U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: GONZALEZ-VELASQUEZ, ORTE... **A 205-132-294**

Date of this notice: 1/3/2018

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:
Cole, Patricia A.
Wendtland, Linda S.
Pauley, Roger

Smith
Userteam: Docket

File: A205 132 294 – Atlanta, GA Date: JAN - 3 2018

In re: Ortencia GONZALEZ-VELASQUEZ a.k.a. Ortencia Gonzales-Velasques

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Dean A. Williams, Esquire

ON BEHALF OF DHS: Sirce E. Owen
Assistant Chief Counsel

APPLICATION: Voluntary departure

On December 2, 2013, an Immigration Judge denied the respondent's application for pre-conclusion voluntary departure under section 240B(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(a)(1) (2012), after determining that the respondent's theft by shoplifting conviction under Ga. Code Ann. § 16-8-14 (2012) was for an aggravated felony theft offense under section 101(a)(43)(G) of the Act, 8 U.S.C. § 1101(a)(43)(G). The respondent, a native and citizen of Guatemala, now appeals. The record will be remanded.

We review an Immigration Judge's findings of fact, including findings regarding witness credibility and what is likely to happen to the respondent, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i) (2017); *see also Zhu v. United States Attorney General*, 703 F.3d 1303 (11th Cir. 2013); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015). We review all other issues, including issues of law, judgment, or discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The record reflects that the respondent was convicted on July 6, 2012, and February 20, 2013, for the offense of theft by shoplifting in violation of Ga. Code Ann. § 16-8-14. For each offense the respondent was sentenced to a term of imprisonment of 12 months, to be served on probation (I.J. at 2; Exh. 4; Exh. 2, Tab B).

At the time of the respondent's convictions section 16-8-14 provided as follows:

> A person commits the offense of theft by shoplifting when such person alone or in concert with another person, with the intent of appropriating merchandise to his or her own use without paying for the same or to deprive the owner of possession thereof or of the value thereof, in whole or in part, does any of the following:
>
> (1) Conceals or takes possession of the goods or merchandise of any store or retail establishment;
>
> (2) Alters the price tag or other price marking on goods or merchandise of any store or retail establishment;
>
> (3) Transfers the goods or merchandise of any store or retail establishment from one container to another;

(4) Interchanges the label or price tag from one item of merchandise with a label or price tag for another item of merchandise; or

(5) Wrongfully causes the amount paid to be less than the merchant's stated price for the merchandise.

Section 101(a)(43)(G) of the Act provides that a theft offense is an aggravated felony if the term of imprisonment is at least 1 year. A crime is a "theft offense" under section 101(a)(43)(G) of the Act if it requires a taking of, or exercise of control over, another's property without consent and with the criminal intent to deprive the owner of the rights and benefits of ownership. *Matter of Garcia-Madruga*, 24 I&N Dec. 436, 440-41 (BIA 2008); *see also Ramos v. U.S. Att'y Gen.*, 709 F.3d 1066, 1069 (11th Cir. 2013). To decide whether an offense fits this definition, we use the categorical approach, which requires us to focus on the minimum conduct that has a realistic probability of being prosecuted under the statute of conviction, rather than on the facts underlying the respondent's particular violation of that statute. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684-85 (2013).

If the minimum conduct that has a realistic probability of being prosecuted under the statute of conviction does not qualify as a "theft offense" for purposes of section 101(a)(43)(G) of the Act, then the issue becomes whether the statute is "divisible." In *Mathis v. United States*, 136 S. Ct. 2243 (2016), the Supreme Court reaffirmed its divisibility analysis set forth in *Descamps v. United States,* 136 S. Ct. 2276, 2281, 2283 (2013). The *Mathis* Court clarified that a statute phrased in the alternative is "divisible," so as to authorize a modified categorical inquiry, only if each statutory alternative defines a discrete "element" of the offense, as opposed to a mere "brute fact" or factual "means" by which an element may be proven. *Mathis v. United States*, 136 S. Ct. at 2248. To help distinguish between "elements" and "means," the *Mathis* Court explained that "if a statutory list is drafted to offer 'illustrative examples,' then it includes only a crime's means of commission," not alternative "elements." *Id.* at 2256 (citing *United States v. Howard*, 742 F.3d 1334, 1348 (11th Cir. 2014); *United States v. Cabrera-Umanzor*, 728 F.3d 347, 353 (4th Cir. 2013)). *See also Matter of Chairez*, 26 I&N Dec. 819, 819-20 (BIA 2016) (clarifying "that the understanding of statutory 'divisibility' embodied in *Descamps* and *Mathis* applies in immigration proceedings nationwide to the same extent that it applies in criminal sentencing proceedings.").

On appeal, the respondent challenges the Immigration Judge's conclusion that her conviction under Ga. Code Ann. § 16-8-14 was for a categorical aggravated felony under section 101(a)(43)(G) of the Act that rendered the respondent statutorily ineligible for pre-conclusion voluntary departure (IJ at 2). *See* section 240B(a)(1) of the Act. She asserts that the Immigration Judge should have applied the modified categorical approach because Ga. Code Ann. § 16-8-14 is divisible (Respondent's Br. at 3, 7-11). We note that the Immigration Judge did not conduct any legal analysis in determining that the respondent's theft by shoplifting offense was an aggravated felony. Rather, the Immigration Judge focused only on the word "theft" appearing in the respondent's conviction record and on the sentence imposed (IJ at 2; Exh. 4).

An offense under section 16-8-14 of the Georgia Code is not a categorical "theft offense" for purposes of the aggravated felony definition because the statute is broader than the generic definition. Specifically, the minimum conduct that has a realistic probability of being prosecuted

under the statute, *i.e.*, to appropriate the property for one's own use, falls outside the generic definition. *See Ramos v. U.S. Att'y Gen.*, 709 F.3d at 1070-71 (citing *Jaggernauth v. U.S. Att'y Gen.*, 432 F.3d 1346 (11th Cir. 2005)).

We conclude that the statute is not divisible. *See Mathis v. United States*, 136 S. Ct. at 2248-49; *Descamps v. United States*, 133 S. Ct. at 2276, 2281, 2283. Section 16-8-14 "provides three forms of mens rea, punishing persons who have the intent (1) to appropriate the property to [one's] own use without paying for it; (2) to deprive the owner of the possession of it; or (3) to deprive the owner of the value of it." *K-Mart Corp. v. Coker*, 410 S.E.2d 425, 426 (Ga. 1991). The Supreme Court of Georgia has stated, however, that by adding the second and third alternative mens rea, "the legislature indicated that the mens rea requirement is not stringent." *Id.* Additionally, the Court of Appeals of Georgia has explained that "categorization of these intents as three discrete mens rea may be misunderstood, in that they may overlap and they are not always mutually exclusive." *Gilliam v. State*, 517 S.E.2d 348, 350 (Ga. 1999) (and cases cited therein, describing cases involving overlapping mens rea).

Moreover, Georgia's pattern jury instruction for theft by shoplifting does not reflect that the jury must be unanimous regarding the mens rea involved in the offense in order to convict under the statute. *See* Georgia Suggested Pattern Jury Instructions § 2.64.30. Although the statute provides three forms of mens rea, it does not appear from the instructions that the jury is required to agree as to the manner in which the theft by shoplifting occurred.[1] It follows that the statute does not define alternative mens rea elements but rather describes alternative means by which a shoplifting offense may be committed. *See Mathis v. United States*, 136 S. Ct. at 2256-57 (authorizing reference to, inter alia, jury instructions to discern whether an aspect of a State statute is an element of the offense). Therefore, Ga. Code Ann. § 16-8-14 is not divisible, which precludes application of the modified categorical approach. *See United States v. Estrella*, 758 F.3d 1239, 1246 (11th Cir. 2014) (holding that under *Descamps* "if the statutory scheme is not such that it would typically require the jury to agree to convict on the basis of one alternative as opposed to the other, then the statute is not divisible in the sense required to justify invocation of the modified categorical approach.").

Inasmuch as an offense under the statute is not a categorical aggravated felony theft offense under section 101(a)(43)(G), and the statute is not divisible for purposes of applying the modified categorical approach, we reverse the Immigration Judge's determination that the respondent was not statutorily eligible for voluntary departure under section 240B(a)(1) of the Act. We will remand the record for the Immigration Judge to determine whether the respondent merits voluntary departure as a matter of discretion. *See* section 240(c)(4)(A)(ii) of the Act, 8 U.S.C.

[1] In *Gilliam v. State*, 517 S.E.2d at 348, 350, the court found harmless error in the trial court's jury instructions regarding all three states of mind when the only mens rea alleged in the accusation was intent to appropriate. After finding that Gilliam's case represented overlapping mens rea, the court explained that under the facts of the case, the jury necessarily had to find that Gilliam intended to appropriate the stolen item to his own use, even if the jury also could have found that Gilliam had the intent to deprive the owner of possession of the item and/or the intent to deprive the owner of the value of the item. *Id.* at 350-51.

§ 1229a(c)(4)(A)(ii); 8 C.F.R. § 1240.8(d); *see also Matter of Almanza*, 24 I&N Dec. 771, 774-75 (BIA 2009), *remanded on other grounds by Almanza-Arenas v. Lynch*, 815 F.3d 460 (9th Cir. 2015) (en banc).

The respondent also argues that the definition of "term of imprisonment" in the Act violates the due process and equal protection clauses (Respondent's Br. at 11-17). We decline to address this argument. The Board has no jurisdiction to consider constitutional challenges to the Act and its implementing regulations. *See Matter of C-*, 20 I&N Dec. 529, 532 (BIA 1992).

Accordingly, the following orders will be entered.

ORDER: The appeal is sustained.

FURTHER ORDER: The record is remanded for further proceedings consistent with this opinion and for the entry of a new decision.

FOR THE BOARD

Board Member Roger A. Pauley respectfully dissents without opinion.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
ATLANTA, GEORGIA

File: A205-132-294 December 2, 2013

In the Matter of

ORTENCIA GONZALEZ-VELASQUEZ	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: 212(a)(6)(A)(i) of the INA as amended in that she is an alien present in the United States without being admitted or paroled or who arrived in the United States at any time or place other than as designated by the Attorney General.

APPLICATIONS: Voluntary departure pre-conclusion under Section 240B(a) of the Act.

ON BEHALF OF RESPONDENT: DEAN ARTHUR WILLIAMS, ESQUIRE
P.O. Box 446
Tucker, Georgia 30085

ON BEHALF OF DHS: SHIRSHA OWEN
Assistant Chief Counsel
Department of Homeland Security
180 Spring Street, Southwest, Third Floor
Atlanta, Georgia 30303

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is an adult, female native and citizen of Guatemala who was last issued a Notice to Appear on February 21, 2012. See Exhibit number 1. At a master calendar hearing held on today's date the respondent appeared represented by

counsel and tendered a request for pre-conclusion voluntary departure conceding proper service of the charging document, admitting all allegations on the NTA, withdrawing all applications for relief from removal, and requesting only voluntary departure pre-conclusion. The respondent also agreed to waive appeal of that voluntary departure order in the event that it was granted. See Exhibit number 3. Having received that the respondent had admitted and conceded and the Court had found that she is in fact removable as charged. See Section 240(c)(1)(A) of the Act. The issue before the Court concerns the respondent's application for voluntary departure pre-conclusion.

STATEMENT OF THE LAW

Voluntary departure may be granted to an alien who establishes eligibility for this relief in the sense that it must be requested prior to or at the master calendar at which the case is first calendared for a merits hearing. No additional request for relief, conceding removability, waiving appeal of all issues, cannot be convicted of an aggravated felony, and not deportable under Section 237(a)(4) which are security grounds, not previously granted voluntary departure under Section 240(b) after having been found inadmissible under Section 212(a)(6)(A), not arriving in and also as a matter of discretion.

In this particular case, the respondent has tendered documentation that has been marked into the record as Exhibit number 4 indicating that she has been convicted of a theft offense for which she was sentenced to 12 months in prison or confinement, I should say. And that would render her an aggravated felon under Section 101(a)(43)(g), rendering her ineligible for this form of relief.

The Government opposed voluntary departure at this stage insofar as the respondent is an aggravated felon. The respondent's counsel has agreed that she is in

fact an ag fel as her convictions stand at this time again as submitted at Exhibit number 4. For this reason the respondent is statutorily ineligible and the Court has no alternative but to enter an order of removal to Guatemala insofar as there are no other applications for relief.

Accordingly, the following order will enter.

ORDER

The respondent's application for voluntary departure pre-conclusion under Section 240B(a) of the Act is hereby pretermitted and denied.

The respondent is ordered removed to Guatemala on the charges contained in the Notice to Appear.

December 2, 2013

MADELINE GARCIA
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE MADELINE GARCIA, in the matter of:

ORTENCIA GONZALEZ-VELASQUEZ

A205-132-294

ATLANTA, GEORGIA

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

CAROL R. LOW (Transcriber)

DEPOSITION SERVICES, Inc.-2

APRIL 4, 2014

(Completion Date)