U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: C[redacted], V[redacted]

A[redacted]281

Date of this notice: 1/24/2018

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:
Pauley, Roger
Wendtland, Linda S.
Greer, Anne J.

Userteam: Docket

File: [redacted] 281 – Las Vegas, NV Date: JAN 24 2018

In re: V[redacted] C[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Seth L. Reszko, Esquire

ON BEHALF OF DHS: An Mai Nguyen
Assistant Chief Counsel

APPLICATION: Cancellation of removal for non-permanent residents

This case was last before us on August 19, 2011, when we received a December 7, 2010, remand from the United States Circuit Court of Appeals for the Ninth Circuit, and in turn remanded the case to the Immigration Judge to consider the respondent's eligibility for cancellation of removal for non-permanent residents under section 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1).[1] On January 30, 2014, the Immigration Judge found the respondent, a native and citizen of Mexico, had not met his burden to demonstrate eligibility and pretermitted the application. The appeal will be sustained and the record will be remanded to the Immigration Court for further proceedings consistent with this decision

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including issues of law, judgment, and discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge found that the respondent was removable for having entered the United States without being admitted or paroled; the respondent applied for cancellation of removal (IJ at 1; Exhs. 1, 2).[2] In 2004, the respondent had been convicted under Utah Code section 76-9-702, for sexual battery (IJ at 3; Exh. 21). The Immigration Judge found the statute was not categorically for a crime involving moral turpitude (IJ June 2012 at 8). However, because the record of conviction did not clearly establish that the respondent's conduct was not morally turpitudinous, and it was the respondent's burden to show eligibility for the application, the Immigration Judge pretermitted the application under section 240A(b)(1)(C) of the Act (IJ at 2).

The respondent's statute of conviction states:

[1] The Ninth Circuit's decision was in response to our January 11, 2007, decision to dismiss the appeal from the Immigration Judge's August 25, 2005, decision to deny cancellation of removal.

[2] All citations are to the Immigration Judge's January 30, 2014, decision unless otherwise specified.

> A person is guilty of sexual battery if the person under circumstance not amounting to rape, rape of a child, object rape, object rape of a child, forcible sodomy, sodomy upon a child, forcible sexual abuse, sexual abuse of a child, aggravated sexual abuse of a child, aggravated sexual assault, or an attempt to commit any of these offenses 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, and the actor's conduct is under circumstance the actor knows or should know will likely cause affront or alarm to the person touched.

Utah Code section 76-9-702(3) (2004).[3]

In our August 19, 2011, decision we stated that this statute was not categorically for a crime involving moral turpitude (Exh. 20). That conclusion remains sound. A conviction is for a crime involving moral turpitude if there is "evil intent" coupled with an act that is "base, vile, and depraved." *See Nunez v. Holder*, 594 F.3d 1124 (9th Cir. 2010). A conviction is categorically for a crime involving moral turpitude only if all the conduct proscribed by the statute meets the generic definition of moral turpitude. *Id.* at 1129.

For sexual offenses, there is often a requirement that the statute include an "intent to harm." *Id.* at 1131 n.4. Often, simple "battery convictions are not categorically [crimes involving moral turpitude] convictions because the required mens rea for simple . . . battery is usually the intent to touch another offensively, not the "evil" intent typically required for a [crime involving moral turpitude]." *Uppal v. Holder*, 605 F.3d 712, 716 (9th Cir. 2010).

The elements for 76-9-702(3) are: (1) intentional touching, whether or not through clothing; (2) the genitals of another person or the breast of a female; (3) under circumstances the actor knows or should know will likely cause affront or alarm to the person touched. *State v. Hirschi*, 167 P.3d 503, 510-11 (Utah Ct. App. 2007); *State v. Knight*, 79 P.3d 969, 971 n.1 (Utah Ct. App. 2003). The Utah courts have found that the intentional touching required for sexual battery is a "general intent" crime, not a "specific intent" crime. *State v. Sessions*, 645 P.2d 643, 646 (Utah 1982). General intent has been likened to a knowing act, while specific intent has been likened to a purposeful act. *See United States v. Bailey*, 444 U.S. 394, 405 (1980).

Because Utah Code section 76-9-702(3) is a general intent crime, we conclude it does not contain the mens reas to be a crime involving moral turpitude. *Uppal v. Holder*, 605 F.3d at 716. The statute requires the prosecution prove a knowing touch; no harm or "evil intent" is required. Moreover, the requirement that the touching cause "affront or alarm" is generally insufficient for crimes involving moral turpitude. *See Nunez v. Holder*, 594 F.3d at 1137 (stating that "de minimus" harm that "offends" the victim "is not ordinarily considered to be inherently vile, depraved, or morally reprehensible.").

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[3] Although the respondent's criminal records state he was convicted under section 76-9-702, the parties agree it was for "sexual battery," which is specified at subsection (3). This is also evident because, as the Immigration Judge found, the respondent was convicted of a class A misdemeanor, which is only available for convictions under 76-9-702(3) (IJ June 2012 at 2; Exh. 21).

Because the statute does not require the "evil intent" for crimes involving moral turpitude, Utah Code section 76-9-702(3) is categorically not a crime involving moral turpitude, and no divisibility analysis need be undertaken. *See generally Mathis v. United States*, 136 S.Ct. 2243, 2249 (2016). Since under the categorical approach, no conduct under section 76-9-702(3) may be said to be for a crime involving moral turpitude, the respondent has met his burden of demonstrating his conviction does not bar him from cancellation of removal. Therefore, the Immigration Judge erred in pretermitting the respondent's cancellation of removal application under section 240A(b)(1)(C) of the Act. Accordingly, the record will be remanded to the Immigration Court to provide the respondent the opportunity to submit his application for relief.

ORDER: The appeal is sustained.

FURTHER ORDER: The record is remanded to the Immigration Court for further proceedings consistent with this decision.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
LAS VEGAS, NEVADA

File: [redacted]281 January 30, 2014

In the Matter of

V[redacted] C[redacted]	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act (the Act), as amended; an alien present in the United States without admission or parole, or who arrived in the United States at any time or place other than as designated by the Attorney General.

APPLICATIONS: Cancellation of removal for certain non-permanent residents and post-conclusion voluntary departure.

ON BEHALF OF RESPONDENT: MAYA TIMIS

ON BEHALF OF DHS: AN NGUYEN

ORAL DECISION OF THE IMMIGRATION JUDGE

It was on January 30, 2014 that a hearing most recently was convened regarding this removal proceedings. On this occasion, the Immigration Court observed the respondent earlier was determined removable, pursuant to clear and convincing evidence, with reference to the aforementioned charge of inadmissibility. The respondent then has designated his country citizenship, Mexico, should removal from the United States prove necessary.

Also on January 30, 2014, the Immigration Court observed there has been a lengthy litigation process involving this removal proceeding regarding the question of whether the respondent is eligible to receive cancellation of removal for certain non-permanent residents. On January 30, 2014, the Immigration Court observed that, this date, the determination of whether the respondent is eligible to receive cancellation of removal for certain non-permanent residents is to be addressed based on the current applicable law. On this basis, the Immigration Court observed, on January 30, 2014, that previous scheduling of an individual hearing to evaluate whether the respondent was convicted in 2004 in the State of Utah for a crime involving moral turpitude no longer is a necessary hearing in Immigration Court because the authority for that hearing no longer controls. Matter of Silva-Trevino, 24 I&N Dec. 687 (A.G. 2008), Olivas-Motta v. Holder, --- F.3d ---, 2013 W.L. 2128318 (9th Cir. May 17, 2013). Thus, with the Immigration Court canceling the scheduling of an individual evidentiary hearing to more recently evaluate the crime involving moral turpitude issue, instead, the January 30, 2014 hearing was convened on a master calendar to further address the circumstances of this case.

Furthermore, on January 30, 2014, the Immigration Court recognized that another change in the applicable precedent decisions necessitates recognizing that it now is the burden of the respondent to prove his ambiguous 2004 State of Utah conviction for sexual batter is not a crime involving moral turpitude. However, the respondent has not met this burden of proof. Consequently, on January 30, 2014, the Immigration Court determined the respondent is not eligible to receive cancellation of removal for certain non-permanent residents. It follows that his Form EOIR-42B application for cancellation of removal for certain non-permanent residents was denied on January 30, 2014 by pretermission.

Further, during the January 30, 2014 hearing the respondent identified his interest in pursuing alternative relief from removal limited to post-conclusion voluntary departure. DHS opposed the respondent receiving this relief from removal as a matter of discretion. But, the understanding of the Immigration Court is that the sole justification for DHS arguing the respondent should not receive post-conclusion voluntary departure is his referenced 2004 criminal history. In that regard, the Immigration Court noted on January 30, 2014 the respondent was convicted of a misdemeanor for which he was sentenced to jail for less than 170 days, of which he asserts serving three weeks. The Immigration Court also has been mindful there is no more recent misbehavior by the respondent, criminal or otherwise, suggesting the respondent is not rehabilitated since his 2004 conviction. It is under these circumstances that the Immigration Court determined on January 30, 2014 that the respondent be granted post-conclusion voluntary departure.

For the respondent to receive post-conclusion voluntary departure, he must post a $500 voluntary departure bond, with DHS, within five business days ending February 6, 2014. Should the respondent fail to timely post that post-conclusion voluntary departure bond, after this same date he then will become the subject of an alternate order of removal from the United States to Mexico.

Should the respondent succeed in timely posting the aforementioned post-conclusion voluntary departure bond, with this he will receive a 60-day period of voluntary departure ending March 31, 2014.

Further, if respondent fails to timely depart from the United States voluntary by March 31, 2014, thereafter he once again will become the subject of an alternate order of removal from the United States to Mexico.

ORDER

IT IS HEREBY ORDERED that the respondent shall be denied cancellation of removal for certain non-permanent residents by pretermission.

IT IS HEREBY FURTHER ORDERED that the respondent shall be granted post-conclusion voluntary departure with the conditions that have been recited herein. (See attached voluntary departure warnings).

RONALD L. MULLINS
Immigration Judge