U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: VO, CUONG QUOC

A 072-595-705

Date of this notice: 1/16/2019

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:
Wendtland, Linda S.

Userteam: Docket

File: A072-595-705 – Atlanta, GA

Date: JAN 16 2019

In re: Cuong Quoc VO a.k.a. Chong Quoc Vo

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Amy F. Haer, Esquire

ON BEHALF OF DHS: Aminda B. Katz
Assistant Chief Counsel

APPLICATION: Termination

The Department of Homeland Security (DHS) appeals from the decision of the Immigration Judge, dated August 9, 2018, terminating these removal proceedings. The respondent opposes the appeal. The appeal will be dismissed.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge for clear error. 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).

As a threshold matter, we affirm the Immigration Judge's finding, as not clearly erroneous, that the respondent is mentally incompetent for purposes of these proceedings (June 7, 2018, IJ). *See Matter of J-S-S-*, 26 I&N Dec. 679 (BIA 2015) (holding that an Immigration Judge's finding of competency is a finding of fact reviewed by the Board for clear error); *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011); *Cooper v. Harris*, 137 S. Ct. 1455, 1465 (2017) (holding that on clear error review, "[a] finding that is 'plausible' in light of the full record—even if another is equally or more so—must govern."). The Immigration Judge sufficiently evaluated the respondent's mental competency (Tr. at 54-57). Our review of the evidentiary record and the DHS's statement on appeal do not disclose any error of law or clear error of fact in the Immigration Judge's assessment of the respondent's competency. We also find the appointment of counsel to be an appropriate safeguard. *See Matter of M-J-K-*, 26 I&N Dec. 773 (BIA 2016) (holding that in cases involving issues of mental competency, an Immigration Judge has the discretion to select and implement appropriate safeguards, which this Board reviews de novo)

The DHS charged the respondent with being removable from the United States under: (1) section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien convicted of an aggravated felony as defined by section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F) (crime of violence as defined in 18 U.S.C. § 16 for which the term of imprisonment is at least 1 year) in relation to his conviction of simple battery under Official Georgia Code (O.C.G.A.) § 16-5-23; and (2) section 237(a)(2)(A)(ii) of the Act (two crimes involving moral turpitude) in relation to his convictions of simple battery under O.C.G.A. § 16-5-23 and theft by shoplifting under O.C.G.A. § 16-8-14. The Immigration Judge concluded

that the DHS did not meet its burden of proof to establish either charge of removability and terminated proceedings.

We affirm the Immigration Judge's determination that the respondent is not removable from the United States under section 237(a)(2)(A)(iii) of the Act based on having been convicted of an aggravated felony as defined in section 101(a)(43)(F) of the Act (IJ at 2). In this regard, we do not find clear error in the Immigration Judge's finding that the record of conviction indicates that the respondent was sentenced to a term of confinement of 12 days, well beneath the threshold of "at least one year" required to render a crime of violence an aggravated felony under section 101(a)(43)(F) of the Act (IJ at 2; Exh. 3). The sentencing sheet plainly indicates that the respondent was sentenced to a term of imprisonment of time served consisting of 12 days and the balance of 1 year on probation. Thus, we agree with the Immigration Judge that the respondent's conviction of simple battery under O.C.G.A. § 16-5-23 is not an aggravated felony and does not render him removable under section 237(a)(2)(A)(iii) of the Act.

We also affirm the Immigration Judge's determination that the respondent is not removable under section 237(a)(2)(A)(ii) of the Act. Specifically, upon de novo review, we affirm the Immigration Judge's determination that on this record the respondent's conviction of theft by shoplifting under O.C.G.A. § 16-8-14 is not a crime involving moral turpitude.[1]

As an initial matter, we are unpersuaded by the DHS's argument that the categorical and modified categorical approaches are inapplicable when determining whether a conviction falls within the confines of a crime involving moral turpitude (DHS Br. at 21 n.4). This argument is foreclosed by precedent of the United States Court of Appeals for the Eleventh Circuit, in whose jurisdiction this case arises, which holds that these approaches are fully applicable in this context. *See Fajardo v. U.S. Att'y Gen.*, 659 F.3d 1303, 1305 (11th Cir. 2011).

Moreover, in *Matter of Silva-Trevino III*, 26 I&N Dec. 826 (BIA 2016), we concluded that the categorical and modified categorical approaches provide the proper framework for determining whether a conviction is for a crime involving moral turpitude. *Id.* at 830-31. We further held that, unless controlling case law of the governing Federal court of appeals (here the United States Court of Appeals for the Eleventh Circuit) expressly dictates otherwise, the realistic probability test, which focuses on the minimum conduct that has a realistic probability of being prosecuted under the statute of conviction, should be applied in determining whether an offense is a categorical

[1] The DHS asserts on appeal that the respondent's convictions under sections 16-8-14 and 16-5-23 of the Official Georgia Code are the two crimes involving moral turpitude that subject the respondent to removability under section 237(a)(2)(A)(ii) of the Act. The DHS does not advance any argument on appeal that the other conviction alleged below on the charging document, Obstruction of a Law Enforcement Officer, in violation of section 16-10-24 of the Official Georgia Code, is also a crime involving moral turpitude. *See Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2011) (when a party fails to substantively appeal an issue addressed in an Immigration Judge's decision, that issue is waived before the Board); *Matter of Edwards*, 20 I&N Dec. 191, 196-197 n.4 (BIA 1990) (noting that issues not addressed on appeal are deemed waived).

crime involving moral turpitude. *See id.* at 831-33; *see also Walker v. U.S. Att'y Gen.*, 783 F.3d 1226, 1229 (11th Cir. 2015) (adopting the categorical approach, but not expressly addressing the realistic probability test).

The respondent's statute of conviction, O.C.G.A. § 16-8-14, provides as follows:

> (a) 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.

The Official Georgia Code in turn defines "deprive" as "[t]o withhold property of another permanently or temporarily" or "[t]o dispose of the property so as to make it unlikely that the owner will recover it." O.C.G.A. § 16-8-1(1).

We have revisited our determination, in *Matter of Grazley*, 14 I&N Dec. 330, 333 (BIA 1973), that "a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended," not a temporary taking. *See Matter of Diaz-Lizarraga*, 26 I&N Dec. 847 (BIA 2016). In so doing, we concluded that a theft offense is a crime involving moral turpitude if it involves a taking or exercise of control over another's property without consent and with an intent to deprive the owner of his property either permanently or under circumstances where the owner's property rights are substantially eroded. *Id.*

Here, the Georgia statute does not include as a required element that the "theft" occur under circumstances where the owner's property rights are permanently or substantially eroded. *See* O.C.G.A. §§ 16-8-14, 16-8-1(1); *see also Matter of Diaz-Lizarraga*, 26 I&N Dec. at 852 & n.8. Thus, the offense of theft by shoplifting is categorically broader than a generic crime involving moral turpitude. *See also Ramos v. U.S. Att'y Gen.*, 709 F.3d 1066 (11th Cir. 2013)

As the statute of conviction includes some crimes that involve moral turpitude and some that do not, the respondent's conviction pursuant to O.C.G.A. § 16-8-14 is not a crime involving moral

turpitude unless the statute is "divisible," such that the modified categorical approach can be applied. *See Descamps v. United States*, 570 U.S. 254 (2013). In removal proceedings, we evaluate the divisibility of criminal statutes by employing the standards set forth in *Mathis v. United States*, 136 S. Ct. 2243 (2016), in which the Supreme Court further explained the "divisibility" analysis in *Descamps*. *See Matter of Chairez*, 26 I&N Dec. 819 (BIA 2016).

Under *Mathis*, the divisibility of a statute depends on whether the statutory alternatives are discrete "elements" as opposed to "means" of committing an offense. *Mathis v. United States*, 136 S. Ct. at 2256. The elements of a crime are those "constituent parts" of a crime's legal definition—the things that the "prosecution must prove to sustain a conviction." *Id.* at 2248; *see also United States v. Estrella*, 758 F.3d 1239, 1246 (11th Cir. 2014) ("[W]e should ask ourselves the following question when confronted with a statute that purports to list elements in the alternative: If a defendant charged with violating the statute went to trial, would the jurors typically be required to agree that their decision to convict is based on one of the alternative elements?"). Thus, the divisibility of O.C.G.A. § 16-8-14 depends upon whether the taking being temporary or permanent (or substantially eroding an owner's property rights) is an "element" of the offense or merely a "brute fact" about which the jury can disagree while still rendering a guilty verdict. *See Mathis v. United States*, 136 S. Ct. at 2248, 2256. We, however, have found no authority, supporting the conclusion that temporary or permanent takings (or substantially eroding an owner's property rights) are alternative elements of theft by shoplifting about which Georgia jurors must agree in order to convict.

For the foregoing reasons, we conclude that the respondent's conviction under O.C.G.A. § 16-8-14 is not categorically a crime involving moral turpitude. We also conclude that the statute is not divisible, and thus, the modified categorical approach does not apply.[2]

As neither charge of removability can be sustained, the Immigration Judge appropriately terminated proceedings. *See Matter of Sanchez-Herbert*, 26 I&N Dec. 43, 44 (BIA 2012). Accordingly, the following order will be entered.

[2] The DHS argues that the respondent's conviction documents show that he was convicted under the "intent [to] appropriat[e]" portion of the statute, that the statute is divisible as to intent to appropriate, and that appropriating property necessarily involves an intent to deprive the owner of the property either permanently or in a manner that substantially erodes the owner's property rights, thereby rendering such conduct turpitudinous (DHS Br. at 22-23). Even assuming divisibility in that regard, however, the DHS's argument is foreclosed by the Eleventh Circuit's holding in *Ramos v. U.S. Att'y Gen.*, 709 F.3d 1066. Addressing the very statute at issue here, O.C.G.A. § 16-8-14, the court determined that the intent to appropriate merchandise to one's own use without paying for the same does *not* amount to an intent to deprive the owner of that merchandise. *Id.* at 1070-71.

ORDER: The DHS's appeal is dismissed.

Linda L. Wendtland

FOR THE BOARD