

2015 WL 4761234 (BIA)

** THIS IS AN UNPUBLISHED DECISION - NOT INTENDED FOR CITATION AS PRECEDENT **

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

IN RE: VERA SAMA A.K.A. VERA KASUBIKA SAMA A.K.A. VELLAH KABUSIKA SAMA

File: A076 581 488 - Baltimore, MD
July 17, 2015

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Alan M. Parra, Esquire

AMICUS CURIAE FOR RESPONDENT

Maureen A. Sweeney, Esquire
University of Maryland, Cary School of Law Immigration Clinic
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Maryland Office of the Public Defender

ON BEHALF OF DHS:

Carrie E. Jonston
Senior Attorney

CHARGE:

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

APPLICATION: Termination

The respondent appeals from the Immigration Judge's decisions finding him removable as charged and ordering him removed from the United States.¹ The Department of Homeland Security (the "DHS") opposes the respondent's appeal. The appeal will be sustained, and the removal proceedings will be terminated.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent is a native and citizen of Zambia and a lawful permanent resident of the United States. In 2006, the respondent was convicted of theft in violation of section 7-104 of the Maryland Criminal Code and was sentenced to a term of imprisonment of 3 years.

The issue on appeal is whether the respondent's conviction renders him removable from the United States as an alien convicted of an "aggravated felony," namely a "theft offense" for which the term of imprisonment was at least 1 year. *See* sections 101(a)(43)(G) and 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(43)(G), 1227(a)(2)(A)(iii). Upon our de novo review, we must conclude that it does not (I.J. Dec. dated January 16, 2015, at 6-14). *See* 8 C.F.R. § 1003.1(d)(3)(ii).

A crime is a "theft offense" under section 101(a)(43)(G) of the Act if it requires a taking of, or exercise of control over, another's property without consent and with the criminal intent to deprive the owner of the rights and benefits of ownership. *Matter of Garcia-Madruga*, 24 I&N Dec. 436, 440-41 (BIA 2008); *Castillo v. Holder*, 776 F.3d 262, 267 (4th Cir. 2015). To decide whether an offense fits this definition, we first employ the categorical approach, which 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).

*2 As noted, the respondent was convicted under section 7-104 of the Maryland Criminal Code (hereafter "§ 7-104"). When the respondent committed his offense and sustained his conviction, § 7-104 contained five discrete, separately titled, subsections, each of which define a different type of criminal conduct constituting "theft": (a) obtaining or exerting unauthorized control over property; (b) obtaining control of property by deception; (c) possession of stolen property; (d) obtaining control of lost, mislaid or mistakenly delivered property; and (e) obtaining services by deception or without consent. Taken at its minimum, this definition of "theft" is categorically broader than the "theft offense" concept because it includes some acts, such as those described in subsections (b) and (e), in which property is acquired *with consent* that was fraudulently obtained. *Matter of Garcia-Madruga, supra*, at 440. Thus, the Immigration Judge properly found that § 7-104 is not categorically an aggravated felony, and the parties have conceded the issue (I.J. Dec. dated January 16, 2015, at 12-13; DHS's Brief at 12-13; Respondent's Brief at 4-5).

Although § 7-104 does not define a categorical "theft offense," the Immigration Judge concluded that it is a "divisible" statute vis-à-vis "theft offense" concept, thereby warranting a modified categorical inquiry into the record of conviction (I.J. Dec. dated January 16, 2015, at 3-14). *See Descamps v. United States*, ___ U.S. ___, 133 S.Ct. 2276 (2013); *Matter of Garcia-Madruga, supra*; *Castillo v. Holder, supra*.

The Immigration Judge found that "the most simple and natural reading of the text of § 7-104 supports the conclusion that the statute is divisible into five alternative sets of elements . . . It is, in fact, hard to conceive of a statute divided more clearly into alternate sets of elements than § 7-104 with its clearly delineated and separately subtitled subsections (a)-(e)" (I.J. Dec. dated January 16, 2015, at 7). Upon de novo review, however, we conclude that § 7-104 is not a divisible statute within the meaning of *Descamps*.

In *Descamps*, the Supreme Court clarified that an offense is divisible - so as to permit a modified categorical inquiry - only if it contains disjunctive sets of "elements," more than one combination of which could support a conviction. *Descamps v. United States, supra*, at 2281, 2283. The Court held that the modified categorical approach is inapplicable "when the crime of which the defendant was convicted has a single, indivisible set of elements." *Id.* at 2282. Thus, § 7-104 can be viewed as divisible only if each of its alternative subsections defines a discrete "element" of the offense, with the term "element" being defined as a fact about the crime that must be found by a jury, "unanimously and beyond a reasonable doubt." *Id.* at 2288-90 (citing *Richardson v. United States*, 526 U.S. 813, 817 (1999)); *see also Omargharib v. Holder*, 775 F.3d 192, 198-99 (4th Cir. 2014).

*3 In § 7-104, the State of Maryland brought various theft-related offenses together under one statutory umbrella in an effort to “avoid the subtle distinctions that existed and had to be alleged and proved to establish the separate crimes under the former law.” *State v. Manion*, 442 Md. 419, 432 (Md., 2015). Each of § 7-104's subsections describes a different and alternative version of the theft offense. *United States v. Cabrera-Umanzor*, *supra*. However, the respondent's conviction is not specifically for one of the five offenses. For example, the conviction record does not specify a section, such as § 7-104(a).

The Maryland courts have held that § 7-104 does not define multiple autonomous offenses with discrete elements; rather, it defines a single offense that may be committed several ways. *E.g.*, *Crispino v. State*, 7 A.3d 1092, 1102 (Md. 2010) (discussing *Rice v. State*, 532 A.2d 1357, 1367 (Md. 1987)). Thus, a Maryland jury is permitted to enter a guilty verdict against a defendant charged with theft so long as all jurors agree that theft in *some* form was committed; the jurors need not unanimously agree upon *which* form of theft the defendant committed. *Cardin v. State*, 533 A.2d 928, 933-34 (Md. Ct. Spec. App. 1987).

As a person can be convicted under § 7-104 even if the jurors disagree as to the manner in which he committed the offense, it follows that the statute's various subsections do not define alternative “elements” of a § 7-104 offense; rather, they merely describe alternative “means” by which such an offense may be committed. *See Schad v. Arizona*, 501 U.S. 624, 636 (1991) (plurality opinion) (“[L]egislatures frequently enumerate alternative means of committing a crime without intending to define separate elements or separate crimes.”); *Richardson v. United States*, *supra*, at 817 (“[A] federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime.”). That is not sufficient to make the statute divisible. *See Matter of Chairez*, 26 I&N Dec. 349, 353 (BIA 2014); *Rendon v. Holder*, 764 F.3d 1077, 1085, 1089 (9th Cir. 2014) (finding that the California burglary state was indivisible because the “jury need not agree on which of the substantive offenses [, grand or petit larceny or any felony,] the defendant intended to commit,” when he entered the locked vehicle). Thus, § 7-104 is indivisible and the Immigration Judge is precluded from conducting a modified categorical inquiry in this matter.

*4 In conclusion, we are required to conclude that the offense defined by § 7-104 is neither a categorical “theft offense” under section 101(a)(43)(G) of the Act nor divisible vis-à-vis the theft offense concept. Accordingly, the DHS has not established by clear and convincing evidence that the respondent's conviction renders him removable as an alien convicted of an aggravated felony. No other removal charges are pending against the respondent, and therefore the proceedings will be terminated.

Accordingly, the following order will be entered.

ORDER: The appeal is sustained, the Immigration Judge's decision is vacated, and the removal proceedings are terminated.

Ana Mann
FOR THE BOARD

Footnotes

- 1 The Immigration Judge issued two decisions in this case. The first, dated January 16, 2015, found the respondent removable as charged. The second, dated January 28, 2015, incorporated the first decision, noted that the respondent was not seeking relief from removal, and ordered the respondent removed from the United States.

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