U.S. Department of Justice

Executive Office for Immigration Review

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Name: BRAVO, JUAN MANUEL

A 078-846-441

Date of this notice: 11/2/2018

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:
Guendelsberger, John
Grant, Edward R.
Kendall Clark, Molly

Userteam: Docket

File: A078-846-441 – York, PA

Date: NOV – 2 2018

In re: Juan Manuel BRAVO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Brennan Gian-Grasso, Esquire

ON BEHALF OF DHS: Jeffrey T. Bubier
Senior Attorney

APPLICATION: Reinstatement of removal proceedings

The Department of Homeland Security (DHS) appeals from the May 23, 2018, decision of the Immigration Judge terminating the removal proceedings in the respondent's case. The appeal will be dismissed.

We review findings of fact, including the determination of credibility, made by the Immigration Judge under a "clearly erroneous" standard. *See* 8 C.F.R. § 1003.1(d)(3)(i); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015; *Matter of R-S-H-*, 23 I&N Dec. 629 (BIA 2003); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent, a native and citizen of Mexico, was convicted on September 21, 2017, of the offense of aggravated assault in violation of 18 Pa. Cons. Stat. § 2702(a)(1), and sentenced to serve 18 to 36 months incarceration. *See* Exh. 2(c). The DHS issued a Notice to Appear charging the respondent with being removable pursuant to section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, for having been convicted of an aggravated felony under section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F), a crime of violence. *See* Exhibit 1.

The Immigration Judge found that the criminal statute under which the respondent was convicted is divisible, properly applied the modified categorical approach, and determined that the respondent's offense does not meet the definition of a crime of violence under 18 U.S.C. § 16(a). *See* IJ at 2-3; *Mathis v. United States*, 136 S. Ct. 2243, 2256 (2016) (must consider whether the statute lists alternative elements or alternative means of committing the offense); *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013) (if the elements of the statute of conviction are broader than the generic crime, then the statute of conviction is not a categorical match); *Moncreiffe v. Holder*, 133 S. Ct. 1678, 1685 (2013); *Jean Louis v. Att'y General*, 582 F.3d 462 (3d Cir. 2009) (modified categorical approach is appropriate where the express language of the criminal statute covers conduct that falls outside the relevant removal ground); *Matter of Cervantes Nunez*, 27 I&N Dec. 238 (BIA 2018); *Matter of Chairez-Castrejon*, 26 I&N Dec. 819 (BIA 2016). The

Immigration Judge addressed the express language of the statute under which the respondent was convicted, that "a person is guilty of assault if he attempts to cause, or intentionally, knowingly, or recklessly causes bodily injury to another," and determined that it did not support the charge of a crime of violence under 18 U.S.C. § 16(a). *See* IJ at 3; *Popal v. Gonzales*, 416 F.3d 249, 254 (3d Cir. 2005) (holding that a violation of Pennsylvania's simple assault statute is overbroad vis-à-vis 18 U.S.C. § 16(a) because, at a minimum, it requires a mens rea of recklessness, rather than intent); *generally United States v. Otero*, 502 F.3d 331, 335 (3d Cir. 2007).

The DHS argues that in order to sustain a conviction under 18 Pa. Cons. Stat. § 2702(a)(1), the Commonwealth must establish a heightened level of recklessness tantamount to the level of malice which seeks to cause injury or death and therefore constitutes a crime of violence under 18 U.S.C. § 16(a). *See* DHS Brief at 3-6. The DHS contends that, under Pennsylvania law, malice is a requisite for aggravated assault, and that the defendant must display a conscious disregard for almost certain death or injury such that it is tantamount to an actual desire to injure or kill. *Id.* The DHS asserts that the Pennsylvania aggravated assault statute requires the use of violent, physical force, that the recklessness required in Pennsylvania for aggravated assault is for all intents and purposes akin to intentional conduct, and that the statute constitutes a crime of violence. *Id*. We disagree.

We have found that 18 U.S.C. § 16(a) defines a crime of violence as an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, and that the term 'use' under that section requires active employment and therefore denotes volition. *See Matter of Kim*, 26 I&N Dec. 912, 914 (BIA 2017), *citing Johnson v. United States*, 559 U.S. 133, 140 (2010); *Leocal v. Ashcroft*, 543 U.S. 1, 9-11 (2004) (holding that 18 U.S.C. § 16(a) suggests a category of violent, active crimes).

The United States Court of Appeals for the Third Circuit, in whose jurisdiction this case arises, has held that the use of physical force must be knowing or intentional, and that recklessness or gross negligence are insufficient. *See United States v. Chapman*, 866 F.3d 129, 133-36 (3d Cir. 2017). This holding has been clarified by the Third Circuit in *United States v. Mayo*, 901 F.3d 218, 224-30 (3d Cir. 2018), which rejected the government's argument that a conviction under § 2702(a)(1) of Pennsylvania's aggravated assault statute necessarily involves the use of physical force, and concluded that aggravated assault under Pennsylvania's § 2702(a)(1) does not categorically require the use of physical force against another. Thus, as the statute does not necessitate the use of violent, physical force, it is not a crime of violence. We find that the Immigration Judge properly concluded that the respondent's conviction is not a crime of violence and that it does not render him removable under section 237(a)(2)(A)(iii) of the Act.

We are not persuaded by the DHS's reliance on *Johnson v. United States*, 559 U.S. 133 (2010), for the contention that causing or attempting to cause serious bodily injury plainly involves "physical force". *See* DHS brief at 7-8. In *United States v. Mayo*, 901 F.3d at 225-230, the Third Circuit concluded that Pennsylvania's § 2702(a)(1) lacks the element of violent physical force required by *Johnson v. United States*, 559 U.S. at 133, and found that the text of the statute and Pennsylvania case law construing it establish that a conviction under § 2702(a)(1) does not necessarily require proof that a defendant engaged in any affirmative use of "physical force" against another person, citing *Commonwealth v. Thomas*, 867 A.2d 594, 597 (Pa. Super. Ct. 2005)

for the conclusion that Pennsylvania case law establishes that a person violates § 2702(a)(1) by causing "serious bodily injury," regardless of whether that injury results from any physical force, let alone the type of violent force contemplated by the Armed Career Criminal Act (ACCA).

We find that the Immigration Judge correctly applied the law in finding that the respondent's conviction was not categorically a crime of violence under 18 U.S.C. § 16(a), and that the DHS did not meet its burden to demonstrate that the respondent was removable under section 237(a)(2)(A)(iii) of the Act. *See* IJ at 3. Upon our de novo review, we conclude that the Immigration Judge appropriately terminated the respondent's removal proceedings. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

FOR THE BOARD