



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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Falls Church, Virginia 22041*

D [REDACTED], A [REDACTED]
[REDACTED]
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**DHS/ICE Office of Chief Counsel - CLE
925 Keynote Circle, Room 201
Brooklyn Heights, OH 44131**

Name: D [REDACTED], A [REDACTED]

A [REDACTED]-348

Date of this notice: 3/4/2020

Enclosed is a copy of the Board's decision in the above-referenced case. If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of this decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

**Panel Members:
Greer, Anne J.
Wilson, Earle B.
Donovan, Teresa L.**

Userteam: Docket

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Falls Church, Virginia 22041

File: A-348 – Cleveland, OH

Date: MAR - 4 2020

In re: A- D-

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Amy L. Scheurman
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of Senegal and a lawful permanent resident of the United States, appeals from an Immigration Judge's August 30, 2019, decision ordering him removed and denying his applications for asylum, withholding of removal, and protection under the Convention Against Torture. *See* sections 208, 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158, 1231(b)(3); 8 C.F.R. §§ 1208.16-.18. The Department of Homeland Security opposes the appeal. The record will be remanded.

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 judgement, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent was convicted on January 17, 2018, of burglary in violation of Ohio Revised Code ("ORC") § 2911.12(A)(2) (IJ at 2; Tr. at 8, 40, 43-45; Exhs. 1-2). He was also convicted on January 17, 2018, of robbery in violation of ORC § 2911.02(A)(3) (IJ at 2; Tr. at 8-9, 40-43; Exhs. 1-2). The record reflects that he was sentenced to 4 years' and 30 months' imprisonment, respectively, with the sentences to be served concurrently (IJ at 3; Tr. at 8, 41, 44; Exh. 2).

Upon de novo review, we disagree with the Immigration Judge's conclusion that the respondent's conviction for robbery also renders him removable as an alien convicted of an "aggravated felony"—namely, a "crime of violence" under 18 U.S.C. § 16 for which the term of imprisonment is at least 1 year (IJ at 2-3). *See* sections 101(a)(43)(F) and 237(a)(2)(A)(iii) of the Act, 8 U.S.C. §§ 1101(a)(43)(F), 1227(a)(2)(A)(iii). A crime of violence is "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 16(a). The physical force used must be "violent force" or "force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010).

ORC § 2911.02(A) provides that:

(A) No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following:

- (1) Have a deadly weapon on or about the offender's person or under the offender's control;
- (2) Inflict, attempt to inflict, or threaten to inflict physical harm on another;
- (3) Use or threaten the immediate use of force against another.

Although the Immigration Judge correctly noted that the respondent was convicted of robbery in violation of ORC § 2911.02(A) subsection (3), he appears to have analyzed the respondent's crime in terms of subsection (2) (IJ at 2; Exh. 1). For example, the Immigration Judge stated that the "robbery statute provides that no person in attempting or committing a theft offense or in fleeing immediately after the attempt or offense shall inflict, attempt to inflict, or threaten to inflict physical harm on another," which tracks the language of subsection (2) (IJ at 2, 6-7). His decision also suggests that he analyzed the respondent's crime in terms of 18 U.S.C. § 16(b), which the Supreme Court found to be impermissibly vague in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). The Immigration Judge cited to a United States Court of Appeals for the Sixth Circuit decision, *United States v. Sanders*, 470 F.3d 616, 621 (6th Cir. 2006), asserting that it held that the language in ORC § 2911.02(A)(3) involved "conduct that presents a serious risk of physical injury to another" (IJ at 2-3). This is similar to the language found in 18 U.S.C. § 16(b), which requires that the offense "by its nature, involves a substantial risk that physical force against the person or property of another may be used."

The distinction between subsections (2) and (3) is critical, because the Sixth Circuit has held that a conviction under subsection (A)(2) is a "crime of violence" for purposes of the Sentencing Guidelines while a conviction under subsection (A)(3) is not. *United States v. Johnson*, 933 F.3d 540, 546 (6th Cir. 2019) (holding that a robbery conviction under ORC § 2911.02(A)(2) requires the level of force necessary to qualify as a "crime of violence" under the Guidelines' elements clause); *United States v. Yates*, 866 F.3d 723, 729-32 (6th Cir. 2017) (holding that ORC § 2911.02(A)(3) robbery does not qualify as a crime of violence under § 4B1.2(a)(1) of the Guidelines as "only a minimal level of force is needed to sustain a conviction" under that statute). In light of *Yates*, the respondent is not removable for an aggravated felony crime of violence based on his conviction for robbery in violation of ORC § 2911.02(A)(3), and we reverse the Immigration Judge's contrary conclusion.

As the Immigration Judge noted, the respondent conceded removability as an alien that, at any time after admission, was convicted of two crimes involving moral turpitude not arising out a single scheme of misconduct (IJ at 1, 3; Tr. at 9-10; Exhs. 1-2). See section 237(a)(2)(A)(ii) of the Act. However, in light of our determination that the respondent's robbery conviction is not an aggravated felony crime of violence because it requires "only a minimal level of force," and the respondent's pro se status before the Immigration Judge and on appeal, we conclude that the Immigration Judge should conduct additional fact-finding and analysis regarding the respondent's removability on remand.

Additionally, as the Immigration Judge's denial of asylum and withholding of removal is also based on his conclusion that the respondent's robbery conviction is an aggravated felony crime of

violence and a particularly serious crime, the Immigration Judge should reassess the respondent's eligibility for those forms of relief on remand as well (IJ at 6-7). *See* sections 208(b)(2)(A)(ii), (B)(i), 241(b)(3)(B)(ii) of the Act; 8 C.F.R. § 1208.16(d)(2). Given our disposition, we decline to address the respondent's remaining appellate arguments at this time.

Accordingly, the following orders will be entered.

ORDER: The respondent's appeal is sustained.

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