3 I. & N. Dec. 460 (BIA), Interim Decision 187, 1948 WL 6295

United States Department of Justice

Board of Immigration Appeals

IN THE MATTER OF S-----

In DEPORTATION Proceedings

A-1892436

Decided by Central Office, December 28, 1948

****1 *460 Narcotic violation–Deportabilty (1925) under the act of February 9, 1909, as amended–Violation of the act of December 17, 1914, as amended (1919)–Violation of section 2 (c) of the act of May 26, 1922–Requirement of "sentence to year or more"–Section 19, Immigration Act of 1917**

(1) A violation of the act of December 17, 1914 ("Harrison Narcotic Act"), as amended (1919), is not a ground of deportation (1925) under the act of February 9, 1909, as amended (1922) (Narcotic Drugs Import and Export Act) in view of the specific provisions of section 2 (e) of the act of February 9, 1909, as amended, which provides for deportation on conviction of section 2 (c) thereof.

(2) A conviction of a violation of section 2 (c) of the act approved May 26, 1922 (amending the act of February 9, 1909) renders an alien subject to deportation if he is sentenced thereon to imprisonment "for a term of a year or more," inasmuch as the provisions of section 19 of the Immigration Act of 1917 are applicable.

(3) A general sentence of 15 months imprisonment (and a fine of $1) as to all three counts in an indictment (three separate offenses), following the alien's conviction on a plea of guilty to all three counts of the indictment was applicable (it being impossible to say on which count the sentence applied) to his conviction on each and all of these three counts; so that it may be concluded the alien was here sentenced on conviction for a violation of the third count to a term of imprisonment for a year or more within the meaning of section 19 of the Immigration Act of 1917.

CHARGES:
Warrant: Act of 1924–No immigration visa.
Act of 1917–Convicted of crime prior to entry–Theft.

Lodged: Act of 1909, as amended–Convicted and sentenced as a narcotic violator.

BEFORE THE CENTRAL OFFICE

Upon consideration of the entire record, the findings of fact and conclusions of law proposed by the Presiding Inspector and served on the alien July 13, 1948, are hereby adopted, except that finding of fact No. (7) is amended to read:

(7) That the respondent was convicted in the United States District Court, El Paso, Tex., on October 28, 1925, upon his plea of guilty to an indictment charging on two counts violation of the act of December 17, 1914, and on a third count violation of the Narcotic Drugs Import and Export Act; and that he was sentenced therefor to 15 months in the Federal Penitentiary and to pay a fine in the sum of $1.

***461 Discussion:** The evidence clearly sustains the warrant charges. The lodged charge is also sustained but some discussion is required. Exhibit 4 shows that the respondent was indicted in the United States District Court at El Paso, Tex., in 1925 on three counts. The first count charges him with unlawful possession and the second count with unlawful purchase of 15 grains of cocaine in violation of the act of December 17, 1914 (commonly known as the Harrison Narcotic Act). The third count charges him with unlawful importation of 15 grains of cocaine in violation of the Narcotic Drugs Import and Export Act. He

was convicted on his plea of guilty on October 28, 1925, and was sentenced to 15 months imprisonment in the Federal Penitentiary at Leavenworth, Kans., and to pay a fine in the sum of $1. The respondent's violations of the Harrison Narcotic Law (act of December 17, 1914) are not a ground for deportation under the act of February 9, 1909, as amended, since section 2 (e) of the latter statute expressly provides that to render an alien subject to deportation thereunder, he must have been convicted for violation of section 2 (c) of said act. *Matter of I----- A-1085093 (Central Office, Apr. 28, 1947).*

**2 The third count of the indictment shows that the respondent was charged with a violation of section 2 (c) of the Narcotic Drugs Import and Export Act. His conviction on that count brought him within the contemplation of the act of 1909, as amended. However, it has been held that an alien is not deportable under the act of 1909, as amended by the act of May 26, 1922, unless he has been sentenced to imprisonment for a term of 1 year or more, on the ground that the act of May 26, 1922, adopts section 19 and 20 of the Immigration Act of 1917 and limits authority to deport in accordance with the provisions of the latter statute. *Weedin* v. *Moy Fat*, 8 F. (2d) 488 (C. C. A. 9, 1925). The record of conviction in the instant case shows that while the respondent pleaded guilty to the three counts in the indictment, he received a general sentence of 15 months imprisonment and a fine of $1 as to all of the offenses. Hence, the question which must be disposed of is whether the present record establishes that the respondent has been sentenced to a term of imprisonment for 1 year or more for his violation of the Narcotic Drugs Import and Export Act.

In *Martinez* v. *Nagle*, 53 F. (2d) 195 (C. C. A. 9, 1931), the court was presented with an issue on all fours with the instant case. Martinez had been ordered deported as a narcotic violator pursuant to the act of 1909. The record showed that on August 10, 1929, Martinez had pleaded guilty to two counts of an indictment. The first count charged a violation of the Harrison Narcotic Act; the second count charged a violation of the Jones-Miller Act (act of 1909). The defendant received a general sentence to imprisonment for a period of 1 year and 1 day in a United States penitentiary and he was also sentenced to pay a fine of $1. As stated by the court, "Therefore, the sole ***462** question * * * is whether or not appellant has been sentenced to imprisonment for a year and a day for violation of the Jones-Miller Act." It was argued by the appellant that the presumption of judicial regularity demanded that the sentence be construed as assigning the term of imprisonment to the first count of the indictment for violation of the Harrison Narcotic Act and as assigning the fine to the second count, namely, the Jones-Miller Act. The court pointed out that the doctrine of judicial regularity would in reality lead to an opposite conclusion, since the Jones-Miller Act requires imprisonment and fine, while the Harrison Narcotic Act provides for imprisonment or fine or both. The language of the first statute (act of 1909) is mandatory that both forms of punishment be inflicted and it must be assumed, therefore, that the trial court carried out the law.

The court in *Martinez* v. *Nagle* went on to make the following statements:

Likewise, we must conclude that the sentence on the second count was meant to run concurrently with that on the first count. The indictments charged separate offenses under two separate statutes, to each of which the appellant pleaded guilty, and we cannot presume that no sentence at all was imposed on a count to which appellant had pleaded guilty.

**3 The court might have sentenced the defendant on each count or it might impose one sentence upon both counts either upon a plea or verdict of guilty, and unless it specifically appears that the sentence was imposed upon one count only, the presumption obtains that it was a sentence upon both counts. *Germignani* v. *United States* (C. C. A. 6), 9 F. (2d) 384.

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And again, 16 C. J. 3032, pp. 1282, 1283: Where an indictment charges several distinct offenses in two or more counts it has been held that defendant cannot complain of a sentence on a general verdict which imposes punishment applicable to either offense without designating on which count it is based, because, it being impossible to say on which count the sentence applied, it would be held to apply to all.

In the instant case, we think that the sentence was on both counts, to run concurrently.

Relying on the reasoning and authority contained in *Martinez* v. *Nagle*, it is concluded that the general sentence to imprisonment for a period of 15 months, which followed the respondent's conviction on a plea of guilty to all three counts of the indictment, was applicable to his conviction on the third count of said indictment, namely, violation of the Narcotic Drugs Import and Export Act. Hence, the respondent is deportable on the lodged charge.

Other Factors: The alien has applied for suspension of deportation or in the alternative for voluntary departure and preexamination. He is not eligible for suspension of deportation under section 19 (c) of the Immigration Act of 1917 (as amended), since he is a member of one of the classes enumerated in section 19 (d) of said act (as amended).

***463** The respondent, age 48, is a native and citizen of Mexico. He testified that he first entered the United States at El Paso, Tex., in 1915 and remained here until January 1921, when he returned to Mexico. He reentered the United States in March 1921 and was deported to Mexico on November 14, 1926. He was deported again on October 24, 1928. He was deported a third time on April 12, 1930. He last entered the United States in November or December 1932 at El Paso, Tex., and has since remained here.

The respondent was married in 1927 in Los Angeles, Calif., to a native and citizen of Mexico. His wife was lawfully admitted to the United States in 1921, but she departed to Mexico in 1930 and did not return to the United States until 1932, at which time she was not in possession of an immigration visa. Hence, she appears to be residing in the United States unlawfully. The respondent and his wife have seven native-born children, the oldest of whom is about 19 years of age. The respondent's wife and oldest daughter are employed, the former earning about $35 per week. The respondent's earnings for 1947 were about $1,700. His cash assets are about $1,000. The respondent's wife indicated that the family might get along without her husband's financial support but that they "would do a lot better if he were permitted to stay here." In addition to his wife and children, the respondent's mother, three sisters, and a brother also reside in the United States.

****4** The respondent admitted that he was guilty of stealing 50 pounds of lard, which resulted in his conviction of theft in the District Court, El Paso, Tex., in 1919. His conviction for the narcotic violation occurred in 1925. He explained the circumstances surrounding that arrest, as follows: "I was with a group of other boys and somebody put that in my pocket. I don't know who did it, and these boys were under suspicion." He declared that he himself had never been a user of narcotic drugs in any form.

In addition to these two convictions, the respondent stated that he was arrested in Los Angeles, Calif., in 1921 for possession of a gun and was sentenced to 30 days in jail. He was arrested on this charge January 1948, and paid a fine of $50 and, according to his testimony, has had 9 or 10 arrests for intoxication since 1941.

The respondent's recent arrests for drunkenness indicate that he has not learned to respect the laws of this country. When this is coupled with the respondent's past criminal record, which is of a serious nature, the conclusion is reached that he does not merit the exercise of administrative discretion under the seventh proviso to section 3 of the Immigration Act of February 5, 1917. An order of deportation should be entered.

***464 Recommendation:** It is recommended that the alien be deported to Mexico at Government expense on the charges stated in the warrant of arrest and on the following charge:

The act of February 9, 1909, as amended by the act of May 26, 1922, in that he has been convicted of and sentenced to imprisonment for a term of 1 year or more for the violation of a law relating to traffic in narcotics, to wit: Convicted and sentenced as a narcotic violator.

It is further recommended that the alien's application for discretionary relief be denied.

So ordered.

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