U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: BENT, BEVERLY EVADNE

A 017-521-783

Date of this notice: 4/21/2017

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Cynthia L. Crosby
Acting Chief Clerk

Enclosure

Panel Members:
Guendelsberger, John
Kendall Clark, Molly
Liebowitz, Ellen C

Userteam: Docket

File: A017 521 783 – San Francisco, CA Date: APR 21 2017

In re: BEVERLY EVADNE BENT a.k.a. Beverly Benford a.k.a. Beverly Bent

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Valerie A. Zukin, Esquire

ON BEHALF OF DHS: J. Mark Kang
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony under section 101(a)(43)(G)

Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony under section 101(a)(43)(M)

APPLICATION: Removability

This case was last before us on October 12, 2012, at which time we dismissed the respondent's appeal from the Immigration Judge's July 14, 2011, decision ordering her removed, which was based upon the Immigration Judge's May 5, 2011, denial of the respondent's motion to terminate. This case is now before us on remand pursuant to a May 14, 2015, order from the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit granted a remand request for us to reconsider our October 12, 2012, decision in light of *Descamps v. United States*, 133 S. Ct. 2276 (2013), and *Rendon v. Holder*, 764 F.3d 1077 (9th Cir. 2014).

We review questions of law, discretion, and judgment arising in appeals from decisions of Immigration Judges de novo, whereas we review findings of fact in such appeals under a "clearly erroneous" standard. *See* 8 C.F.R. § 1003.1(d)(3)(i), (ii). The appeal will be dismissed in part and sustained in part.

The respondent was charged with being removable under 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 under section 101(a)(43)(G) of the Act, 8 U.S.C. § 1101(a)(43)(G), i.e., a theft offense (including the receipt of stolen property) or burglary offense for which the term of

imprisonment was at least 1 year, and under section 101(a)(43)(M)(i) of the Act, i.e., an offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000.[1]

The respondent was convicted in 2009 of violating 18 U.S.C. § 641, which reads:

> § 641. Public money, property or records
> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or
> Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted--
> Shall be fined under this title or imprisoned not more than ten years, or both; but if the value of such property in the aggregate, combining amounts from all the counts for which the defendant is convicted in a single case, does not exceed the sum of $1,000, he shall be fined under this title or imprisoned not more than one year, or both.
> The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

Aggravated Felony under Section 101(a)(43)(G) of the Act

Section 101(a)(43)(G)'s reference to a "theft offense (including receipt of stolen property)" can be defined as "a taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." *United States v. Corona-Sanchez*, 291 F.3d 1201, 1205 (9th Cir. 2002); *see also Matter of Garcia-Madruga*, 24 I&N Dec. 436 (BIA 2008). A conviction for the receipt of stolen property with knowledge that the property is stolen qualifies as a theft offense. *See Matter of Cardiel-Guerrero*, 25 I&N Dec. 12 (BIA 2009).

In our October 12, 2012, decision we concluded that, even assuming that 18 U.S.C. § 641 is not a categorical theft offense, the record demonstrates that the respondent has been convicted of a theft aggravated felony under the modified categorical approach. On remand, the Department of Homeland Security (DHS) argues that 18 U.S.C. § 641 is a categorical theft offense, and the respondent argues that it is not. We agree with the respondent.

When evaluating a criminal statute under the categorical approach, we apply the realistic probability test. This requires us to focus on the minimum conduct that has a realistic probability of being prosecuted under the statute of conviction, rather than on the facts underlying the respondent's particular violation of that statute. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684-85 (2013); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). The Supreme Court has explained:

[1] The charge in the Notice to Appear refers generally to section 101(a)(43)(M), but there is no dispute in this case that section 101(a)(43)(M)(ii) of the Act (relating to tax evasion) is not at issue.

> [T]o find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime. To show that realistic probability, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.

Gonzales v. Duenas-Alvarez, *supra*, at 193. Counsel for the respondent argues that the statute can be violated by consensual takings, such as embezzlement,[2] and that such takings would not fall within the generic definition of theft. We agree, in that the generic crime of theft requires the taking of, or exercise of control over, property *without consent*. *See United States v. Corona-Sanchez*, *supra*; *Matter of Garcia-Madruga*, *supra*. 18 U.S.C. § 641 expressly refers to embezzlement, which does not require a non-consensual taking, and our research has revealed cases where 18 U.S.C. § 641 has been applied to embezzlement. *See*, *e.g.*, *United States v. Kranovich*, 401 F.3d 1107 (9th Cir. 2005); *United States v. Terrigno*, 838 F.2d 371 (9th Cir. 1988); *United States v. Gibbs*, 704 F.2d 464 (9th Cir. 1983). We therefore find that the statute includes offenses that fall outside the generic definition of theft. We conclude that the respondent's conviction under 18 U.S.C. § 641 is not for a categorical theft aggravated felony within the meaning of section 101(a)(43)(G) of the Act.

We next must determine whether the statute is divisible – i.e., it defines multiple crimes in the alternative, each of which requires a different set of elements to be proven for conviction. The Ninth Circuit has advised that when a court is making a divisibility determination and "encounters a statute that is written in the disjunctive (that is, with an "or"), that fact alone cannot end the divisibility inquiry. Only when state law requires that in order to convict the defendant the jury must unanimously agree that he committed a particular substantive offense contained within the disjunctively worded statute are we able to conclude that the statute contains alternative elements and not alternative means." *Rendon v. Holder*, *supra*, at 1086.

If the statute is divisible and if at least one, but not all, of the possible offenses qualifies as an aggravated felony within the meaning of section 101(a)(43)(G) of the Act, we must attempt to identify the respondent's actual crime of conviction for the purpose of determining whether it falls within section 101(a)(43)(G). To do so, we would employ the "modified categorical approach" by looking to a limited class of documents in the record of conviction, such as a charging document, jury instructions, a plea agreement, or a transcript of the plea colloquy between the defendant and the judge. *See Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016); *Descamps v. United States*, *supra*, at 2283-86; *Matter of Chairez*, 26 I&N Dec. 819, 822 (BIA 2016).

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[2] "To 'embezzle' means willfully or deliberately to take or to convert the money or property of another after the money or property lawfully came into the possession of the person who eventually took it. [This can occur by reason of some office, employment, or position of trust which the alleged embezzler held]." 1A Fed. Jury Prac. & Instr. § 16:01 (6th ed.).

We conclude that 18 U.S.C. § 641 is divisible. The statute defines several possible offenses, which are listed in the disjunctive: embezzling, stealing, purloining, or knowingly converting government property, as well as knowingly receiving, concealing, or retaining the same with intent to convert it. Although the disjunctive listing is insufficient to establish divisibility, *see Rendon v. Holder*, *supra*, at 1086, the Ninth Circuit stated in *United States v. Rojo*, 727 F.2d 1415, 1418 (9th Cir. 1983), that "it is noteworthy that 18 U.S.C. § 641 sets out *several possible violations*. The citation did not inform [the defendant] which of these violations he allegedly committed and he should not have to speculate in this regard" (emphasis supplied). In another discussion of 18 U.S.C. § 641, the Ninth Circuit compared the elements of the offenses of embezzling, stealing, purloining, and converting under the statute. *See United States v. Thordarson*, 646 F.2d 1323, 1335 n.23 (9th Cir. 1981) (relying upon *Morissette v. United States*, 342 U.S. 246 (1952)). In another case, the Ninth Circuit recognized that the unauthorized sale of government property and conversion of government property are "separate and distinct" offenses under 18 U.S.C. § 641, with varying elements. *See United States v. Scott*, 789 F.2d 795, 798 (9th Cir. 1986). The Ninth Circuit has also held that an indictment that charged that a defendant did "receive, conceal and retain, with intent to convert to his own use and gain, stolen goods and property of the United States" stated an offense under 18 U.S.C. § 641. *See McGriff v. United States*, 408 F.2d 333 (9th Cir. 1969). The Ninth Circuit has approved a district court's treatment of embezzlement as a discrete offense under 18 U.S.C. § 641, with a distinguishing requirement that the defendant be shown to have taken money or property acquired lawfully through employment or other position of trust. *See United States v. Miller*, 520 F.2d 1208, 1211 (9th Cir. 1975). Finally, in other cases the Ninth Circuit has recognized that stealing, embezzlement, and conversion of government property are discrete offenses under 18 U.S.C. § 641. *See United States v. Chesney*, 10 F.3d 641, 642-43 (9th Cir. 1993) (conversion of government funds); *United States v. Terrigno*, *supra* (embezzlement); *Ailsworth v. United States*, 448 F.2d 439, 440 (9th Cir. 1971) (stealing government property). We conclude that 18 U.S.C. § 641 lists multiple discrete offenses, and thus it is divisible. *See Mathis v. United States*, *supra*, at 2249.[3]

We next apply the modified categorical approach to attempt to identify the respondent's actual crime of conviction. *See Mathis v. United States*, *supra*, at 2249; *Descamps v. United States*, *supra*, at 2284-85. The Judgment issued in connection with the respondent's criminal case states that the respondent pleaded guilty to count 1 of the Indictment. Although the Indictment's charging language is found under the heading of "The Embezzlement," the actual charge is that the respondent "did embezzle, steal, purloin, and knowingly convert" things of value belonging to the United States, in violation of 18 U.S.C. § 641. This language is unclear as to the specific charged offense. However, in the June 10, 2008, Memorandum of Plea

[3] It is acceptable practice for a charging document to state allegations in the conjunctive, although the statute lists multiple offenses in the disjunctive, and a conviction may rest upon proof of any of the offenses alleged. *United States v. Urrutia*, 897 F.2d 430, 432 (9th Cir. 1990). Therefore, the fact that federal prosecutors, including the prosecutor in the instant case, may list in their charging documents several offenses linked in a single phrase in 18 U.S.C. § 641 – such as embezzling, stealing, purloining, and knowingly converting, or some combination thereof – does not establish that these offenses are merely means of violating the statute. *See Mathis v. United States*, *supra*, at 2248-49; *Rendon v. Holder*, *supra*, at 1086. It is still necessary for the prosecutor to prove and the jury to find that the defendant committed at least one of the listed offenses.

Agreement, the respondent agreed that the government "would be able to establish beyond a reasonable doubt each and every element of the offense," including that she "knowingly stole money or property of value with the intention of depriving the owner of the use or benefit of the money or property." "To steal means to take away from one in lawful possession without right with the intention to keep wrongfully." *Morissette v. United States*, *supra*, at 271. "Stealing" involves the taking of property without consent. *Vasquez-Gonzalez v. Holder*, 588 F. Appx. 538, 540 (9th Cir. 2014).

We conclude that the respondent's offense of stealing falls within the definition of theft under section 101(a)(43)(G) of the Act, that is, "a taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." *See United States v. Corona-Sanchez*, *supra*, at 1205; *see also Matter of Garcia-Madruga*, *supra*. We therefore conclude that the record establishes by clear and convincing evidence, as required by section 240(c)(3)(A) of the Act, 8 U.S.C. § 1229a(c)(3)(A), that the respondent is removable as charged under section 237(a)(2)(A)(iii) of the Act as an alien convicted of a theft aggravated felony, as defined at section 101(a)(43)(G) of the Act.

Aggravated Felony under Section 101(a)(43)(M)(i) of the Act

To determine whether the respondent is removable as charged under section 101(a)(43)(M)(i) of the Act as an alien convicted of an aggravated felony, i.e., an offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000, we employ the "categorical approach" and focus only on the elements of the offense, and not on the facts surrounding the commission of the crime. *See Mathis v. United States*, *supra*, at 2248; *Descamps v. United States*, *supra*, at 2281; *Matter of Chairez*, *supra*, at 821. If the statute is not a categorical match but is divisible, as we have already concluded it is, and if at least one, but not all, of the offenses under the statute qualifies as an aggravated felony within the meaning of section 101(a)(43)(M)(i) of the Act, we must attempt to identify the respondent's actual crime of conviction for the purpose of determining whether it falls within section 101(a)(43)(M)(i). *See Mathis v. United States*, *supra*, at 2249; *Descamps v. United States*, *supra*, at 2281; *Matter of Chairez*, *supra*, at 821-22. To do so, we would again employ the "modified categorical approach." *See Mathis v. United States*, *supra*, at 2249; *Descamps v. United States*, *supra*, at 2283-86.

We first consider whether 18 U.S.C. § 641 categorically describes offenses involving fraud or deceit. The Supreme Court has advised that "[t]he scope of [section 101(a)(43)(M)(i) of the Act] is not limited to offenses that include fraud or deceit as formal elements. Rather, [it] refers more broadly to offenses that 'involv[e]' fraud or deceit – meaning offenses with elements that necessarily entail fraudulent or deceitful conduct." *Kawashima v. Holder*, 565 U.S. 478, 483-84 (2012). The Court added that for purposes of section 101(a)(43)(M) of the Act, the term "deceit" means "the act or process of deceiving (as by falsification, concealment, or cheating)." *Id.* (citing Webster's Third New International Dictionary 584 (1993)).

Therefore, the proper inquiry is whether an offense under 18 U.S.C. § 641 necessarily entails fraudulent or deceitful conduct, not whether it did in this particular case. We conclude that it is possible to violate the statute without fraud or deceit. The Supreme Court, in discussing 18 U.S.C. § 641, has advised that knowing conversions include "intentional and knowing abuses

and unauthorized uses of government property." *See Morissette v. United States*, *supra*, at 272. Conversion "may reach use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use. Money rightfully taken into one's custody may be converted without any intent to keep or embezzle it merely by commingling it with the custodian's own, if he was under a duty to keep it separate and intact." *Id.* These forms of knowing conversion do not "necessarily entail fraudulent or deceitful conduct." *Kawashima v. Holder*, *supra*, at 484. Because conversion under 18 U.S.C. § 641 does not necessarily entail fraudulent or deceitful conduct, a violation of the statute is not categorically a fraud or deceit offense within the meaning of section 101(a)(43)(M)(i) of the Act.

Because we have already concluded that 18 U.S.C. § 641 lists multiple discrete offenses and is thus divisible, we next apply the modified categorical approach to attempt to identify the respondent's actual crime of conviction. *See Mathis v. United States*, *supra*, at 2249; *Descamps v. United States*, *supra*, at 2284–85. As noted above, in the June 10, 2008, Memorandum of Plea Agreement reached in connection with the respondent's conviction, the respondent agreed that the government "would be able to establish beyond a reasonable doubt each and every element of the offense," including that she "knowingly stole money or property of value with the intention of depriving the owner of the use or benefit of the money or property." As noted above, "[t]o steal means to take away from one in lawful possession without right with the intention to keep wrongfully." *Morissette v. United States*, *supra*, at 271. Such an offense does not necessarily entail fraud or deceit. We therefore conclude that the record does not establish by clear and convincing evidence, as required by section 240(c)(3)(A) of the Act, that the respondent is removable as charged under section 237(a)(2)(A)(iii) of the Act as an alien convicted of a fraud or deceit aggravated felony, as defined at section 101(a)(43)(M)(i) of the Act.[4]

Accordingly, the following orders will be entered.

ORDER: The appeal is dismissed with regard to the respondent's removability under section 237(a)(2)(A)(iii) of the Act, as an alien convicted of an aggravated felony under section 101(a)(43)(G) of the Act.

FURTHER ORDER: The appeal is sustained with regard to the respondent's removability under section 237(a)(2)(A)(iii) of the Act, as an alien convicted of an aggravated felony under section 101(a)(43)(M)(i) of the Act.

FOR THE BOARD

[4] We need not reach the issue whether any such fraud or deceit resulted in a loss to the victim or victims exceeding $10,000, as would be required to render the respondent removable under section 101(a)(43)(M)(i) of the Act. *See Nijhawan v. Holder*, 557 U.S. 29 (2009).