



U.S. Department of Justice

Executive Office for Immigration Review

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Name: BAH, MOMODU LAMINE

A 094-647-221

Date of this notice: 1/31/2019

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:
Donovan, Teresa L.
Kelly, Edward F.
Adkins-Blanch, Charles K.

Userteam: Docket

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Falls Church, Virginia 22041

File: A094-647-221 – Boston, MA

Date:

JAN 31 2019

In re: Momodu Lamine BAH

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Kamah Gueh-Thoronka, Esquire

The respondent, a native and citizen of Sierra Leone whose status was adjusted to that of lawful permanent resident, appeals the decision of the Immigration Judge, dated July 30, 2018, sustaining the charge of removability under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii), based upon a holding that he has been convicted of a drug trafficking aggravated felony under section 101(a)(43)(B) of the Act, 8 U.S.C. § 1101(a)(43)(B), and ordering his removal from the United States. The Department of Homeland Security (“DHS”) has not replied to the respondent’s appeal. The respondent’s appeal will be sustained. The record will be remanded for further proceedings, as appropriate, and consideration of the alternative charge of removability under section 237(a)(2)(B)(i) of the Act.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the “clearly erroneous” standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent was convicted of Sale of a Controlled Substance in violation of N.H. REV. STAT § 318-B:26 (IJ at 2). As, under N.H. REV. STAT § 318-B:1 (XXX), the term “sale” includes acts of bartering, exchanging, gifting, or offering a controlled substance, the respondent’s conviction is not categorically a conviction for a drug trafficking aggravated felony as such conduct is broader than the generally understood nature of drug trafficking (IJ at 3). *James v. Holder*, 698 F.3d 24, 27 (1st Cir. 2012) (stating that the Act’s definition of “illicit trafficking” does not appear to encompass offers and gifts); *Matter of Davis*, 20 I&N. Dec. 536, 541 (BIA 1992); *see also U.S. v. Almanza-Vigil*, No. 17-2007, 2019 WL 117084, at *10 (10th Cir. Jan. 7, 2019) (holding that a state statute that proscribes all offers to sell a controlled substance, including fraudulent ones, criminalizes more conduct than (and is a categorical mismatch for) the Act’s definition of “illicit trafficking in a controlled substance”).

While we agree that the New Hampshire statute in question is divisible, we disagree with the Immigration Judge’s application of the modified categorical approach in this case. Here, relying upon the Indictment, the Immigration Judge found that the respondent was convicted of having sold Oxycodone “in exchange for United States currency” (IJ at 3-4). However, the brute fact that the respondent committed his offense by exchanging United States currency for Oxycodone is not an element of N.H. REV. STAT § 318-B:26. *See State v. Bell*, 480 A.2d 906, 909 (N.H. 1984) (rejecting a claim that the identity of the purchaser is an element of the offense at issue in this case). New Hampshire juries have been charged that “The State does not have to prove that the Defendant made a profit. You may also find that a sale occurred if the Defendant offered to sell

or give control of drugs to another person, but, in fact, no drugs were actually given or sold.” *State v. Mars*, No. 2014-0811, 2016 WL 3748712 (N.H. May 13, 2016). A jury would not have been required to unanimously agree that the respondent committed his offense by selling Oxycodone “in exchange for United States currency.” *State v. Doucette*, 776 A.2d 744, 751 (N.H. 2001) (“In order to convict the defendant of a criminal offense, a jury must unanimously agree that the defendant committed the material elements of the offense beyond a reasonable doubt.”). Instead, it appears that, the respondent or any other criminal defendant could have been convicted of Sale of a Controlled Substance if some New Hampshire jurors were satisfied, beyond a reasonable doubt, that he actually sold Oxycodone “in exchange for United States currency,” other jurors were only satisfied that he “gifted” Oxycodone, and the other jurors concluded that he merely offered Oxycodone. *State v. Munoz*, 949 A.2d 155, 159 (N.H. 2008) (holding that, with respect to attempted burglary, a jury is not required to unanimously agree to what underlying crime the defendant would have committed in furtherance of the attempted burglary); *State v. Francoeur*, 767 A.2d 429 (N.H. 2001) (holding that, for purposes of an assault conviction, jury unanimity is not required as to whether the injury was caused by “shards of glass” or a “sharp-bladed object”).

For the reasons set forth above, we disagree with the Immigration Judge’s decision to sustain the charge of removability under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii). While the respondent likely sold Oxycodone “in exchange for United States currency,” the DHS has not established, by clear and convincing evidence, that he has been convicted of a drug trafficking aggravated felony as such “brute fact” is not an element of the statute under which he was convicted. *Mathis v. United States*, 136 S. Ct. 2243, 2254 (2016) (holding that how a given defendant actually perpetrated his crime “makes no difference,” even if his conduct fits within the generic offense); *Matter of Chairez*, 27 I&N Dec. 21, 23 (BIA 2017) (holding that, under *Mathis*, we may “peek” at an alien’s conviction record for the “sole and limited purpose” of deciding whether statutory alternatives define discrete “elements” or facts that must be proven to a jury beyond a reasonable doubt in order to convict); *Matter of Kim*, 26 I&N Dec. 912, 913 (BIA 2017) (“An element of a statute is what the ‘prosecution must prove to sustain a conviction’ and the jury must find beyond a reasonable doubt.”).

For the reasons set forth above, we sustain the respondent’s appeal and reverse the Immigration Judge’s decision to hold that he is subject to removal under section 237(a)(2)(A)(iii) of the Act. Remanded proceedings are warranted for consideration of the alternative charge of removability under section 237(a)(2)(B)(i) of the Act and further proceedings as appropriate. The following orders are entered.

ORDER: The respondent’s appeal is sustained and the Immigration Judge’s decision, dated July 30, 2018, is vacated.

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



FOR THE BOARD