U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: BENT, BEVERLY EVADNE

A 017-521-783

Date of this notice: 11/13/2018

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:
Mann, Ana
Kelly, Edward F.
Geller, Joan B

Userteam: Docket

File: A017-521-783 – San Francisco, CA Date: NOV 13 2018

In re: BEVERLY EVADNE BENT a.k.a. Beverly Benford a.k.a. Beverly Bent

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jayashri Srikantiah, Esquire

APPLICATION: Removability

This case was last before us on April 21, 2017, at which time we dismissed in part and sustained in part the respondent's appeal from the Immigration Judge's July 14, 2011, decision ordering her removed. The case is now before us on remand once more pursuant to a May 17, 2018, order from the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit granted a remand request for us to reconsider our April 21, 2017, decision. The Department of Homeland Security (DHS) did not file a brief subsequent to the remand. The respondent's appeal will be sustained, and proceedings will be terminated.

We review questions of law, discretion, and judgment arising in appeals from decisions of Immigration Judges de novo, whereas we review findings of fact in such appeals under a "clearly erroneous" standard. *See* 8 C.F.R. § 1003.1(d)(3)(i), (ii).

The respondent was charged with being removable under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien convicted of an aggravated felony under section 101(a)(43)(G) of the Act, 8 U.S.C. § 1101(a)(43)(G), i.e., a theft offense (including the receipt of stolen property) or burglary offense for which the term of imprisonment was at least 1 year, and under section 101(a)(43)(M)(i) of the Act, i.e., an offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000.[1]

The respondent was convicted in 2009 of violating 18 U.S.C. § 641, which reads:

> § 641. Public money, property or records
> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

[1] The charge in the Notice to Appear refers generally to section 101(a)(43)(M), but there is no dispute in this case that section 101(a)(43)(M)(ii) of the Act (relating to tax evasion) is not at issue.

> Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted--
> Shall be fined under this title or imprisoned not more than ten years, or both; but if the value of such property in the aggregate, combining amounts from all the counts for which the defendant is convicted in a single case, does not exceed the sum of $1,000, he shall be fined under this title or imprisoned not more than one year, or both.
> The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

Aggravated Felony under Section 101(a)(43)(G) of the Act

Section 101(a)(43)(G)'s reference to a "theft offense (including receipt of stolen property)" can be defined as "a taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." *United States v. Corona-Sanchez*, 291 F.3d 1201, 1205 (9th Cir. 2002); *see also Matter of Garcia-Madruga*, 24 I&N Dec. 436 (BIA 2008). A conviction for the receipt of stolen property with knowledge that the property is stolen qualifies as a theft offense. *See Matter of Cardiel-Guerrero*, 25 I&N Dec. 12 (BIA 2009).

In our April 21, 2017, decision we concluded that 18 U.S.C. § 641 is not a categorical theft offense but that it is divisible, and that the record demonstrates that the respondent has been convicted of a theft aggravated felony under the modified categorical approach. The Ninth Circuit's remand order instructed us to revisit this issue in light of the Ninth Circuit's model criminal jury instruction for 18 U.S.C. § 641, as in effect at the time of the respondent's conviction in 2009.

As we noted before, when evaluating a criminal statute under the categorical approach, we apply the realistic probability test. This requires us to focus on the minimum conduct that has a realistic probability of being prosecuted under the statute of conviction, rather than on the facts underlying the respondent's particular violation of that statute. *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). The Supreme Court has explained:

> [T]o find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language. It requires 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 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. Because the statute can be violated by consensual takings, such as embezzlement,[2] such takings would not fall within the generic definition of theft,

[2] "To 'embezzle' means willfully or deliberately to take or to convert the money or property of another after the money or property lawfully came into the possession of the person who eventually

which requires the taking of, or exercise of control over, property *without consent*. *See United States v. Corona-Sanchez*, 291 F.3d at 1205; *Matter of Garcia-Madruga*, 24 I&N Dec. at 436. 18 U.S.C. § 641 expressly refers to embezzlement, which does not require a non-consensual taking, and our research has revealed cases where 18 U.S.C. § 641 has been applied to embezzlement. *See, e.g.*, *United States v. Kranovich*, 401 F.3d 1107 (9th Cir. 2005); *United States v. Terrigno*, 838 F.2d 371 (9th Cir. 1988); *United States v. Gibbs*, 704 F.2d 464 (9th Cir. 1983). We therefore again find that, because the statute includes offenses that fall outside the generic definition of theft, the respondent's conviction under 18 U.S.C. § 641 is not for a categorical theft aggravated felony within the meaning of section 101(a)(43)(G) of the Act.

The next step is to determine whether the statute is divisible – i.e., it defines multiple crimes in the alternative, each of which requires a different set of elements to be proven for conviction. The Ninth Circuit has advised that when a court is making a divisibility determination and "encounters a statute that is written in the disjunctive (that is, with an "or"), that fact alone cannot end the divisibility inquiry. Only when state law requires that in order to convict the defendant the jury must unanimously agree that he committed a particular substantive offense contained within the disjunctively worded statute are we able to conclude that the statute contains alternative elements and not alternative means." *Rendon v. Holder*, 764 F.3d 1077, 1086 (9th Cir. 2014).

If the statute is divisible and if at least one, but not all, of the possible offenses qualifies as an aggravated felony within the meaning of section 101(a)(43)(G) of the Act, we must attempt to identify the respondent's actual crime of conviction for the purpose of determining whether it falls within section 101(a)(43)(G). To do so, we would employ the "modified categorical approach" by looking to a limited class of documents in the record of conviction, such as a charging document, jury instructions, a plea agreement, or a transcript of the plea colloquy between the defendant and the judge. *See Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016); *Descamps v. United States*, 570 U.S. 254, 260-65 (2013); *Matter of Chairez*, 26 I&N Dec. 819, 822 (BIA 2016).

We now revisit the issue whether the first portion of 18 U.S.C. § 641, under which the respondent was convicted, is divisible. The Ninth Circuit's May 17, 2018, remand order instructed us to consider the Ninth Circuit's Model Criminal Jury Instructions for 18 U.S.C. § 641 by comparing the 2003 model instructions with the 2010 model instructions for this statute. The 2003 instructions read as follows:

> 8.31 THEFT OF GOVERNMENT MONEY OR PROPERTY (18 U.S.C. § 641)
> The defendant is charged in [Count _____ of] the indictment with theft of government [money] [property] in violation of Section 641 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:
> First, the defendant knowingly stole [money][property of value] with the intention of depriving the owner of the use or benefit of the [money] [property];
> Second, the [money] [property] belonged to the United States; and
> Third, the value of the [money] [property] was more than $1,000.

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took it. [This can occur by reason of some office, employment, or position of trust which the alleged embezzler held]." 1A Fed. Jury Prac. & Instr. § 16:01 (6th ed.).

The 2010 instructions, now in effect, were revised to read as follows:

> 8.39 THEFT OF GOVERNMENT MONEY OR PROPERTY (18 U.S.C. § 641)
> The defendant is charged in [Count _____ of] the indictment with theft of government [money] [property] in violation of Section 641 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:
> First, the defendant knowingly [[embezzled] [stole] [converted to defendant's use] [converted to the use of another]] [money] [property of value] with the intention of depriving the owner of the use or benefit of the [money] [property];
> Second, the [money] [property] belonged to the United States; and
> Third, the value of the [money] [property] was more than $1,000.

It therefore is apparent that for at least the period 2003 to 2010, the Ninth Circuit's official jury instructions for 18 U.S.C. § 641 required only a finding that the defendant "stole" money or property from the United States; there was no separate required finding as to whether the defendant had embezzled, stolen, or converted the money or property.

In our April 21, 2017, decision we considered a number of Ninth Circuit opinions that supported a conclusion that 18 U.S.C. § 641 is divisible. *See*, *e.g.*, *United States v. Scott*, 789 F.2d 795, 798 (9th Cir. 1986) (recognizing that the unauthorized sale of government property and conversion of government property are "separate and distinct" offenses under 18 U.S.C. § 641); *United States v. Rojo*, 727 F.2d 1415, 1418 (9th Cir. 1983) (recognizing several possible violations in 18 U.S.C. § 641); *United States v. Thordarson*, 646 F.2d 1323, 1335 n.23 (9th Cir. 1981) (relying upon *Morissette v. United States*, 342 U.S. 246 (1952), and comparing the elements of the offenses of embezzling, stealing, purloining, and converting under the statute); *United States v. Miller*, 520 F.2d 1208, 1211 (9th Cir. 1975) (treating embezzlement as a discrete offense under 18 U.S.C. § 641, with a distinguishing requirement that the defendant be shown to have taken money or property acquired lawfully through employment or other position of trust).[3] However, none of these decisions was issued between 2003 and 2010, the period during which the Ninth Circuit's 2003 Model Criminal Jury Instructions were in effect.

Because the 2003 jury instructions for 18 U.S.C. § 641 treat the first paragraph of the statute as requiring only a finding that the defendant "stole" from the United States, rather than a specific finding that the defendant had embezzled, stolen, or converted the property, we cannot conclude that those aspects are elements such that the statute was divisible at the time of the respondent's conviction in 2009. Because the first portion of the statute does not describe a categorical theft offense, as noted above, and because that portion of the statute is not divisible, we do not proceed to the modified categorical approach, which would allow an examination of certain conviction documents in an attempt to determine whether the respondent has been convicted of a theft offense.

[3] The Ninth Circuit's remand order points out *United States v. Seaman*, 18 F.3d 649, 650 (9th Cir. 1994), which does not follow this trend of cases and instead lists embezzlement, stealing, purloining, and knowing conversion as separate means of violating the statute, not separate offenses under the statute.

We therefore conclude that the record does not establish by clear and convincing evidence, as required by section 240(c)(3)(A) of the Act, 8 U.S.C. § 1229a(c)(3)(A), that the respondent is removable as charged under section 237(a)(2)(A)(iii) of the Act as an alien convicted of a theft aggravated felony, as defined at section 101(a)(43)(G) of the Act.

Aggravated Felony under Section 101(a)(43)(M)(i) of the Act

As we previously concluded in our April 21, 2017, decision, the record does not establish by clear and convincing evidence, as required by section 240(c)(3)(A) of the Act, that the respondent is removable as charged under section 237(a)(2)(A)(iii) of the Act as an alien convicted of a fraud or deceit aggravated felony, as defined at section 101(a)(43)(M)(i) of the Act.

Accordingly, the following order will be entered.

ORDER: The respondent's appeal is sustained, and removal proceedings are terminated.

FOR THE BOARD

Board Member Ana Mann respectfully concurs in the result in this case. I write separately to note that while the respondent's statute of conviction is not divisible in this case, the respondent's conviction records show that she plead guilty to theft of government property, and she was required to make restitution of $128,681.80. However, we may not consider these records, as the statute under which she was convicted is not divisible. *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Descamps v. United States*, 133 S. Ct. 2276 (2013). This approach results in the termination of immigration proceedings for persons who have committed serious crimes, and it is not apparent that Congress would have intended such a result. *See Matter of Chairez*, 27 I&N Dec. 21 (BIA 2017) (Malphrus, concurring) ("we must presume that the respondent committed the least of the acts criminalized within the range of conduct punishable under his statute of conviction").