U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: *S-YOU, KOEUN **A27-819-377**

Date of this notice: 12/27/2005

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

Sincerely,

F. F. Krider

Frank Krider
Chief Clerk

Enclosure

Panel Members:
PAULEY, ROGER

File: A27 819 377 - Cleveland

Date: DEC 27 2005

In re: KOEUN YOU

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Charleston C. K. Wang, Esquire

ON BEHALF OF DHS: Victoria A. Christian
Deputy 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

APPLICATION: Termination

The Department of Homeland Security (DHS) appeals the Immigration Judge's decision, dated August 22, 2005, terminating removal proceedings against the respondent. The appeal will be dismissed.

The DHS charged the respondent with being removable as an alien convicted of an aggravated felony as defined under section 101(a)(43)(F) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(F). Specifically, the DHS asserted that the respondent's convictions on August 4, 2003, for aggravated vehicular homicide in violation of Ohio Revised Code Annotated § 2903.06(A), and two counts of vehicular assault in violation of Ohio Revised Code Annotated § 2903.08(A)(2) and sentence of 2 years incarceration constituted crimes of violence as defined under 18 U.S.C. § 16. In response, the respondent moved to terminate proceedings arguing that the convictions did not constitute crimes of violence and, thus, the respondent was not removable as an alien convicted of an aggravated felony under section 237(a)(2)(A)(iii) of the Act. Thereafter, the Immigration Judge found that the respondent's convictions did not constitute crimes of violence and he terminated removal proceedings. As a result, the DHS filed a timely appeal arguing that the Immigration Judge's decision is erroneous and that proceedings should be reinstated.

The respondent was convicted of three separate offenses in violation of Ohio Revised Code Annotated §§ 2903.06(A) and 2903.08(A)(2). The respondent's conviction under section 2903.06(A) is for aggravated vehicular homicide and it is a divisible statute. The statute is divided into separate sections requiring no *mens rea*, a negligent *mens rea*, or a reckless *mens rea* in order to establish culpability.

Where a statute under which an alien was convicted is divisible, we look to the record of conviction, and other documents admissible as evidence in proving a criminal conviction, to determine whether the specific offense of which the alien was convicted will sustain a ground of removability under section 237(a)(2)(A)(iii) of the Act. The record of conviction includes the charging document, plea agreement, a verdict or judgment of conviction, a record of sentence, or a plea colloquy transcript. *See Matter of Vargas-Sarmiento*, 23 I&N Dec. 651 (BIA 2004); *see also Matter of Sweetser*, 22 I&N Dec. 709 (BIA 1999).

The conviction records relating to the conviction under section 2903.06(A) relate to count 2 of the Indictment which specifically provides that the respondent recklessly caused the death of the victim. Likewise, the conviction records relating to the convictions under section 2903.08(a)(2) relate to counts 4 and 6 of the Indictment which both specifically provide that the respondent recklessly caused serious physical harm to the victims. As a result, all the convictions are based on a mental state requiring recklessness.

This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. However, the Sixth Circuit has not addressed whether a conviction for aggravated vehicular homicide or vehicular assault, with a reckless *mens rea*, is sufficient to constitute a crime of violence as defined under 18 U.S.C. § 16. Likewise, the Supreme Court in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), did not address whether a *mens rea* of recklessness was sufficient to constitute a crime of violence. Thus, in immigration cases arising within circuits that have not yet had occasion to consider this question, we will apply the standards adopted by the majority of the circuit courts. *See Matter of Yanez*, 23 I&N Dec. 390, 391 (BIA 2002).

The United States Court of Appeals for the Third Circuit, in *Oyebanji v. Gonzales*, 418 f.3d 260 (3d Cir. 2005), recently held that vehicular homicide requiring a *mens rea* of recklessness did not constitute a crime of violence as defined under 18 U.S.C. §16. The Third Circuit Court of Appeals relied on the Supreme Court's decision in *Leocal v. Ashcroft, supra*, indicating that "accidental" conduct (which would seem to include reckless conduct) is not enough to qualify as a crime of violence. Additionally, the Third Circuit relied on the Supreme Court's reasoning that because 8 U.S.C. § 1101(h) identifies crimes of violence separately from any injury causing driving under the influence crime, then injury causing reckless driving offenses are not crimes of violence. *See Oyebanji v. Gonzales, supra* at 264. Likewise, the United States Court of Appeals for the Ninth Circuit, in *Lara-Cazares v. Gonzales*, 408 F.3d 1217 (9th Cir. 2005), held that gross vehicular manslaughter while intoxicated did not constitute a crime of violence and also relied on the Supreme Court's analysis in *Leocal v. Ashcroft, supra*. The United States Court of Appeals for the Fourth Circuit has addressed the issue in *Bejarano-Urrutia v. Gonzales*, 413 F.3d 444 (4th Cir. 2005), and the court held that an alien's conviction for involuntary manslaughter was not a crime of violence. Specifically, the Fourth Circuit Court found, relying on *Leocal v. Ashcroft, supra*, and *Jobson v. Ashcroft*, 326 F.3d 367, 373 (2d Cir. 2003), that a conviction for involuntary manslaughter

which required a mental state of recklessness did not constitute a crime of violence. In *United States v. Vargas-Duran*, 356 F.3d 598 (5th Cir. 2004), the United States Court of Appeals for the Fifth Circuit determined that the respondent's conviction for intoxication assault was not a crime of violence because it did not require intentional use of force. Therefore, the necessary *mens rea* would be one of intent. Likewise, the Second Circuit Court of Appeals, in *Jobson v. Ashcroft*, 326 F. 3d 367 (2d Cir. 2003), found that manslaughter in the second degree for recklessly causing death was not a crime of violence because 18 U.S.C. § 16(b) contemplates the intentional use of force. Specifically, the Second Circuit stated that "section 16(b) contemplates only *intentional* conduct and refers only to those offenses in which there is a substantial likelihood that the perpetrator will *intentionally* employ physical force." *Id* at 373. As such, the Immigration Judge's conclusion that the respondent's convictions for aggravated vehicular homicide and vehicular assault, requiring a *mens rea* of recklessness, do not constitute crimes of violence as defined under 18 U.S.C. § 16 is not erroneous. Consequently, the Immigration Judge's termination of removal proceedings was not in error.

ORDER: The DHS' appeal is dismissed.

FOR THE BOARD