U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: COOKE, SEAN ANTHONY

A 060-601-631

Date of this notice: 3/5/2020

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:
Mann, Ana

Userteam: Docket

File: A060-601-631 – Atlanta, GA

Date: MAR - 5 2020

In re: Sean Anthony COOKE a.k.a. Shawn Anthony Cooke a.k.a. Shawn Cooke

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: H. Glenn Fogle, Jr., Esquire

APPLICATION: Removability; cancellation of removal

The respondent is a native and citizen of Jamaica. He has filed a timely motion to reconsider the Board's January 2, 2019, decision. Section 240(c)(6) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(6); 8 C.F.R. § 1003.2(b); *Matter of O-S-G-*, 24 I&N Dec. 56 (BIA 2006). On September 25, 2019, the Board granted a stay of removal. For the following reasons, the record will be remanded for further findings of fact.

The respondent's status was adjusted to that of a lawful permanent resident on April 4, 2009. Since his adjustment of status, he has been involved in a series of criminal activities.

In 2015, a grand jury indicted the respondent on four counts. Between May 5, 2015 and May 6, 2015, the respondent was charged with committing the offense of entering an automobile. He was also charged with theft by taking for entering and taking a 2012 Ford Escape on May 10, 2015. He was also charged with theft by taking for taking the motor vehicle license plate of another between May 11, 2015 and May 12, 2015. Last, he was charged with a controlled substance violation for possession of marijuana in an amount less than one ounce. *See* Exh. 1; Motion to Terminate, Tab A.

On August 11, 2016, the respondent pled guilty to two separate thefts in violation of Ga. Code Ann. § 16-8-2. He also pled guilty to entering an automobile. He was sentenced to 5 years. *See* Exh. 1; Motion to Terminate, Tab A.

Also in 2015, a grand jury indicted the respondent for the offense of aggravated assault for stabbing another person with a knife on June 22, 2015, and for crossing the guard lines with drugs for entering a jail with marijuana on June 23, 2015 (Exh. 1). On April 24, 2017, his aggravated assault charge was nol pros, and he pled guilty to a lesser included drug charge of possession of marijuana less that an ounce for which he was sentenced to 11 months (Exh. 1; Motion to Terminate, Tab B).

On January 17, 2016, the respondent was charged with having committed four crimes related to domestic violence. Specifically, he was charged with two counts of simple battery family violence, one count of criminal trespass, and one count of obstructing or hindering a person making an emergency telephone call. On September 20, 2016, the respondent pled guilty to two separate violations of simple battery family violence in violation of Ga. Code Ann. § 16-5-23(f), as well as

interference with a 911 emergency call under Ga. Code Ann. § 16-10-24.3 (Exh. 1; Motion to Terminate, Tab C).

For the domestic violence battery convictions, the Immigration Judge found that the respondent was sentenced to 12 months confinement for both counts, which he was allowed to serve on probation provided he complied with the terms and conditions of probation (IJ at 2, 4, July 11, 2018; IJ at 1, Feb. 14, 2018). *See* Exh. 1; Motion to Terminate, Tab C. In addition, on March 23, 2017, a state court judge found that the respondent had willfully violated the terms of his probation. The respondent was ordered to serve 120 days in the county jail (Exh. 1).

Based on these convictions, the respondent was placed in proceedings and charged with removability under section 237(a)(2)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(ii) as convicted of two or more crimes involving moral turpitude, and under section 237(a)(2)(E)(i) of the Act, 8 U.S.C. § 1227(a)(2)(E)(i), for the crimes of domestic violence.

The Immigration Judge determined that the respondent was removable as charged based on concessions that this theft and domestic violence convictions were crimes of moral turpitude, and because the respondent committed crimes of domestic violence. The Immigration Judge denied the respondent's application for cancellation of removal under section 240A(a) of the Act, 8 U.S.C. § 1229b(a), because the respondent's domestic violence convictions were also aggravated felonies based on his sentence. *See* Section 240A(a)(3) of the Act.

In our decision issued on January 2, 2019, we held that the respondent should not be held to his prior concessions that his theft and domestic violence convictions were crimes of moral turpitude because the Immigration Judge specifically found that his convictions were not crimes involving moral turpitudes. We agreed with the Immigration Judge that the respondent's domestic violence convictions were crimes of domestic violence under section 237(a)(2)(E)(i) of the Act. However, we declined to remand for consideration of the respondent's application for cancellation because under section 240A(d)(1)(B) of the Act, the stop time rule barred relief. In light of our decision, we did not address whether the domestic violence convictions were aggravated felonies based on the respondent's sentences.

On reconsideration, we agree with the respondent that his domestic violence convictions do not fall within section 212(a)(2) of the Act, 8 U.S.C. § 1182(a)(2), and so the stop time bar does not apply to his domestic violence convictions. *See Matter of Campos Torres,* 22 I&N Dec. 1289 (BIA 2000). However, the stop time rule may still apply if he admitted to acts constituting a crime involving moral turpitude under section 212(a)(2) of the Act, 8 U.S.C. 1182(a)(2). *See e.g. Miresles-Zuniga v. Holder,* 743 F.3d 11 (5th Cir. 2015); *Matter of Jurado*, 24 I&N Dec. 29, 31 (BIA 2006). Therefore, we will remand the record for further consideration of this issue.

Moreover, as we explained in our prior decision (BIA at 4), there is a question as to whether the respondent's domestic violence sentences involved a sentence of 12 months confinement or 12 months direct probation. The Immigration Judge denied cancellation of removal because the respondent's simple battery family violence conviction was a crime of violence aggravated felony under section 101(a)(43)(F) of the Act, and he was sentenced to a term of imprisonment of at least one-year (IJ at 2-5, July 11, 2018, *citing* Motion to Pretermit [sic], Tab C at 32). On appeal, the

respondent, relying on the same document, contends that he was sentenced to probation of 12 months for each simple battery family violence conviction and 2 days of jail.

Section 101(a)(48)(B) of the Act defines a "term of imprisonment" as including "the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence on whole or in part." A sentence to a direct probationary period, however, is not for a "term of imprisonment." *United States v. Ayala-Gomez*, 255 F.3d 1314 (11th Cir. 2001); *United States v. Guzman-Bera*, 216 F.3d 1019 (11th Cir. 2000) ("When a court does not order a period of incarceration and then suspend it, but instead imposes probation directly, the conviction is not an 'aggravated felony."). On remand, the Immigration Judge may consider whether the respondent was sentenced to 12 months confinement or probation for his domestic violence convictions, as this finding was not explained.

Finally, given the respondent's criminal history since he was granted the privilege of lawful permanent resident status in the United States, we also remand for consideration of whether the respondent warrants a grant of cancellation as a matter of discretion. *See Matter of Sotelo,* 23 I&N Dec. 201 (BIA 2001); *Matter of C-V-T-*, 22 I&N Dec. 7 (BIA 1998).

In accordance with the foregoing, the following order will be issued.

ORDER: The record is remanded for further proceedings in accordance with this decision.

FOR THE BOARD