U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: KARNGA, TROKON IKIMI

A 062-029-909

Date of this notice: 12/13/2019

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:
Wilson, Earle B.

Humadyl
Userteam: Docket

File: A062-029-909 – Juneau, WI

Date: DEC 13 2019

In re: Trokon Ikimi KARNGA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Aissa Iselle Olivarez, Esquire

ON BEHALF OF DHS: Kristin Linsley
Assistant Chief Counsel

APPLICATION: Termination

The Department of Homeland Security ("DHS") appeals from an Immigration Judge's decision, dated September 20, 2018, terminating removal proceedings against the respondent. The respondent opposes the appeal and urges us to affirm the Immigration Judge's decision. The record will be remanded.

The respondent—a native and citizen of Liberia and a lawful permanent resident of the United States—was convicted on November 2, 2017, of "child enticement" in violation of section 948.07 of the Wisconsin Statutes Annotated. In July 2018, the DHS initiated removal proceedings against the respondent by filing a notice to appear in immigration court, alleging that child enticement under section 948.07 is a crime involving moral turpitude ("CIMT") that renders him deportable under section 237(a)(2)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(i) (2012) (Exh. 1). The respondent promptly moved to terminate the proceedings, arguing that section 948.07 does not define a CIMT. The Immigration Judge granted that motion in her decision of September 20, 2018, holding that section 948.07 is categorically overbroad and indivisible vis-à-vis the CIMT definition. This timely appeal followed.

Whether section 948.07 defines a CIMT is legal question that we review de novo. 8 C.F.R. § 1003.1(d)(3)(ii) (2018).[1] To involve moral turpitude, a crime requires two essential elements: reprehensible conduct and a culpable mental state. *Matter of Silva-Trevino*, 26 I&N Dec. 826, 834 (BIA 2016). To decide whether a particular crime has such elements, we employ the categorical approach, which requires us to disregard the specific facts underlying the respondent's conviction and to focus instead on the elements of the crime and the minimum conduct that has a realistic probability of being prosecuted thereunder. *Matter of Silva-Trevino*, 26 I&N Dec. at 831. If the elements of a crime encompass any conduct that does not involve moral turpitude, then the crime

[1] The respondent argues on appeal that the CIMT concept is unconstitutionally vague as applied to non-fraud offenses (Respondent's Br. at 21-23). We express no opinion on that subject. The Board does not have authority to entertain constitutional challenges to the immigration laws. *See, e.g., Matter of Isidro-Zamorano*, 25 I&N Dec. 829, 832 (BIA 2012).

is not a CIMT unless: (1) it is "divisible" under *Mathis v. United States*, 136 S. Ct. 2243 (2016), and *Descamps v. United States*, 570 U.S. 254 (2013), into multiple discrete offenses, at least one of which is a categorical CIMT; and (2) admissible portions of the respondent's conviction record establish that the elements of his particular offense of conviction match the CIMT concept. *Matter of Silva-Trevino*, 26 I&N Dec. at 833 & n.8.[2]

We begin with the language and elements of section 948.07, which provides as follows:

> **948.07. Child enticement**
>
> Whoever, with intent to commit any of the following acts, causes or attempts to cause any child who has not attained the age of 18 years to go into any vehicle, building, room or secluded place is guilty of a Class D felony:
>
> (1) Having sexual contact or sexual intercourse with the child...
>
> (2) Causing the child to engage in prostitution.
>
> (3) Exposing genitals, pubic area, or intimate parts to the child or causing the child to expose genitals, pubic area, or intimate parts…
>
> (4) Recording the child engaging in sexually explicit conduct.
>
> (5) Causing bodily or mental harm to the child.
>
> (6) Giving or selling to the child a controlled substance or controlled substance analog ….

It is these elements that we compare to the CIMT concept.

On appeal, the DHS first argues that section 948.07 defines a categorical CIMT, without regard to the crime the defendant intends to commit, on the theory that "removing a child from the protection of the public with an enumerated criminal motive is always turpitudinous, regardless of the subsequent criminal act intended" (DHS Br. at 8-11). That argument is unpersuasive because—as the respondent correctly observes in his response brief (Respondent's Br. at 11)—section 948.07 "does not require that the defendant's action separate the child from the public." *State v. Gomez*, 507 N.W.2d 378, 380 (Wis. Ct. App. 1993). On the contrary, the Court of Appeals of Wisconsin has upheld several convictions under section 948.07 where the defendant was

[2] The DHS argues that we should abandon the Supreme Court's "divisibility" jurisprudence in CIMT cases (DHS Br. at 16-24). We deem that argument foreclosed by controlling circuit law. *Garcia-Martinez v. Barr*, 921 F.3d 674, 681 (7th Cir. 2019). Further, as we explained in *Matter of Silva-Trevino*, the imperative of nationwide uniformity counsels strongly in favor of our continued adherence to the principles set forth in the Supreme Court's categorical approach cases. 26 I&N Dec. at 831-33 & nn.

prosecuted for inducing a child, with the requisite intent, to move from one room to another inside a private residence. *Id.*; *State v. Provo*, 681 N.W.2d 272, 277 (Wis. Ct. App. 2004).

Another difficulty with the DHS's theory—which is predicated on the unique culpability associated with luring *children* away from the protection of the public—is that section 948.07 does not require that the defendant *know* the victim to be a child, or even be reckless or negligent as to that fact. As the Wisconsin Supreme Court has explained, "[c]hild enticement is a strict liability offense ... in the sense that the State need not prove the defendant's knowledge of the child's minority and the defendant cannot use mistake as to the child's minority as a defense." *State v. Robins*, 646 N.W.2d 287, 293 (Wis. 2002) (citing Wis. Stat. Ann. § 939.43(2) ("[a] mistake as to the age of a minor ... is not a defense"), and Wis. Stat. Ann. § 939.23(6) ("[c]riminal intent does not require proof of knowledge of the age of a minor even though age is a material element in the crime")).

Under the circumstances, the DHS has not demonstrated by clear and convincing evidence that moral turpitude necessarily inheres in the mere act of "caus[ing] or attempt[ing] to cause any child who has not attained the age of 18 years to go into any vehicle, building, room or secluded place" for an illicit purpose. Thus, the status of section 948.07 as a CIMT depends upon the nature of the underlying offense the defendant intends to commit after causing the child to "go into" a prohibited place.

The Immigration Judge found that section 948.07 is categorically overbroad with respect to the CIMT concept because "the least culpable conduct contemplated [by its elements] involves a child attempting to 'cause another child to go into a vehicle, room, or secluded place' with the intent to give the child marijuana" (IJ at 2). The DHS challenges that determination on several fronts, arguing first that the distribution of marijuana is turpitudinous (even without remuneration) and, alternatively, that there is no "realistic probability" that section 948.07 would be used to prosecute the casual sharing of marijuana among minors (DHS Br. at 11-16).

We find it unnecessary to address the merits of the Immigration Judge's hypothetical marijuana example, however, because we conclude upon de novo review that even the "sexual contact" prong of the statute—section 948.07(1)—is categorically overbroad under *Matter of Silva-Trevino*, in which we reaffirmed the Attorney General's determination that "a crime involving intentional sexual conduct by an adult with a child involves moral turpitude as long as the perpetrator knew or should have known that the victim was a minor." 26 I&N Dec. at 834 (citing *Matter of Silva-Trevino*, 24 I&N Dec. 689, 706-07 (A.G. 2008)).[3] As the Wisconsin Supreme Court held in *State v. Robins*, 646 N.W. 2d at 293, a defendant's conviction under section 948.07(1) does not establish that he "knew or should have known that the victim was a minor" within the meaning of *Silva-Trevino*. On the contrary, *Robins* establishes that the defendant's state of mind with respect to the victim's age need not be proven beyond a reasonable doubt under that section.

[3] The definition of "sexual contact" set forth in Wis. Stat. Ann. § 948.01(5) encompasses the same minimum conduct that was covered by Tex. Penal Code § 21.11(a)(1), the Texas "indecency with a child" statute at issue in *Silva-Trevino*.

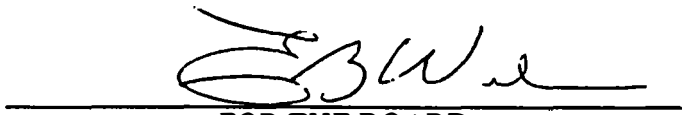
Inasmuch as section 948.07 is categorically overbroad with regard to the CIMT concept, the respondent's conviction thereunder cannot render him deportable under section 237(a)(2)(A)(i) of the Act unless the statute is divisible. In assessing the divisibility of section 948.07, we ask whether the different "intended crimes" it covers (i.e., "sexual contact," prostitution, exposure, etc.) are discrete "elements" of the offense about which a jury must agree beyond a reasonable doubt, or merely "means" or "brute facts" about which jurors may disagree while still rendering a guilty verdict. *Matter of Chairez*, 26 I&N Dec. 819, 822-23, 824-25 (BIA 2016). Only if each statutory alternative defines a discrete "element" may we proceed to a "modified categorical" inquiry into the respondent's conviction record.

As the Immigration Judge determined, the Wisconsin Supreme Court holds that section 948.07 defines "one offense with multiple modes of commission." *State v. Derango*, 613 N.W.2d 833, 838-39 (Wis. 2000). Thus, the "intended crimes" listed in section 948.07 are alternative "means," not alternative "elements" (IJ at 1). *State v. Hendricks*, 906 N.W.2d 666, 673-75 (Wis. 2018). This case law establishes that section 948.07 is indivisible as to the CIMT concept, precluding resort to the modified categorical approach, which in turn means that the DHS has not carried its burden to prove that the respondent is deportable under section 237(a)(2)(A)(i).

In its brief, the DHS requests a remand to lodge an additional charge of deportability under section 237(a)(2)(E)(i) of the Act, which pertains (in relevant part) to any alien convicted of a "crime of child abuse" (DHS Br. at 3, 24 & Exh. D). The respondent opposes remand as "highly inefficient, a waste of judicial resources, and contrary to the doctrine of *res judicata*" (Respondent's Br. at 24). We understand the respondent's efficiency concerns, but do not agree that res judicata principles preclude the DHS from lodging additional removal charges during a single, ongoing removal proceeding. Res judicata comes into play only when there has been a "final judgment on the merits" between the same parties. *Alvear-Velez v. Mukasey*, 540 F.3d 672, 677 (7th Cir. 2008). No such final judgment has been entered here. Applicable regulations specify, moreover, that the DHS may lodge additional or substituted removal charges "at any time" during removal proceedings. 8 C.F.R. §§ 1003.30, 1240.10(e). The present removal proceedings remain ongoing, notwithstanding the pendency of an administrative appeal. Accordingly, we will grant the DHS's request to remand the record.

In sum, the DHS has not demonstrated by clear and convincing evidence that the respondent's conviction for child enticement under Wis. Rev. Stat. § 948.07 renders him removable under section 237(a)(2)(A)(i) of the Act. However, the record will be remanded to permit the DHS to lodge an additional removal charge under section 237(a)(2)(E)(i) of the Act, and for such further proceedings as may be necessary thereafter.

ORDER: The record is remanded for further proceedings consistent with the foregoing opinion.



FOR THE BOARD