U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: CASTELLAR-LONDONO, DAVID ... **A 058-506-216**

Date of this notice: 7/29/2019

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:
Creppy, Michael J.

Sch[illegible]
Userteam: Docket

File: A058-506-216 – Aurora, CO Date: JUL 29 2019

In re: David Alejandro CASTELLAR-LONDONO a.k.a. David Alesandro Londando

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: James S. Lamb, Esquire

ON BEHALF OF DHS: Geoffrey D. Rieman
Deputy Chief Counsel

APPLICATION: Termination of proceedings

The Department of Homeland Security (DHS) appeals from the Immigration Judge's decision dated September 13, 2018, granting the respondent's motion to terminate proceedings. The respondent, a native and citizen of Colombia, opposes the appeal. The appeal will be dismissed.

We review findings of fact determined by an Immigration Judge, including credibility findings, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment, and all other issues in appeals from decisions of Immigration Judges de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

On January 28, 2016, the respondent was convicted of two counts of sexual battery under section 76-9-702.1 of the Utah Code (IJ at 2; Respondent's Document Submission (Aug. 14, 2018)). Based on these convictions, the DHS charged the respondent with removability under section 237(a)(2)(A)(i) of the Act, 8 U.S.C. § 1227(a)(2)(A)(i), as an alien who has been convicted of a crime involving moral turpitude within 5 years of admission (IJ at 2; Exh. 1).[1] On August 29, 2018, the respondent moved for termination of proceedings, arguing that his convictions for sexual battery under the Utah Code do not qualify as crimes involving moral turpitude. The Immigration Judge granted the motion (IJ at 4-6).

Moral turpitude refers to conduct that is inherently base, vile, depraved, and contrary to the accepted rules of morality and the duties owed between individuals, either one's fellow persons or society in general. *Rodriguez-Heredia v. Holder*, 639 F.3d 1264, 1268 (10th Cir. 2011). An

[1] The DHS initially charged the respondent with removability under section 237(a)(2)(A)(i) of the Act based on his two convictions for attempted forcible sexual abuse under sections 76-4-101 and 76-5-404 of the Utah Code (IJ at 2; Exh. 1). The respondent and the Utah District Attorney's Office subsequently filed a joint motion to reopen his criminal case to withdraw his guilty plea for those two convictions and instead enter a guilty plea for two counts of sexual battery (IJ at 2). The state court granted the motion to reopen (IJ at 2). The DHS then filed a Form I-261 amending the allegations in the Notice to Appear to replace the attempted forcible sexual abuse convictions with the sexual battery convictions (Exhs. 1, 3).

offense constitutes a crime involving moral turpitude if it involves reprehensible conduct committed with some form of scienter. *Matter of Silva-Trevino*, 26 I&N Dec. 826, 828 n.2 (BIA 2016). To determine if an offense is morally turpitudinous, we employ the categorical approach and focus only on the elements of the offense, not on the underlying conduct that resulted in the conviction. *See Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016); *Descamps v. United States*, 570 U.S. 254, 260-61 (2013). In this case, we examine whether the elements of section 76-9-702.1 of the Utah Code categorically proscribe conduct that is morally turpitudinous.

Section 76-9-702.1 of the Utah Code punishes a person who "intentionally touches, whether or not through clothing, the anus, buttocks, or any part of the genitals of another person, or the breast of a female person, and the actor's conduct is under circumstances the actor knows or should know will likely cause affront or alarm to the person touched." *See also State v. Norton*, 427 P.3d 312, 326 n.7 (Utah Ct. App. 2018). Utah's case law has interpreted the "affront or alarm" element to mean lack of consent. *See State v. LoPrinzi*, 338 P.3d 253, 259 (Utah Ct. App. 2014) (providing that the affront or alarm language "must implicate a lack of consent"); *State v. Hirschi*, 167 P.3d 503, 511 (Utah Ct. App. 2007) (providing that the jury must have found that any touching occurred without consent).

Simple assault or battery—that is, the offensive touching or threatened offensive touching of another person committed with general intent that does not result in serious bodily harm—is generally not a crime involving moral turpitude. *See Matter of Wu*, 27 I&N Dec. 8, 10-11 (BIA 2017); *Matter of Sanudo*, 23 I&N Dec. 968, 971-73 (BIA 2006); *Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996). An offensive touching may qualify as a crime involving moral turpitude only if it requires proof of some aggravating element or attendant circumstance that significantly increases the offender's culpability vis-a-vis simple assault. *Matter of Wu*, 27 I&N Dec. at 10-11; *Matter of Sanudo*, 23 I&N Dec. at 971. Such aggravating factors include the use of a deadly weapon or force likely to produce great bodily injury, or the infliction of bodily injury upon a person whom society views as deserving of special protection, such as a spouse or uniformed police officer. *See Matter of Wu*, 27 I&N Dec. at 8; *Matter of Tran*, 21 I&N Dec. 291 (BIA 1996); *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988).

We are not persuaded by the DHS's claim that the nature of the touching prohibited by section 76-9-702.1 of the Utah Code constitutes an aggravating factor that distinguishes the offense from simple assault or battery (DHS's Br. at 9-10). Section 76-9-702.1 of the Utah Code is a general intent statute that proscribes offensive touching. The statute requires only that the actor have the general intent to touch certain areas of another person. *See State v. Von Niederhausern*, 427 P.3d 1277, 1283 (Utah Ct. App. 2018); *State v. Hirschi*, 167 P.3d at 51. Although limited to specified sensitive areas of the body, there is no requirement that the person act with lewd intent or the intent to arouse or damage psychologically or physically.[2] *See State v. Hirschi*, 167 P.3d at 511; *cf.*

[2] We are not persuaded by the DHS's assertion that "sexual battery" under Utah law was the former "gross lewdness" as provided in section 76-9-702(3) of the Utah Code (DHS's Br. at 5-6, 11-12). A review of Utah case law shows that the former gross lewdness statute required the State to prove that the person touched be 14 years of age or older while the sexual battery statute does

Matter of Cortes Medina, 26 I&N Dec. 79, 82 (BIA 2013) (determining that indecent exposure crimes are "not inherently turpitudinous in the absence of" lewd intent).

For the foregoing reasons, given the limitations of the categorical approach, we must conclude that the respondent's conviction under section 76-9-702.1 of the Utah Code is categorically overbroad and is thus not a crime involving moral turpitude. We therefore affirm the Immigration Judge's grant of the respondent's motion to terminate proceedings.

In light of the foregoing, the appeal will be dismissed. The following order will be entered.

ORDER: The DHS's appeal is dismissed.

FOR THE BOARD

not. *See, e.g.*, *State v. Jones*, 878 P.2d 1175, 1177 n.2 (Utah Ct. App. 1994); *State v. Perry*, 871 P.2d 576, 578-80 (Utah Ct. App. 1994).