U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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STEWART, CLAYTON HUGH ANTHONY
A043-399-408
STEWART DETENTION FACILITY
146 CCA ROAD, P.O. BOX 248
LUMPKIN, GA 31815

DHS/ICE Office of Chief Counsel - SDC
146 CCA Road, P.O.Box 248
Lumpkin, GA 31815

Name: STEWART, CLAYTON HUGH AN... **A 043-399-408**

Date of this notice: 2/11/2015

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:
Malphrus, Garry D.
Guendelsberger, John
Pauley, Roger

Userteam: Docket

File: A043 399 408 – Lumpkin, GA Date: FEB 11 2015

In re: CLAYTON HUGH ANTHONY STEWART a.k.a. Dwayne Anthony Marshall
a.k.a. Dwayne Hugh Marshall

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

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)

APPLICATION: Termination

The respondent appeals from an Immigration Judge's October 28, 2014, decision ordering him removed from the United States.[1] The appeal will be sustained and the removal proceedings will be terminated.

The respondent, a native and citizen of Jamaica, has been a lawful permanent resident of the United States since 1992. In 2011, 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 5 years, all but 18 months of which was suspended. The issue on appeal is whether that conviction renders the respondent 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). We conclude that it does not.[2]

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); *see also Ramos v. U.S. Atty. Gen.*, 709 F.3d 1066, 1069 (11th Cir. 2013). To decide whether an offense fits this definition, we employ the categorical approach, which requires us to focus on the minimum conduct that has a realistic probability of being

[1] The respondent's request for oral argument is denied. His request for waiver of the appellate filing fee is granted.

[2] Whether the respondent's offense of conviction is an aggravated felony is a legal question that we review de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

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).

If the minimum conduct that has a realistic probability of being prosecuted under the statute of conviction does not qualify as a "theft offense," then the DHS's aggravated felony charge must be dismissed unless that statute is shown to be "divisible." An offense is divisible with respect to the "theft offense" concept if (1) it lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of "elements," more than one combination of which could support a conviction; and (2) at least one, but not all, of those listed offenses or combinations of disjunctive elements is a categorical match to the "theft offense" definition. *See Matter of Chairez*, 26 I&N Dec. 349, 353 (BIA 2014) (describing the test for divisibility adopted in *Descamps v. United States*, 133 S. Ct. 2276, 2281, 2283 (2013)). If the statute of conviction is meaningfully divisible, then it is permissible for the Immigration Judge to conduct a "modified categorical" inquiry, which involves an examination of admissible portions of the respondent's conviction record in order to identify the particular offense or discrete set of elements for which he was convicted. *Id.*

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 subsections, each of which defined a different type of criminal conduct as 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), supra, in which property is acquired *with consent* that was fraudulently obtained. *See Matter of Garcia-Madruga, supra*, at 440.

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. at 8). Upon de novo review, however, we conclude that § 7-104 is not a divisible statute within the meaning of *Descamps v. United States, supra.*

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. 133 S. Ct. at 2281, 2283. 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 (citing *Richardson v. United States*, 526 U.S. 813, 817 (1999)); *see also United States v. Estrella*, 758 F.3d 1239, 1245-48 (11th Cir. 2014); *Omargharib v. Holder*, --- F.3d ----, No. 13-2229, 2014 WL 7272786, at *4 (4th Cir. Dec. 23, 2014).

The Maryland courts have long 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).

Inasmuch 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 United States v. Estrella*, 758 F.3d 1239, 1246 (11th Cir. 2014) (holding that under *Descamps* "if the statutory scheme is not such that it would typically require the jury to agree to convict on the basis of one alternative as opposed to the other, then the statute is not divisible in the sense required to justify invocation of the modified categorical approach.") Therefore, § 7-104 is indivisible and the Immigration Judge is precluded from conducting a modified categorical inquiry in this matter.

In conclusion, we find 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.

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

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
LUMPKIN, GEORGIA

File: A043-399-408 October 28, 2014

In the Matter of

CLAYTON HUGH ANTHONY STEWART	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGE: Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, as amended - in that at any time after admission you have been convicted of an aggravated felony as defined in Section 101(a)(43)(G) of the Act, a law related to a theft offense (including receipt of stolen property) or burglary offense for which a term of imprisonment of at least one year was imposed.

APPLICATION: None before the Court.

ON BEHALF OF RESPONDENT: PRO SE

ON BEHALF OF DHS: KELLY JOHNSON, Assistant Chief Counsel

ORAL DECISION AND ORDER OF THE IMMIGRATION JUDGE

INTRODUCTION AND JURISDICTIONAL STATEMENT

On August 20, 2014, the Department of Homeland Security filed a Notice to Appear against the respondent. The filing of this charging document commenced proceedings and vested jurisdiction with this Court. 8 C.F.R. Section 1003.14(a). The Notice to Appear has been admitted into evidence as Exhibit No. 1.

The respondent is a 37-year-old male native and citizen of Jamaica who was admitted to the United States at Baltimore, Maryland, on or about May 29, 1992, as an immigrant.

The respondent conceded to the four factual allegations that he is not a citizen or national of the United States, that he is a native and citizen of Jamaica, that he was admitted to the United States in Baltimore, Maryland, on or about May 29, 1992, as an immigrant and that on September 2, 2011, he was convicted in the Circuit Court of Prince George's County, Maryland, for the offense of theft in violation of Section 7-104 of the Criminal Law Article Against the Peace, Government and Dignity of the State of Maryland, for which he received a sentence of five years imprisonment.

The respondent denied being removable as charged under Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act. The respondent denied that charge saying that he has not been convicted of an aggravated felony as defined in Section 101(a)(43)(G) of the Act, a law related to a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment of at least one year was imposed.

The respondent has articulated no form of relief that he is seeking before this Court. However, he believes that he has not been convicted of an aggravated felony.

SERVICE OF THE NOTICE TO APPEAR AND TEN-DAY PERIOD

The respondent has conceded proper service of the Notice to Appear and based on the respondent's testimony and the Certificate of Service in the NTA, this Court finds that the Notice to Appear has been properly served and that the respondent, Mr. Stewart, was afforded ten days following the service of the Notice to Appear prior to appearing before an Immigration Judge.

PLEADINGS

The respondent admitted to the four factual allegations and denied the one and only charge of removability.

This Court finds that the Government has proven by clear and convincing evidence that the respondent is removable as charged. Accordingly, the removal charge has been sustained by the Court.

DESIGNATION OF COUNTRY OF REMOVAL

The respondent has designated Jamaica as his country of removal, and h~~.~~ ~~H~~e has advised the Court that he has no fear of returning there.

SUMMARY OF EVIDENTIARY RECORD ON REMOVABILITY

Exhibits

The evidentiary record of this proceeding consists of:

Exhibit 1, the Notice to Appear

Exhibit 2, docket entries:

- counts
- statement of charges
- application for statement of charges
- probation revoked and sentence of the Court
- sentence of the Court
- complaint

Exhibit 3, Department of Homeland Security brief in support of the Notice to Appear:

- statement of the facts
- tab A, docket entries and statement of charges
- Tab B, Westlaw printout of Maryland Code, Criminal Law Section

7-104 effective October 1, 2009, to September 30th, 2012, general theft provisions

Exhibit 4, respondent's brief (labeled Department of Homeland Security brief in support of the Notice to Appear)

- defense argument
- Westlaw printout of Maryland Code, Criminal Law Section 7-104, general theft provision
- selective Immigration consequences of certain Georgia offenses
- Maryland Code, Criminal Law, formerly cited as Maryland Code, Article 27, Section 340
- Courtney Wayne Lecky, Petitioner, v. Eric H. Holder, Jr., Attorney General, respondent
- State of Maryland, Prince George County, counts
- EARM regarding Stewart, Clayton Hugh Anthony, 043-399-408, I-213 narrative and additional information contained therein.

All admitted evidence, Exhibits 1 through 4 identified above, has been considered in its entirety regardless of whether specifically mentioned in the text of this decision.

PROCEDURAL HISTORY

The respondent first appeared before this Court on September 22, 2014. The respondent contested removability and the case was reset to October 14, 2014, approximately three weeks later. The Court assigned a filing deadline for the Department of Homeland Security of October 3, 2014, and assigned the October 14 time of the next hearing as the deadline for the respondent to file his reply brief.

At the respondent's second hearing on October 14, 2014, respondent made

arguments regarding the conviction, the sentence and the status of certain family. Exhibits 1 and 2 were marked at that time. The case was reset to today, October 28, 2014. Also on October 14, 2014, the respondent advised the Court that he did not file a brief, but instead wished to only make an oral argument to the Court. The Court offered Mr. Stewart more time to file a brief, but the respondent only pursued the oral argument. The case was reset to October 28, 2014.

Today, on October 28, 2014, the respondent did in fact submit to the Court what the Court marked today as Exhibit 4. Although the Court notes that it is marked on the cover page as Department of Homeland Security brief in support of the Notice to Appear, that Exhibit 4 is in fact respondent's brief.

Today, on October 28, hearing no objection from either side, the Court admitted all four exhibits into the Record of Proceedings. The Court sustained the aggravated felony charge and found the respondent, Mr. Stewart, removable as charged by clear and convincing evidence. The respondent designated Jamaica as his country of removal and told the Court that he had no fear of returning there.

The respondent began advancing an argument regarding derivative citizenship. He told the Court he came to United States at the age of 15 and that his stepfather is a United States citizen. Mr. Stewart said that he believed he derived citizenship from his stepfather. The Court offered Mr. Johnson, the Assistant Chief Counsel for ICE, an opportunity to explore, investigate or analyze any possibility of derivative citizenship and Mr. Johnson advised the Court that his office has already analyzed that and found that the respondent was not entitled to any form of citizenship. Mr. Johnson further advised the Court that he would have no objection for the Court giving Mr. Stewart an opportunity to submit any proof of citizenship to the Court, derivative or otherwise. Mr. Stewart declined this opportunity and advised the Court that he was not going to pursue

this before the Court.

STATEMENT OF THE LAW

There is currently no request for any form of relief before this Court. This Court sees based on the arguments of both sides and based on the evidence in the record no form of relief available for the respondent.

The major issue before the Court was whether or not the respondent was properly charged as an aggravated felon. The Court has examined whether stealing in violation of Section 7-104 of the Maryland Criminal Code (Maryland Code Annotated Criminal Law) constitutes an aggravated felony theft offense.[2] This Court finds that respondent's conviction for stealing in violation of Section 7-104 of the Maryland Code Annotated Criminal Law constitutes an aggravated felony theft offense under Section 101(a)(43)(G) of the Immigration and Nationality Act.

Looking at the exhibits, the Court sees that on September 2, 2011, respondent was convicted in the Circuit Court of Prince George's County, Maryland, for the offense of theft in violation of Maryland Code Annotated Criminal Law Section 7-104. See Exhibit 3, tab A. For that offense, respondent was sentenced to five years confinement. All but 18 months of that sentence was suspended.

On August 20, 2014, the Department of Homeland Security (DHS) charged respondent with removability pursuant to Section 237(a)(2)(A)(iii) of the Act, as amended, in that any time after admission respondent has been convicted of an aggravated felony as defined in Section 101(a)(43)(G) of the Act, a law related to a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment of at least one year was imposed.

To determine whether Mr. Stewart was convicted of an aggravated felony theft offense, it is necessary to first look to the facts of conviction and the statutory definition

of the offense. See Jaggernauth v. U.S. Attorney General, 432 F.3d 1346, 1353 (11th Cir. 2005); see also Taylor v. U.S., 495 U.S. 575, 598 (1990); see also Gonzales v. Duenas-Alvarez, 549 U.S. 183, 185-186 (2007), (observing that "[I] in determining whether a conviction ... falls within the scope of a listed offense (example, theft offense), the lower courts uniformly have applied the approach ... set forth in Taylor v. United States"). The statute is divisible, meaning that the statutory language contains some offenses that would qualify as aggravated felonies under the generic definition and others that would not. Then the Court must look at the Record of Conviction, meaning the indictment, plea, verdict and sentence to determine the offense of which the respondent was convicted. See also Matter of Sweetser, 22 I&N Dec. 709, 713-14 (BIA 1999). The Court's finding that a prior conviction constitutes an aggravated felony must be supported by clear, unequivocal and convincing evidence. See Woodby v. INS, 385 U.S. 276, 286 (1966); see also INA Section 240(c)(3)(A).

Under INA Section 101(a)(43)(G), a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment of at least one year is imposed is an aggravated felony. Congress did not define the term theft offense. Accordingly, the Courts define it in the generic sense in which the terms are now used in the criminal codes of most states. See Taylor, 495 U.S. at 598. According to the Board, a taking of property constitutes a theft whenever there is criminal intent to deprive the owner of their rights and benefits of ownership, even if such deprivation is less than total or permanent. See Matter of V-Z-S-, 22 I&N Dec. 1338, 1346 (BIA 2000); see also Matter of Garcia-Madruga, 24 I&N Dec. 436, 438 (BIA 2008). The Eleventh Circuit has accepted that definition as its own. See Ramos v. U.S. Attorney General, 709 F.3d 1066 (11th Cir. 2013); see also Jaggernauth, 432 F.3d at 1353.

Here, respondent was convicted of theft in violation of Maryland Code Annotated

Criminal Law Section 7-104, which includes a series of general theft provisions. This statute is divisible as at least one of its provisions would not qualify as an aggravated felony. See Maryland Code Annotated Criminal Law, Section 7-104(e), (provision does not require a person act with the intent to deprive the owner of the property). Therefore, to determine which of the offenses respondent was convicted of, we apply the modified categorical approach and turn to the Record of Conviction. See Matter of Sweetser, 22 I&N Dec. at 713-14.

The indictment and conviction documents indicate that respondent was convicted of stealing a 2011 Hyundai Sonata having a value of at least $10,000, but less than $100,000, in violation of Section 7-104 of the criminal law. Looking to the language of Maryland Code Annotated Criminal Law Section 7-104, it appears respondent was convicted of either Maryland Code Annotated Criminal Law Section 7-104(a) for unauthorized control over property or Maryland Code Annotated Criminal Law Section 7-104(b) for unauthorized control over property by deception.

As the charging document does not contain any indication that respondent was alleged to have stolen the property through deception, it is likely that respondent was convicted of Section 7-104(a). See Exhibit 3, tab A. Under this provision, a person commits theft through the unauthorized control over property if that person willfully or knowingly obtains or exerts unauthorized control over property if the person; (1) intends to deprive the owner of the property; (2) willfully or knowingly uses, conceals or abandons the property in a manner that deprives the owner of the property; or (3) uses, conceals or abandons the property knowing the use, concealment or abandonment probably will deprive the owner of the property.

Respondent's argument, though at times difficult to discern, appears to center on the fact that he was not convicted of a theft and, therefore, did not commit an

aggravated felony. The respondent was charged with seven counts, but was only convicted of Count 5 of the indictment for stealing a vehicle. Respondent argues that the language of Maryland Code Annotated Criminal Law Section 7-104 requires that a person in violation of the statute exert unauthorized control of the property and that this language is not contained in Count 5. Respondent contends that without the state establishing that he exerted control over the property, he could not have committed a theft as defined by the Maryland statute.

In contrast, the Department argues that steal as defined by the U.S. Supreme Court in Morissette v. United States, 342 U.S. 246, 271 (1952), means to take away from one in lawful possession without right with the intention to keep wrongfully. Therefore, having been convicted of stealing property, the Department argues that respondent was convicted of a theft offense and is removable.

Pursuant to Maryland Code Annotated Criminal Law Section 7-101(d)(1), to exert control includes to take, carry away, appropriate to a person's own use or sell, convey or transfer title to an interest in or possession of property. Although the Maryland Criminal Law does not define what it means to steal, the Court of Appeals of Maryland has held that to steal property is to take it with an intent to deprive the owner of the rights and benefits of ownership. Jones v. State, 303 Md. 323, 340 (1985), citing United States v. Turley, 352 U.S. 407 (1957). Further, the Court of Special Appeals of Maryland observed that one of the elements of stealing is indeed theft. See Goines v. State, 89 Md. App. 104, 108-109 (1992). Although these cases concerned Maryland Annotated Code Section 342, which has since been repealed, they contain very similar language to that of Section 7-104. Maryland Annotated Code Section 342 of the general theft provision hold in part that "a person who commits the offense of theft when he willfully or knowingly obtains control, which is unauthorized or exerts control which is

unauthorized over property of the owner, and ... he has the purpose of depriving the owner of property." See Maryland Annotated Code Section 342(a).

Therefore, to convict a person of stealing in Maryland, the state must establish that the person took property from the owner with the intent to deprive them of that property. See Jones, 303 Md. at 340. By establishing that the person took the property, the state, in turn, establishes that the person exerted control over the property.

Here, respondent was convicted of stealing a vehicle, which means that the state proved that he took the property. Therefore, by taking the vehicle, respondent exerted control over it and committed a theft offense under Maryland law.

Turning to whether stealing in violation of Maryland Code Annotated Criminal Law Section 7-104 constitutes an aggravated felony theft offense pursuant to INA Section 101(a)(43)(G). The Board has defined a theft offense as a taking of property ... where there is criminal intent to deprive the owner of their rights and benefits of ownership, even if such deprivation is less than total or permanent. Matter of Garcia-Madruga, 24 I&N Dec. at 438, quoting Matter of V-Z-S-, 22 I&N Dec. at 1346; see also Jaggernauth, 432 F.3d at 1353.

As discussed above, respondent was convicted of stealing a car in violation of Maryland Code Annotated Criminal Law Section 7-104, which under Maryland law required respondent to have knowingly taken away property with the intent to deprive the owner of that property. See Exhibit 2; See Maryland Code Annotated Criminal Law Section 7-104.

Additionally, respondent received a prison sentence of at least a year for the offense. See INA Section 101(a)(43)(G); see also United States v. Christopher, 239 F.3d 1191, 1993 (11th Cir. 2001) (term of imprisonment is "deemed to include the period of the incarceration or confinement ordered by a Court of Law regardless of any

suspension of the imposition or execution of that imprisonment"). Thus, respondent was convicted of an aggravated felony theft offense under Section 101(a)(43)(G) of the Act and is removable. See INA Section 237(a)(2)(A)(iii).

CONCLUSION

For the reasons set forth above, respondent is hereby ordered:

ORDER

IT IS HEREBY ORDERED that the respondent be removed from the United States to Jamaica on the charge contained in the Notice to Appear.

The respondent and ICE counsel are both in this court and both have been told that should any appeal be filed, it must be received in the hands of the Board of Immigration Appeals not later than November 28, 2014. Therefore, any appeal is due by November 28, 2014.

October 28, 2014

Please see the next page for electronic signature

BARRY ~~S.~~ CHAIT
Immigration Judge
Stewart Immigration Court

//s//

Immigration Judge BARRY S. CHAIT

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