U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: BROWN, MARVIN CHRISTOPHER **A 042-462-847**

Date of this notice: 6/8/2018

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.
Pauley, Roger
Wendtland, Linda S.

Userteam: Docket

File: A042 462 847 – Orlando, FL Date: JUN 0 8 2018

In re: Marvin Christopher BROWN a.k.a. Marcus Smith

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Maureen A. Sweeney, Esquire

ON BEHALF OF DHS: Tamaira Rivera
Assistant Chief Counsel

APPLICATION: Termination, cancellation of removal for certain permanent residents

The respondent, a native and citizen of Jamaica, and a lawful permanent resident of the United States since 1990, appeals from an Immigration Judge's December 20, 2017, decision, finding him removable under section 237(a)(2)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. 1227(a)(2)(A)(ii), for having committed two or more crimes involving moral turpitude not arising out of a single scheme of misconduct, and denying his application for relief under section 240A(a) of the Act, 8 U.S.C. § 1229b(a), in discretion. The Department of Homeland Security (DHS) requests summary affirmance. The respondent's appeal will be sustained and proceedings will be terminated.[1]

In November 2011, March 2014, and June of 2014, the respondent was convicted under Maryland Criminal Code section 7-104 (§ 7-104), for theft under 1000 dollars (IJ at 1-2; Exh. 5). In May 2014, he was convicted under the same statute for theft between 1000 and 10,000 dollars (IJ at 1; Exh. 5). The respondent does not dispute these convictions, or the Immigration Judge's finding that they did not arise out of a single scheme of misconduct (IJ at 2).

The Immigration Judge did not expressly find removability established, but assumed it had been because the pro se respondent conceded the factual allegations (IJ at 2; Exhs. 1, 1A). The Immigration Judge denied the application for cancellation of removal in discretion (IJ at 5-7). On appeal, through counsel, the respondent argues he is not removable. The DHS has not specifically responded to this argument. We agree with the respondent.

[1] The respondent's request for a fee waiver is granted. His request for oral argument is denied. As the respondent has not challenged the Immigration Judge's denial of his asylum, withholding of removal, or protection under the Convention Against Torture application, we consider those arguments waived. *Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012).

The phrase "crime involving moral turpitude" describes a class of offenses involving reprehensible conduct committed with a culpable mental state. *Matter of Silva-Trevino*, 26 I&N Dec. 826, 834 (BIA 2016). In the United States Court of Appeals for the Eleventh Circuit, reprehensible conduct means "an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." *Pierre v. U.S. Att'y Gen.*, 879 F.3d 1241, 1251 (11th Cir. 2018).

Crimes "in which fraud was an ingredient have always been regarded as involving moral turpitude." *Jordan v. De George*, 341 U.S. 223, 232 (1951); *see also Walker v. U.S. Att'y Gen.*, 783 F.3d 1226, 1229 (11th Cir. 2015). We have recently clarified that a theft crime may be properly characterized as one of moral turpitude if it is committed with the intent to permanently deprive an owner of property, *or* "under circumstances where the owner's property rights are substantially eroded." *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847, 852-53 (BIA 2016).

To determine whether a crime qualifies as a crime involving moral turpitude, we apply the traditional "categorical approach," under which we focus upon the statutory elements of the crime rather than the facts underlying the particular offense, considering the least culpable conduct necessary to obtain a conviction. *Cano v. U.S. Att'y Gen.*, 709 F.3d 1052, 1053 (11th Cir. 2013); *Fajardo v. U.S. Att'y Gen.*, 659 F.3d 1303, 1305 (11th Cir. 2011). An element is one that must be found by a jury beyond a reasonable doubt to sustain a conviction. *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016).

The respondent's statute of conviction is not divisible. The Maryland courts have held that § 7-104 is a consolidated statute, encompassing many forms of theft. *State v. Manion*, 112 A.3d 506, 514 (Md. 2015) ("[Theft under § 7-104 brought together] a number of preexisting theft-related offenses including larceny, embezzlement, false pretenses, shoplifting, and receiving stolen property. . . . The purpose of the [statute] was to avoid the subtle distinctions that existed and had to be alleged and proved to establish the separate crimes under the former law." (internal formatting omitted)). The Maryland courts have further clarified that the subsections "are not autonomous offenses but rather one crime defined [various] ways. It follows that the jury unanimity [regarding the specific subsection of § 7-104] is not constitutionally required." *Crispino v. State*, 7 A.3d 1092, 1102 (Md. 2010). Thus, the respondent is removable for a crime involving moral turpitude only if all the subsections categorically cover turpitudinous conduct.

However, the statute is overbroad as to the requirement of moral turpitude. For example, one subsection of the respondent's statute, at the time of conviction stated in part:

> A person may not willfully or knowingly obtain or exert unauthorized control over property, if the person: intends to deprive the owner of the property[.]
>
> § 7-104(a)(1).[2]

[2] Although the statute was modified after the respondent's November 2011 conviction, the wording of this portion of the statute was exactly the same on each date the respondent was convicted.

Maryland provides a definition for the word "deprive."

> "Deprive" means to withhold property of another:
>
> (1) Permanently;
> (2) For a period that results in the appropriation of *a part of* the property's value;
> (3) With the purpose to restore it only on payment of a reward or other compensation; or
> (4) To dispose of the property or use or deal with the property in a manner that makes it unlikely that the owner will recover it.

Maryland Criminal Code section 7-101(c) (emphasis added).

Here, the meaning of "deprive" includes only the appropriation of "a part of" the property's value; this renders it insufficient to reach our threshold of "substantially eroded" property rights. *Matter of Diaz-Lizarraga*, 26 I&N Dec. at 852-53. In *Diaz-Lizarraga*, we explained that our purpose was to distinguish between truly temporary takings, such as joyriding, and those where "a thief may have intended to return the stolen property after the passage of so much time that its value to the owner has been lost or substantially eroded." *Id.* In contrast, the Maryland state courts have found that a theft has occurred under § 7-104 when a family occupies a home, even if only for a day, without authorization or payment. *See Hobby v. State*, 83 A.3d 794, 809-10 (Md. 2014). Thus, despite the usability of the home and its return to the owner, a theft has occurred because the rental value for that day is "a part of" the property's value that has been taken without consent. *Id.* This understanding of "deprive" is broader than what we contemplated in *Diaz-Lizarraga*. The respondent's statute is overbroad as to the intent to deprive, and as such cannot support a finding that it is categorically one for moral turpitude. Because the respondent's statute of conviction is indivisible and overbroad, the DHS has not established that the respondent is removable for having been convicted of two crimes involving moral turpitude.

Accordingly, the following orders shall be entered.

ORDER: The appeal is sustained.

FURTHER ORDER: The Immigration Judge's decision is vacated, the charge of removability under section 237(a)(2)(A)(ii) of the Act is not sustained, and proceedings are terminated.

FOR THE BOARD