U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Falls Church, Virginia 20530

DOMINGUEZ-PARRA, JAVIER O
252196/A090-109-290
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DHS/ICE Office of Chief Counsel - TUS
P.O. Box 25158
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Name: DOMINGUEZ-PARRA, JAVIER O **A 090-109-290**

Date of this notice: 1/15/2015

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:
Guendelsberger, John
Mullane, Hugh G.
Pauley, Roger

Userteam: Docket

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 20530

Decision of the Board of Immigration Appeals

File: A090 109 290 – Tucson, AZ Date: JAN 15 2015

In re: JAVIER O. DOMINGUEZ-PARRA a.k.a. Ismael Bernal

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Brent Landis
Senior Attorney

CHARGE:

Notice: Sec. 237(a)(2)(A)(ii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(ii)] - Convicted of two or more crimes involving moral turpitude

APPLICATION: None

The Department of Homeland Security ("DHS") appeals from the Immigration Judge's decision dated September 25, 2014, terminating proceedings. The appeal will be sustained and the record will be remanded.

We find reversible error in the Immigration Judge's determination that the DHS did not prove by clear and convincing evidence that the respondent's two convictions, for shoplifting in violation of A.R.S. § 13-805, and for manslaughter in violation of A.R.S. §§ 13-1103, 1101, 28-301, 3304, 3305, 3315, 13-604, 701, 702, 702.01, 801, rendered him removable as an alien convicted of two or more "crimes involving moral turpitude" within the meaning of section 237(a)(2)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(ii).

It is not contested that the manslaughter conviction is a crime involving moral turpitude ("CIMT"). The issue before us is whether the shoplifting conviction is a CIMT.

A.R.S. § 13-1805 reads, in pertinent part:

A. A person commits shoplifting if, while in an establishment in which merchandise is displayed for sale, such person knowingly obtains such goods of another with the intent to deprive him of such goods by:
1. Removing any of the goods from the immediate display or from any other place within the establishment without paying the purchase price…

A.R.S. § 13-1805 (1996). Furthermore, the word deprive is defined as "withhold[ing] the property interest of another either permanently or for so long a time period that a substantial portion of its economic value or usefulness or enjoyment is lost, to withhold with the intent to restore it only on payment of any reward or other compensation or to transfer or dispose of it so that it is unlikely to be recovered." A.R.S. § This definition closely tracks the Model Penal Code's definition of "deprive", which we discussed in *Matter of V-Z-S-*, 22 I&N Dec. 1338 (BIA 2000).

A conviction for theft qualifies as a crime involving moral turpitude ("CIMT") if the statute of conviction (or, in the case of a divisible statute, the record of conviction) establishes that the offense necessarily entailed a specific intent on the part of the offender to effect a permanent taking of another's property without consent. *Matter of V-Z-S-*, supra, at 1346 n.12 (BIA 2000); *Matter of Grazley*, 14 I&N Dec. 330, 333 (BIA 1973); *Matter of D-*, 1 I&N Dec. 143, 144-45 (BIA 1941). We have consistently held that shoplifting, the crime of which the respondent was convicted, is a CIMT. *See, e.g. Matter of Jurado*, 24 I&N Dec. 29, 33-34 (BIA 2006). As a matter of law, the Arizona statute under which the respondent was convicted cannot be distinguished from the statute discussed in *Matter of Jurado*, because the taking must be intentional and must erode a substantial part of the value of the item taken. This erosion in and of itself results in a permanent loss to the victim of the crime, irrespective of how the state may couch the distinction between "temporary" and "permanent", and the erosion of the substantial value indicates that that the unlawful taking or attempted taking presumptively included an intent to permanently deprive. *Matter of Jurado, supra*, at 34 (citing *Matter of V-Z-S-, supra*, at 350).

Furthermore, under the plain language of the statute, the mens rea of knowing applies to the act of depriving, and since we have concluded that the act of depriving is either a permanent act or the functional equivalent of a permanent act, turpitude necessarily inheres. As the permanent nature of the loss to the victim is the necessary result of the intended criminal action, *Matter of Jurado* is binding precedent in this case. *See also Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1107-08 (9th Cir. 2011) (citing *Matter of Jurado* in an analogous context).

This is not a case where the language of the statute arguably might cover non-turpitudinous conduct. We conclude that there is no theoretical possibility of the state successfully prosecuting an individual for non-turpitudinous conduct. *Cf. Matter of Silva-Trevino,* 24 I&N Dec. 687, 697-98 (A.G. 2008)(discussing a class of cases where there is no reasonable probability of the case being prosecuted under circumstances where the requisite scienter and reprehensible conduct is lacking, in spite of theoretical possibility of such a case existing, and quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). Consequently, we need not discuss the applicability of *Gonzales v. Duenas-Alvarez* to this case.

Hence, as the offense in question is a categorical CIMT, the Immigration Judge erred in advancing to the modified categorical approach. In sum, the Immigration Judge erred as a matter of law in concluding that the DHS did not establish the respondent's removability under section 237(a)(2)(A)(ii) of the Act. The Immigration Judge's decision will be vacated and the record will be remanded to allow the respondent an opportunity to apply for relief. The following orders shall be issued.

ORDER: The appeal is sustained.

FURTHER ORDER: The Immigration Judge's decision is vacated.

FURTHER ORDER: The record is remanded for further proceedings.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
300 WEST CONGRESS STREET, SUITE 300
TUCSON, ARIZONA 85701

IN THE MATTER OF	)	**IN REMOVAL PROCEEDINGS**
	)	
DOMINGUEZ-PARRA, Javier	)	**FILE NO.:** A090-109-290
	)	
Respondent	)	**DATE:** September 25, 2014
	)	

CHARGE: Section 237(a)(2)(A)(ii) of the Act, in that, at any time after admission, the respondent was convicted of two or more crimes involving moral turpitude not arising out of a single scheme of criminal misconduct.

On Behalf of Respondent:
Javier Dominguez-Parra, pro se
ADOC #252196
ASPC Tucson, Whetstone Unit
P.O. Box 24402
Tucson, Arizona 85734

On Behalf of the Department:
Matthew Kaufman
Senior Attorney
Department of Homeland Security
6431 South Country Club Road
Tucson, Arizona 85706

DECISION AND ORDER OF THE IMMIGRATION COURT

I. PROCEDURAL HISTORY

On February 21, 2012, the Department of Homeland Security ("the Department") issued a Notice to Appear, charging the respondent as removable under section 237(a)(2)(A)(ii) of the Immigration and Nationality Act ("INA" or "the Act"). [Ex. 1]. In support of this charge, the Department alleges the following: [1] the respondent is not a citizen or national of the United States; [2] he is a native and citizen of Mexico; [3] he entered the United States at an unknown location in Arizona on or about August 5, 1981; [4] he was not then admitted or paroled after inspection by an Immigration Officer; [5] his status was adjusted to that of lawful permanent resident on October 26, 1989; [6] on August 9, 1996, he was convicted in the City of Phoenix Municipal Court for the offense of shoplifting in violation of Arizona Revised Statutes ("ARIZ. REV. STAT." or "A.R.S.") § 13-1805(A)(1), committed on October 19, 1995; [7] on March 26, 2010, he was convicted in the Superior Court of Arizona, Maricopa County, for the offense of manslaughter, a class two felony, in violation of ARIZ. REV. STAT. §§ 13-1103, 13-1101, for which he was sentenced to seven years in prison; and [8] these crimes did not arise out of a single scheme of criminal misconduct. [*Id.*].

EXHIBIT # 17
SHK
JUDGE
9/25/14
DATE

The following is a list of documents that have been formally admitted as an exhibit in the Record of Proceeding and considered by the Court in making the present decision: Exhibit 1 is the Notice to Appear; Exhibit 2 is the Department's motion to change venue to Tucson, Arizona and the order granting the motion; Exhibit 3 is the Department's exhibit list including the following tabs: Tab A, Form I-213, Record of Deportable/Inadmissible Alien; Tab B, Form I-181, Creation of Record of Lawful Permanent Residence; Tab C, conviction documents for manslaughter conviction (case number CR2009-168446); Tab D, conviction documents for shoplifting conviction; and Tab E, conviction documents for possession of narcotic drugs conviction (case number CR2001-003425); Exhibit 4 is the Court's order requesting briefs; and Exhibit 5 is the Department's statement of position.

II. PROVING EXISTENCE OF CRIMINAL CONVICTIONS

Pursuant to section 240(c)(3) of the Act, the Department has the burden to prove by clear and convincing evidence that the respondent is removable as charged. Where removability hinges on the existence of criminal convictions, this includes the burden of providing clear and convincing evidence of the fact of conviction. *See* INA § 240(c)(3)(A). To meet this burden, section 240(c)(3)(B) of the Act and 8 C.F.R. § 1003.41 set forth a non-exhaustive list of documents that are admissible as proof of a criminal conviction.

With regards to the shoplifting conviction, the Department has submitted the court information sheet. [*See* Ex. 3, Tab D]. Although the physical case file has been purged in accordance with the Phoenix Municipal Court procedures, it appears that the file remains in the case management system. [*Id.*]. The case management system printout clearly reflects that the respondent was charged with shoplifting under ARIZ. REV. STAT. § 13-1805(A)(1). [*Id.*]. The document further indicates that the case concluded after a "Guilty by Judicial Finding." [*Id.*]. Turning to the manslaughter conviction, the Department submitted the sentencing order, plea agreement, indictment, direct complaint, plea transcript, and presentence report for case number CR2009-168446. [*See* Ex. 3, Tab C]. Specifically, the indictment alleges that the respondent "recklessly caused the death of [the victim] in violation of A.R.S. §§ 13-1101, 13-1103 . . . ." Likewise, the plea agreement and sentencing order indicate that the respondent plead guilty and was sentenced under the same statutes.

Accordingly, the Court finds that the Department has proved the existence of the respondent's two criminal convictions by clear and convincing evidence.

III. REMOVABILITY

To determine whether an alien has been convicted of a crime involving moral turpitude ("CIMT"), the Court employs an element-based inquiry that compares the elements of the underlying statute to those of the generic CIMT definition at issue. *Taylor v. United States*, 495 U.S. 575, 602 (1990). This is done by examining the statute of conviction "in terms of how the

law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion." *Begay v. United States*, 553 U.S. 137, 141 (2008). Occasionally, however, the Court is permitted to go "beyond the language of the statute to a narrow, specified set of documents that are part of the record of conviction" to determine what elements formed the basis of the underlying conviction. *Tokatly v. Ashcroft*, 371 F.3d 613, 620 (9th Cir. 2004). These are known as the "categorical" and "modified categorical" approaches, respectively.

There are three possible scenarios that arise when applying this inquiry. First, if the elements of the statute are the same as, or narrower than, those of the generic offense, the offense is said to "categorical[ly]" constitute the generic offense. *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013). Second, if the statute has alternative elements, some – but not all – of which encompass the elements of the generic offense, the statute is said to be "divisible" and the Court can examine the underlying record of conviction to determine which elements (generic or non-generic) formed the basis of the conviction. *See id.* at 2279. Third, if "the statute of conviction has an overbroad or missing element . . . , [an alien] convicted under that statute is *never* convicted of the generic crime." *Id.* at 2280 (emphasis added). This is so because the modified categorical approach cannot be employed to ascertain whether the offense was committed in such a way so as to satisfy the "missing element" or otherwise limit the overbroad element to conduct that does, in fact, satisfy the generic crime. *See id.* at 2292-93 (explaining that the modified categorical approach can be used "*only* to determine which alternative element in a divisible statute formed the basis of the [underlying] conviction" (emphasis added)).

The term "moral turpitude" is one that has been the subject of debate among the Board of Immigration Appeals ("the Board") and the circuit courts, including the Ninth Circuit, for many years. *Matter of Lopez-Meza*, 22 I&N Dec. 1188, 1191 (BIA 1999) (stating that moral turpitude is "a 'nebulous concept' with ample room for differing definitions of the term"). Generally, "[m]oral turpitude refers . . . to conduct which 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." *Matter of Ajami*, 22 I&N Dec. 949, 950 (BIA 1999). For a number of years, the Board acknowledged that a CIMT often did incorporate, but need not require, the presence of an "evil intent." *See Matter of Torres-Varela*, 23 I&N Dec. 78, 83-43 (BIA 2001) (collecting cases). However, with the issuance of *Matter of Silva-Trevino*, 24 I&N Dec. 687, 706 & n.5 (A.G. 2008), as the Ninth Circuit has acknowledged, "the presence of scienter [has been interpreted] to be an essential element of a crime involving moral turpitude." *Marmolego-Campos v. Holder*, 558 F.3d 903, 915 (9th Cir. 2009). Thus, with regard to the present discussion, a CIMT is said to include two generic elements: (1) scienter; and (2) reprehensible conduct. *Matter of Silva-Trevino*, 24 I&N Dec. at 706 & n.5.

In the context of crimes involving the use or threat of physical force, "reprehensible conduct" is present where there is some type of *aggravating factor* that takes the offense beyond mere lawlessness by "transgress[ing] the socially accepted rules of morality and breach[ing] the individual's ethical duty to society." *Matter of Leal*, 26 I&N Dec. 20, 25 (BIA 2012); *see also*

Uppal v. Holder, 605 F.3d 712, 717-18 (9th Cir. 2010). Such factors can include serious bodily harm or death, *Matter of Franklin*, 20 I&N Dec. 867, 869-71 (BIA 1994); *cf. Morales-Garcia v. Holder*, 567 F.3d 1058, 1060-1063 (9th Cir. 2009) (acknowledging the *minor* nature of the resulting injury under a statute that does *not* constitute a CIMT), the use of a deadly weapon, *Matter of Medina*, 15 I&N Dec. 611 (BIA 1976), or the presence of a special relationship between the victim and perpetrator, *Matter of Tran*, 21 I&N Dec. 291 (BIA 1996) (a domestic partner or spouse), *Guerrero de Nodahl v. INS*, 407 F.2d 1405 (9th Cir. 1969) (a child).

a. Manslaughter

The respondent was convicted of manslaughter in that he "[r]ecklessly caus[ed] the death of another person." ARIZ. REV. STAT. § 13-1103(A)(1). [Sentencing Order, Ex. 3, Tab C]. The elements of this offense fit squarely within the CIMT elements, discussed above. First, in a series of cases, the Board has held that recklessness is a culpable mental state for moral turpitude purposes where it entails a conscious disregard of a substantial and unjustifiable risk posed by one's conduct. *See, e.g.*, *Matter of Leal*, 26 I&N Dec. at 22-24; s*ee also Matter of Ruiz-Lopez*, 25 I&N Dec. 551, 553-54 (BIA 2011), *aff'd*, 682 F.3d 513 (6th Cir. 2012); *Matter of Franklin*, 20 I&N Dec. 867, 869-71 (BIA 1994), *aff'd*, 72 F.3d 571 (8th Cir. 1995); *Matter of Wojtkow*, 18 I&N Dec. 111, 112-13 (BIA 1981); *Matter of Medina*, 15 I&N Dec. 611, 613 (BIA 1976), *aff'd sub nom. Medina-Luna v. INS*, 547 F.2d 1171 (7th Cir. 1977). Arizona defines "recklessly" as follows:

> with respect to a result or to a circumstance described by a statute defining an offense, that a person is aware of and *consciously disregards a substantial and unjustifiable risk* that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard of such risk constitutes a *gross deviation* from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware of such risk solely by reason of voluntary intoxication also acts recklessly with respect to such risk.

ARIZ. REV. STAT. § 13-105(10)(c) (emphasis added). As such, the reckless mental state included in the respondent's statute of conviction is sufficiently culpable for CIMT purposes.

Second, recklessly causing the death of another person is morally turpitudinous because it is a base act that transgresses the socially accepted rules of morality and breaches the individual's ethical duty to society. *Matter of Leal*, 26 I&N Dec. at 25. "One of the most fundamental (and least onerous) duties a man owes to his community . . . is that he will take reasonable care to avoid causing the death of others." *Id.* Thus, with regard to the respondent's statute of conviction, "reprehensible conduct" is present because the crime necessarily requires the death of another person. *See Matter of Franklin*, 20 I&N Dec. 867, 870 (BIA 1994) (holding an involuntary manslaughter conviction to constitute a CIMT because it required both extreme

recklessness and the *actual death* of another person); *cf. Morales-Garcia v. Holder*, 567 F.3d 1058, 1060-1063 (acknowledging the *minor* nature of the resulting injury under a statute that does *not* constitute a CIMT).

Thus, the Court finds the elements of manslaughter under Arizona law to be coextensive with the elements of scienter and reprehensible conduct for purposes of constituting a CIMT. *See Uppal*, 605 F.3d at 717 (infliction of harm under such circumstances "says something about the turpitude or blameworthiness inherent in the action").

b. Shoplifting

In the context of theft-related offense, the Ninth Circuit has explained that an offense is one that necessarily involves moral turpitude where it requires the taking of personal property from another with the intent to *permanently* deprive the owner of such property. *Alvarez-Reynaga v. Holder*, 596 F.3d 534, 537 (9th Cir. 2010). The Board and Ninth Circuit have consistently focused on the underlying intent when determining whether an offense involves moral turpitude. *See, e.g.*, *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1159-60 (9th Cir. 2009) (moral turpitude is inherent in a theft offense only where it is "undertaken with the intent to deprive the owner of property permanently").

ARIZ. REV. STAT. § 13-1805(A)(1) provides a person is guilty of shoplifting if,

> while in an establishment in which merchandise is displayed for sale, [the defendant] knowingly obtains such goods of another with the *intent to deprive* that person of such goods by . . . removing any of the goods from the immediate display or from any other place within the establishment without paying the purchase price[.]

(emphasis added). Arizona law defines "intent to deprive" as "intent to withhold the property interest of another either permanently or for so long a time period that a substantial portion of its economic value or usefulness or enjoyment is lost, or withhold with the intent to restore it only on payment of any rewards or other compensation . . . ." ARIZ. REV. STAT. 13-1801(4). By its own terms, therefore, Arizona defines shoplifting under section 13-1805 to occur even where the taking of property is less than permanent. *See Matter of Grazley*, 14 I&N Dec. 330, 333 (BIA 1973). Because the respondent's conviction does not necessarily require intent to permanently deprive, it is not categorically a CIMT.

Because the statute of conviction has alternative elements, some ("permanently") – but not all ("for so long a time period that a substantial portion of its economic value . . . is lost") – of which encompass the elements of the generic offense, the statute is said to be "divisible" and the Court can examine the underlying record of conviction to determine which elements (generic or non-generic) formed the basis of the conviction. *See Descamps*, 133 S. Ct. at 2281. However,

even after reviewing the record of conviction, which merely includes the court information sheet, it remains unclear as to the determinative issue of whether the respondent acted with the intent to permanently deprive the establishment of such goods. *See United States v. Hernandez-Hernandez,* 431 F.3d 1212, 1217 (9th Cir. 2005) (internal quotation marks omitted) (the Court cannot apply the modified categorical approach where the record does not contain any "documentation or judicially noticeable facts that clearly establish that the conviction is a [crime of moral turpitude]."). Accordingly, the Court finds that the Department has failed to meet its burden of proving that the respondent's shoplifting conviction is a CIMT.

IV. CONCLUSION

In light of the aforementioned discussion, the following orders shall be entered:

ORDERS: **IT IS HEREBY ORDERED THAT** the Department's charge under section 237(a)(2)(A)(ii) of the Act is **NOT SUSTAINED.**

IT IS FURTHER ORDERED THAT the instant removal proceedings are **TERMINATED.**

September 25, 2014
Date

Sean H. Keenan
U.S. Immigration Judge

CERTIFICATE OF SERVICE
SERVICE BY: Mail (M) Personal Service (P)
TO: [✓] DHS [✓] Alien [ ] Alien's Attorney
Date: 9/25/14 By: _____ (Court Staff)