U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: Z[redacted], A[redacted] S[redacted]

A [redacted]-796

Date of this notice: 4/12/2019

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:
Greer, Anne J.
Wendtland, Linda S.
Donovan, Teresa L.

Userteam: Docket

vg

File: A[redacted]-796 – Orient, OH

Date:

APR 12 2019

In re: A[redacted] S[redacted] Z[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Erin P. Brown, Esquire

ON BEHALF OF DHS: Dustin T. Roth
Assistant Chief Counsel

APPLICATION: Cancellation of removal; remand

In a decision dated November 1, 2018, an Immigration Judge pretermitted and denied the respondent's application for cancellation of removal pursuant to section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a) (2012), and ordered him removed from the United States. The respondent, a native and citizen of Romania, has appealed from this decision. The appeal will be sustained and proceedings will be terminated.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i) (2018). We review all other issues, including issues of law, discretion, or judgment, under the de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

Although the respondent initially conceded that he was convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct under section 237(a)(2)(A)(ii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(ii), he later sought to withdraw this concession (IJ at 2). The Immigration Judge denied the motion to withdraw the concession after concluding that the respondent was removable as charged based on his conviction for two counts of aggravated vehicular homicide in violation of section 2903.06(A)(2)(a) of the Ohio Revised Code (IJ at 4).[1] Since the respondent committed these crimes less than 7 years after he was admitted to the United States in any status, the Immigration Judge also pretermitted and denied his application for cancellation of removal pursuant to section 240A(a)(2) of the Act (IJ at 4-5).

[1] At the time of the respondent's offense, section 2903.06(A)(2)(a) provided, in relevant part, that "[n]o person, while operating or participating in the operation of a motor vehicle . . . shall cause the death of another . . . [r]ecklessly." Because the respondent's offense required "only recklessness," it cannot "constitute [a] crime[] of violence" under section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). *United States v. Rede-Mendez*, 680 F.3d 552, 562 (6th Cir. 2012) (collecting cases).

It is undisputed that a violation of section 2903.06(A)(2)(a) of the Ohio Revised Code necessarily involves morally turpitudinous conduct (IJ at 5). As a consequence, the only issue we must decide is whether the Immigration Judge correctly concluded whether the respondent's two counts of vehicular homicide, in violation of Ohio law, do not arise "out of a single scheme of criminal misconduct" within the meaning of section 237(a)(2)(A)(ii) of the Act.[2] We review this question of law de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii). Because we cannot affirm the Immigration Judge's conclusion in this regard, we will reverse his decision and terminate these proceedings.

Section 237(a)(2)(A)(ii) of the Act renders removable any "alien who at any time after admission is convicted of two or more crimes involving moral turpitude, *not arising out of a single scheme of criminal misconduct*, regardless of whether . . . the convictions were in a single trial." (Emphasis added.) This statutory language means that "when an alien has performed an act, which, in and of itself, constitutes a complete, individual, and distinct crime, he is deportable when he again commits such an act, even though one may closely follow the other, be similar in character, and even be part of an overall plan of criminal misconduct." *Matter of Islam*, 25 I&N Dec. 637, 639 (BIA 2011) (quoting *Matter of Adetiba*, 20 I&N Dec. 506, 509 (BIA 1992)). "Thus, we determined that the single scheme exception 'refers to acts, which although separate crimes in and of themselves, were performed in furtherance of a single criminal episode, such as where . . . two crimes *flow from and are the natural consequence of a single act of criminal misconduct*.'" *Id.* (emphasis added) (quoting *Matter of Adetiba*, 20 I&N Dec. at 511).

It is undisputed that the respondent committed aggravated vehicular manslaughter in violation of Ohio law when he was driving above the speed limit and crashed into an oncoming car, killing both of that vehicle's passengers (IJ at 4; Respondent's Br. at 2). Because the respondent's offense resulted in the death of two victims, the respondent was charged with and convicted of two counts of aggravated vehicular manslaughter, each one relating to a separate, respective victim (IJ at 4; Respondent's Br. at 2). The Immigration Judge found these facts significant and concluded that the respondent was removable as charged on this basis (IJ at 4).

In support of his conclusion, the Immigration Judge cited *Parikh v. Gonzales*, 155 F. App'x 635, 639 (4th Cir. 2005), for the proposition that "[t]he presence of separate victims supports a finding that the offenses did not constitute a single scheme of conduct" (IJ at 4). However, the United States Court of Appeals for the Fourth Circuit, in that case and others, has not found the presence of separate victims to be dispositive of the applicability of the single scheme exception, observing that "the existence of an *opportunity to reflect upon one crime before committing another*, and the existence of a *time period between the two offenses* also weigh against finding that the offenses constituted a single scheme." *Id.* (emphases added); *see also Akindemowo v. INS*, 61 F.3d 282, 287 (4th Cir. 1995) (finding it significant that "there were separate victims" and that

[2] The Department of Homeland Security ("DHS") does not challenge the Immigration Judge's determination that the respondent's conviction for theft in the third degree under section 164.05 of the Oregon Revised Statutes is not one for a crime involving moral turpitude, and we consider any arguments in this regard to be waived (IJ at 5). *See, e.g.*, *Matter of A.J. Valdez & Z. Valdez*, 27 I&N Dec. 496, 496 n.1 (BIA 2018).

the alien "had the opportunity to reflect upon one crime before committing the other, yet he elected not to disassociate himself from his criminal misconduct").

Because both victims were killed as a result of the respondent's single act of speeding and crashing into their vehicle, we agree with the respondent that "he did not have time to reflect on his first offense [of vehicular manslaughter] or disassociate himself from" this criminal act before he caused the death of his second victim (Respondent's Br. at 6). *Matter of Islam*, 25 I&N Dec. at 642. We therefore conclude, upon de novo review, that the respondent's crimes arose out of a single scheme of misconduct within the meaning of section 237(a)(2)(A)(ii) of the Act, and we reverse the Immigration Judge's conclusion to the contrary.

Because the respondent is not removable as charged, we will also reverse the Immigration Judge's decision not to allow the respondent to withdraw his prior concession of removability. *See Hanna v. Holder*, 740 F.3d 379, 387 (6th Cir. 2014) (permitting an alien to withdraw a prior admission or concession if "the factual admissions or concessions of [removability] were untrue or incorrect" (alteration in original) (citation omitted)). For this same reason, we will terminate the respondent's removal proceedings. *See Matter of Sanchez-Herbert*, 26 I&N Dec. 43, 44 (BIA 2012) (providing that termination is appropriate where the DHS cannot establish an alien's removability). Accordingly, the following orders will be entered.

ORDER: The appeal is sustained and the Immigration Judge's November 1, 2018, is vacated.

FURTHER ORDER: The removal proceedings are terminated.

FOR THE BOARD