in violation of Oklahoma Statute (Okla. Stat.) tit. 21 § 1289.9 to antique firearms.² We agree with the Immigration Judge's decision for the following reasons.

The respondent is a lawful permanent resident of the United States. In 2016, the respondent was convicted of the above offense (IJ at 2; Exh. 2). The DHS subsequently charged the respondent with being deportable for having been convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or

¹ In accordance with Operating Policies and Procedures Memorandum No. 04-06, withholding-only proceedings before the Immigration Judge in this matter were completed in Tulsa, OK. The case was docketed for hearing in Tulsa, OK, and the Immigration Judge, while sitting in the Immigration Court in Dallas, TX, heard the case through video conference pursuant to section 240(b)(2)(A) of the Act, 8 U.S.C. § 1229a(b)(2)(A). Accordingly, we will consider the applicant's claim under the precedent decisions of the United States Court of Appeals for the Tenth Circuit.

² We have considered the entirety of the DHS's arguments on appeal. However, as the DHS has not paginated its appeal brief, we are unable to provide citations to specific pages of its brief in this decision. *See* Board of Immigration Appeals Practice Manual, § 4.6(b) at 58 (Feb. 3, 2017) ("Briefs should *always* be paginated.").

conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of Title 18) in violation of any law (IJ at 2; Exh. 1). See section 237(a)(2)(C) of the Act, 8 U.S.C. § 1227(a)(2)(C).

The parties agree that Oklahoma's definition of firearms is broader than the federal definition because Oklahoma does not provide an exception to antique firearms (IJ at 4). Compare 18 U.S.C. § 921(a)(3) (containing an exception for antique firearms) with Okla. Stat. tit. 21 §§ 1289.3-1289.5 (defining the terms pistols, rifles, and shotguns, but containing no exception for antique firearms). The parties further agree that the appropriate legal test under these circumstances is the realistic probability test (IJ at 4). Under this test, even if a state statute is broader than the federal generic definition, the respondent must show "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013) (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)).

The respondent presented an Oklahoma case with a conviction for, among other offenses, possession of a firearm after former conviction of a felony involving a .44 caliber black powder pistol (IJ at 4; Respondent's Brief in Support of Termination at 34).³ See *Grissom v. State*, 253 P.3d 969, 973 (Okla. Crim. App. 2011). The DHS does not meaningfully argue on appeal that the weapon in *Grissom* falls outside the federal definition of an antique firearm.

The issue is whether this case satisfies the realistic probability test. "To show that realistic probability, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues." *Gonzales v. Duenas-Alvarez*, 549 U.S. at 193.

The DHS argues that this conviction only demonstrates that Oklahoma prosecutes antique firearms in the context of possession of a firearm after former conviction of a felony. The DHS further notes that *Grissom v. State* involved other particularly heinous crimes, including murder, for which a death sentence was imposed. According to the DHS, these circumstances do not present a realistic probability that Oklahoma would prosecute an antique firearm in the context of carrying a firearm while under the influence of alcohol, which only imposes a maximum of six months in jail and a \$500 fine. See Okla. Stat. tit. 21 § 1289.15 (setting forth the punishment).

³ The respondent presented an unpublished case involving an accomplice in this case arising from the same underlying facts (IJ at 4; Respondent's Reply to DHS Brief at 64). It appears that the trial court sustained the accomplice's demurrer to the offense of possession of a firearm after former conviction of a felony, and no sentence was adjudged for that offense. This unpublished case does not apparently demonstrate a successful prosecution of an offense involving antique firearms. See *Matter of Chairez (Chairez I)*, 26 I&N Dec. 349, 356 (BIA 2014) (requiring a showing that the state "successfully applied" the statute to prosecute offenses involving antique firearms); see also *Matter of Chairez (Chairez III)*, 26 I&N Dec. 819, 821 n.2 (BIA 2016) (noting that this aspect of *Chairez I* remains good law).

We are not persuaded by these arguments. We acknowledge that the respondent has not presented evidence of a successful prosecution involving an antique firearm for his statute of conviction. We further acknowledge the difference between the actual and substantial harm present in *Grisson v. State* compared to the risk of harm inherent in carrying a firearm under the influence of alcohol. However, the risk of harm flowing from carrying a firearm under the influence of alcohol is quite high. A state has a reasonable interest in criminalizing such conduct. At the very least, the respondent has presented evidence that Oklahoma will prosecute firearm offenses in the context of antique firearms. This evidence cuts in favor of an inference that Oklahoma would prosecute carrying an antique firearm under the influence of alcohol.

The DHS further argues that the respondent must present more than a single case. It is true that *Gonzales v. Duenas-Alvarez* refers to "other cases." 549 U.S. at 193. However, a respondent may also show that a statute was applied in "his own case," which indicates that a single case establish the realistic probability test. We have indicated that the respondent must show "any actual (as opposed to hypothetical) case" in the context of the realistic probability test. *Matter of Louissaint*, 24 I&N Dec. 754, 757 (BIA 2009). We further note that at least one court of appeals has held that a single case can meet this burden. See *Nunez v. Holder*, 594 F.3d 1124, 1129 n.2 (9th Cir. 2010). We conclude that a single case can establish the realistic probability test.

Upon review, we are persuaded that the respondent satisfied the realistic probability test. The respondent notes the inherent limitations in reviewing appellate decisions for evidence of prosecutions, including the fact that these decisions may not mention the type of firearm at issue (Respondent's Br. at 4). Prosecutions might also be resolved by a guilty plea and thus be unlikely to involve appellate review. See *Nunez v. Holder*, 594 F.3d at 1137 n. 10 (noting that the majority of people might never go to trial but would plead guilty instead). We conclude that the respondent's arguments are not based upon legal imagination, but rather establish a realistic probability that Oklahoma would prosecute carrying a firearm while impaired in the context of antique firearms.

In reaching this conclusion, we note that the test requires a probability, rather than a certainty. While the respondent has not presented an actual successful prosecution of his statute of conviction in the context of antique firearms, he has presented a realistic probability that Oklahoma would do so. Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.


FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
DALLAS, TEXAS

File: A092-617-875

January 10, 2017

In the Matter of

MIGUEL ANGEL MARTINEZ-GUZMAN

RESPONDENT

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)
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)

IN REMOVAL PROCEEDINGS

CHARGES:

Section 237(a)(2)(C) of the Immigration and Nationality Act (as admitted), in that at any time after admission you have been convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, in violation of any law, any weapon, part, or accessory which is a firearm or destructive device as defined in 18 U.S.C. Section 921(a).

APPLICATIONS: Request for termination.

ON BEHALF OF RESPONDENT: MICHAEL ABDOVEIS, ESQUIRE

P.O. BOX 580460

TULSA, OKLAHOMA 74158

ON BEHALF OF DHS: HEIDI GRAHAM, ESQUIRE

ASSISTANT CHIEF COUNSEL

DALLAS, TEXAS

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a native and citizen of Mexico. He was admitted to the

United States as a lawful permanent resident in Dallas, Texas, on or about December 1, 1990. On May 2, 2016, he was convicted in the District Court in Tulsa County, Oklahoma, for the offense of carrying a firearm while under the influence of drug or alcohol, to wit, a .45 pistol in violation of 21 OK Statute 1289.9. Consequently, the Department of Homeland Security (here in after referred to as the Government) charged respondent with removal under Section 237(a)(2)(C) of the Immigration and Nationality Act (as amended) in that at any time after admission, he has been convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry in violation of any law any weapon, part, accessory which is a firearm or destructive device as defined in 18 U.S.C. Section 921(a). See Exhibit 1.

On November 29, 2016, the respondent via counsel did receive the Notice to Appear. It is placed in his record as Exhibit 1.

On November 29, 2016, the respondent via counsel admitted that he's not a citizen or national of the United States, that he is a native citizen of Mexico, that he was admitted to the United States as a lawful permanent resident at Dallas, Texas, on or about December 1, 1990. However, respondent via counsel denied that on May 2, 2016, he was convicted of the offense of carrying a firearm while under the influence of drug or alcohol, in violation of 21 O.S.C. 1289.9, to wit, a .45 pistol.

The burden of proof is on the Government to establish respondent's removal by clear and convincing evidence. See Section 240(c)(3)(A) of the Act. See also 8 C.F.R. Section 1240.8(a).

To support allegation 4, that is, the respondent was convicted of carrying a firearm under the influence of drug or alcohol, to wit, a .45 pistol, and the charge of removal, the Government submitted a copy of the respondent's conviction record.

Exhibit 3. That document indicates that the respondent pled guilty of carrying a firearm under the influence of drug or alcohol. That document also indicates that a .45 pistol was involved. Based upon the conviction record in this case, the Court finds that allegation 4 has been established by clear and convincing evidence.

The next issue to resolve by the Court is whether or not the respondent is subject to removal under Section 237(a)(2)(C) of the Act.

21 O.S.C. 1289.9 states in part it shall be unlawful for any person to carry or use shotguns, rifles, or pistols in any circumstances while under the influence of beer, intoxicating liquids, or any hallucinogenic or any unlawful or prescribed drug, and it shall be unlawful for any person to carry or use shotguns, rifles, or pistols when under the influence of any drug prescribed by a licensed physician if such consumption affects mental, emotional or physical processes to a degree that would result in abnormal behavior. Any person convicted of a violation of the provisions of this section shall be punished as provided in Section 1289.15 of this title. Any person convicted of a violation of the provision of this section, after having been issued a handgun license pursuant to provisions of the Oklahoma Self-Defense Act shall have the license suspended for a term of six months, and shall be subjected to an administrative fine of \$50, upon a hearing and determination by the Oklahoma State Bureau of Investigation that the person is in violation of the provisions of this section. See 21 O.S.C. 1289.9.

FINDINGS OF FACT AND CONCLUSION OF LAW

The issue before the Court again is whether the respondent is removable pursuant to Section 237(a)(2)(C), for a firearms offense for his conviction under 21 O.S.C. 1289.9, carrying a weapon under the influence of alcohol.

In applying the category approach to the respondent's conviction under 21 OK Section 1289.9 of carrying weapons under the influence of alcohol, the Court finds

that the Oklahoma definition of pistol, shotgun and rifle are categorically overbroad compared to the Federal definition of firearms under Section 237(a)(2)(C). Specifically, unlike the Federal statute under 18 U.S.C. 912(a)(16), Oklahoma does not provide an exception to antique firearms.

Nevertheless, this does not end the inquiry, as noted by the U.S. Supreme Court precedent in Moncrieffe v. Holder, 133 S.Ct. 1679, 693 (2013) and the Board decision in the Matter of Ferreira, 26 I&N Dec. 415, 420 (BIA 2014), requires that there be a realistic probability, not a theoretical possibility, that the state would apply its statute to conduct that falls outside the generic definition of a crime. To defeat the category comparison in this matter, the respondent would have to demonstrate that the state of Oklahoma actually prosecutes the relevant offense in cases involving antique firearms.

Respondent has provided two cases where the state of Oklahoma prosecuted criminal defendants for a firearm charge involving a firearm described as a .44 caliber black powder pistol, or a .44 caliber frontier replica black powder pistol. See Grissom v. State, 2011 OK CR 3, 253 P.3d 969, an unpublished decision from the Court of Criminal Appeals of Oklahoma involving Grissom's accomplice Jessie Floyd Johns. These two cases arise out of the same criminal conduct. Although more details were not provided in those cases, described pistol may qualify as an antique firearm as a muzzle-loading pistol designed to use black powder under 18 U.S.C. Section 921(a)(16)(C), or potentially as a replica of a firearm manufactured before 1898 under Section 921(a)(16)(B). The Government has acknowledged such in its brief.

However, the Court is unconvinced by the Government's arguments that Grissom is not evidence of any realistic probability that the state would pursue a conviction under 21 O.S.C. 1289.9. This is based largely in part because Grissom

involved a conviction for a different crime of possession of a firearm after a former conviction of a felony. Grissom also involved particularly heinous crimes, unlike respondent's misdemeanor offense. But in many situations the Court must look to other criminal statutes as an indicator of how the state may approach other violations. Grissom indicates that the state prosecutes, then, its expansive definition of a firearm.

The Court is also unconvinced that a single recent case is not sufficient to meet the realistic probability test. This is even assuming Grissom and Johns should be counted as only one case. The precedent of this issue did not establish a magical number of cases required to meet the threshold for the realistic probability test. Thus, the Court finds that the Government has not met its burden of proof by clear and convincing evidence that the respondent has been convicted of a firearm offense under Section 237(a)(2)(C), in light of the recent Supreme Court decision. As such, since the Government has failed to meet its burden of proof, the Court would terminate proceedings against the respondent.

Accordingly, the following orders should be entered:

ORDERS

IT IS HEREBY ORDERED the removal proceedings against the respondent be terminated.

Date: January 10, 2017

DETRICH H. SIMS
Immigration Judge