Matter of CANCINOS-MANCIO, Respondent

Decided April 28, 2023

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

Under the modified categorical approach, an Immigration Judge may consider the transcript of a plea colloquy in determining the factual basis of a plea.

FOR THE RESPONDENT: Juan L. Rocha, Esquire, Mesa, Arizona

FOR THE DEPARTMENT OF HOMELAND SECURITY: Damona T. Hakiman, Assistant Chief Counsel

BEFORE: Board Panel: BAIRD and SAENZ, Appellate Immigration Judges; PEPPER, Temporary Appellate Immigration Judge.

BAIRD, Appellate Immigration Judge:

This matter was last before the Board on March 10, 2017, when we remanded these proceedings for further consideration of the respondent's removability. The respondent now appeals the August 13, 2019, decision of the Immigration Judge finding him removable under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1227(a)(2)(A)(iii) (2018), for having been convicted of an aggravated felony crime of violence. The Department of Homeland Security ("DHS") opposes the appeal. The appeal will be dismissed.

I. FACTUAL AND PROCEDURAL HISTORY

The respondent is a native and citizen of Guatemala who entered the United States without inspection in 1984 and adjusted status to that of a lawful permanent resident on October 19, 2000. On January 14, 2013, he was convicted of aggravated assault pursuant to sections 13-1203 and 13-1204(A)(2)[1] of the Arizona Revised Statutes and was sentenced to 3.5 years in prison. DHS placed the respondent into removal proceedings and charged him with removability under section 237(a)(2)(A)(iii) of the INA, 8 U.S.C.

[1] An assault under section 13-1203 becomes an aggravated assault under section 13-1204(A)(2) if a deadly weapon or dangerous instrument is used in the assault.

§ 1227(a)(2)(A)(iii), for having been convicted of an aggravated felony crime of violence.

The Immigration Judge sustained the charge of removability. On March 10, 2017, the Board remanded the record to the Immigration Judge to employ the modified categorical approach to determine under which subsection of section 13-1203(A) of the Arizona Revised Statutes ("section 13-1203(A)") the respondent had been convicted. On August 13, 2019, the Immigration Judge again sustained the charge of removability, concluding the respondent had been convicted under section 13-1203(A)(2) and that his conviction under this subsection, in conjunction with section 13-1204(A)(2), constitutes an aggravated felony crime of violence.

The respondent did not seek relief from removal before the Immigration Judge. He appeals the finding of removability. The respondent argues the record does not reflect he was convicted under section 13-1203(A)(2), and the Immigration Judge impermissibly sustained the removability charge by relying on an exchange between the judge, the respondent's defense counsel, and the respondent during the change of plea hearing.[2]

II. ANALYSIS

A. Section 13-1203(A) of the Arizona Revised Statutes

The respondent pled guilty to aggravated assault in violation of sections 13-1203 and 13-1204(A)(2) of the Arizona Revised Statutes. At all relevant times, section 13-1203(A) has provided that a person commits assault by:

> 1.Intentionally, knowingly or recklessly causing any physical injury to another person; or
> 2.Intentionally placing another person in reasonable apprehension of imminent physical injury; or
> 3.Knowingly touching another person with the intent to injure, insult or provoke such person.

Ariz. Rev. Stat. Ann. § 13-1203(A) (2012).

The United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, has held that section 13-1203(A) is overbroad

[2] The respondent also argues remand is required because the Immigration Judge did not articulate the burden of proof for determining removability and applied the wrong legal standard. Though the Immigration Judge's decision does not explicitly state the burden of proof, it references the prior decision which did explicitly hold DHS to the clear and convincing evidence standard. When the decision turns from removability to relief from removal, it specifies that the respondent bears that burden, reflecting the difference in burdens of proof between removability and relief from removal.

and divisible. *United States v. Sahagun-Gallegos*, 782 F.3d 1094, 1098–99 (9th Cir. 2015); *United States v. Cabrera-Perez*, 751 F.3d 1000, 1004–05 (9th Cir. 2014). Arizona state courts have explicitly found that the three subsections listed under section 13-1203(A) are separate offenses. *See State v. Feeney*, 219 P.3d 1039, 1042 (Ariz. 2009) (en banc) (noting that "the elements required to prove a violation of § 13- 1203(A)(2) differ from those required to prove a violation of § 13 -1203(A)(1)"); *State v. Waller*, 333 P.3d 806, 815 (Ariz. Ct. App. 2014) ("The three types of assault are distinct offenses with different elements, not merely different manners of committing the same offense."); *In re Jeremiah T.,* 126 P.3d 177, 181 (Ariz. Ct. App. 2006) (stating that "the elements of § 13-1203(A)(1) and (A)(3) differ"). We therefore apply the modified categorical approach to determine if the respondent's conviction is for an aggravated felony.

B. Modified Categorical Approach

In *Shepard v. United States*, 544 U.S. 13, 26 (2005), the Supreme Court of the United States determined that documents that could be considered when applying the modified categorical approach include "the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or . . . some comparable judicial record of this information." *Id*. Here, the Immigration Judge examined the transcript of the change of plea hearing to determine that the respondent specifically pled guilty to subsection (2) of section 13-1203(A).

At the change of plea hearing, the trial court judge ("the Court"), the respondent ("the defendant"), and the respondent's defense attorney ("Counsel") discussed the plea as follows:

> THE COURT: Then with regards to Count I as amended, aggravated assault, a Class 3 non-dangerous, non-repetitive felony offense and a domestic violence offense committed on July 18th of 2012, how do you wish to plead; guilty or not guilty?
>
> THE DEFENDANT: Guilty.
>
> THE COURT: Counsel, can you provide the factual basis?
>
> [COUNSEL]: Yes. On the date, time and location listed in the complaint, and within Maricopa County and within the jurisdiction of this court, Defendant recklessly placed the victim in reasonable apprehension of imminent injury by brandishing a weapon, doing so recklessly and causing fear. There was a relationship under the statute that would qualify for domestic violence under the statute as the Defendant and the victim had previously lived together. And that item was a deadly weapon or dangerous instrument.

> THE COURT: Well, which one was it? I don't understand. What was the item?
>
> [COUNSEL]: A deadly weapon, Your Honor.
>
> THE COURT: And so do you agree with everything that your attorney just told me, sir?
>
> THE DEFENDANT: Yes, Ma'am.
>
> THE COURT: Just one moment. I'm looking at the mens rea out of 13-1203. Now you said recklessly.
>
> [COUNSEL]: Uh-huh.
>
> THE COURT: But when I look at assault you can intentionally, knowingly or recklessly cause physical injury, which he didn't here. You can intentionally place another person in reasonable apprehension of imminent physical injury or you can knowingly touch another person with the intent to injure, insult or provoke. So I'm having trouble embracing that mens rea.
>
> [COUNSEL]: Okay. Intentionally placed the other in reasonable apprehension of fear.
>
> THE COURT: And do you agree with that?
>
> THE DEFENDANT: Yes.

After a conversation with the respondent's defense attorney during which the attorney articulated the factual basis of the conviction and the particular elements of section 13-1203(A)(2), the Court directly asked the respondent if he agreed, and he personally assented.[3] This discussion reflects that, after some clarification, the respondent specifically pled guilty to "[i]ntentionally placing another person in reasonable apprehension of imminent physical injury" in violation of section 13-1203(A)(2). Under the modified categorical approach, the Immigration Judge permissibly considered the transcript from the change of plea hearing, as it is a "transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant." *Shepard*, 544 U.S. at 26; *see also United States v. Marcia-Acosta*, 780 F.3d 1244, 1251 (9th Cir. 2015) (stating that "courts

[3] The change of plea hearing appears to have been conducted in English. The respondent also chose to proceed in English throughout his immigration proceedings, indicating that he is an English speaker and, thus, would have been able to understand the discussion by his attorney and the judge of the Superior Court during the change of plea hearing. He does not assert otherwise.

may review the plea colloquy or other 'comparable judicial record'") (quoting *Shepard*, 544 U.S. at 26); *Alvarado v. Holder*, 759 F.3d 1121, 1130 (9th Cir. 2014) ("A statement of the factual basis supporting the guilty plea 'may be considered if specifically incorporated into the guilty plea or admitted by a defendant.'") (quoting *Parrilla v. Gonzales*, 414 F.3d 1038, 1044 (9th Cir. 2005)).

The respondent argues his case is analogous to that of *Marcia-Acosta*, where the Ninth Circuit determined the lower court erred in relying on a plea colloquy in which the defendant's attorney recited the statement of facts on the defendant's behalf which indicated an intentional mens rea, but the defendant himself did not admit to the mens rea element of the offense. 780 F.3d at 1252-53. The Ninth Circuit emphasized the need to "restrict[] the examination of plea colloquies [to] assure[] that a sentencing court not 'substitute . . . a facts-based inquiry for an elements-based one.'" *Id.* at 1251 (quoting *Descamps v. United States*, 570 U.S. 254, 278 (2013)).

The circuit courts have taken different approaches with respect to the degree to which a criminal defendant must signify assent to representations made in a plea colloquy. *See, e.g.*, *United States v. Dudley*, 5 F.4th 1249, 1261–62 (11th Cir. 2021) (holding the lower court correctly considered the defendant's plea colloquy during which the court informed the defendant of the consequences of his plea, the prosecution stated the factual basis for the conviction, the defendant's attorney did not object or add to the facts, and the defendant specifically pled guilty three times); *United States v. Taylor*, 659 F.3d 339, 342, 346 (4th Cir. 2011) (stating it was appropriate for the court to rely on the plea colloquy where the defendant personally stated his intention to plead guilty, his attorney did not make any corrections to the prosecution's statement of facts, and the defendant declined to make additional comments); *United States v. Miller*, 478 F.3d 48, 52 (1st Cir. 2007) (noting a defendant may provide assent by silence or lack of objection). We do not need to reconcile these various approaches today as, contrary to the respondent's argument, the instant case is distinguishable from *Marcia-Acosta*.

Unlike in *Marcia-Acosta*, the respondent here specifically assented to the underlying factual basis and admitted to the elements of the offense. *See United States v. Cordova-Portillo*, 660 F. App'x 548, 550 (9th Cir. 2016) (finding it appropriate to consider the transcript of a change of plea hearing where a defendant personally agreed to the factual basis given by his attorney and in so doing admitted the elements of section 13-1203(A)(2)). Specifically, it is clear the respondent in this case personally assented to the elements of section 13-1203(A)(2) as the specific purpose of the trial court judge's additional questions was to clarify the mens rea element because the respondent's defense counsel initially conflated elements from subsections (1) and (2) ("So I'm having trouble embracing the mens rea.").

The case at hand is also distinguishable from *Marcia-Acosta* where "there [was] no narrowing through the indictment, information, or other charging document, and no narrowing of the offense of conviction through the actual conviction documents or pleas." 780 F.3d at 1255. Here, though neither the criminal charging document nor the amendment to the charge specifies under which subsection the respondent was charged, the language mirrors only that of section 13-1203(A)(2). Count 1 of the original complaint alleges the respondent "intentionally placed [the victim] in reasonable apprehension of imminent physical injury" and that the offense "is a dangerous felony." Count 1 was amended to remove the latter "allegation of dangerous," but otherwise the language of Count 1 remained as charged. The respondent, therefore, was made aware of the charges against him and, after some clarification, pled guilty to charges that reflect section 13-1203(A)(2).

As held by the Ninth Circuit, "[i]f the operative charging document limits the charge to a statutory alternative that meets the generic offense definition, a factual-basis statement at the plea colloquy and the charge, *together*, can establish the crime of conviction, because that fact then *does* become essential." *Id*. (emphasis in original). In *Marcia-Acosta*, the government did not present either narrowing language of the offense in the indictment or proof that the defendant assented to the elements of the specific subsection in the plea colloquy. *Id*. at 1252–53. In the case at hand, there is evidence of both. We are therefore unpersuaded by the respondent's argument that his case is governed by *Marcia-Acosta*.

The transcript of the respondent's change of plea hearing demonstrates that the factual basis for the respondent's amended plea was for an aggravated assault with a deadly weapon under section 13-1204(A)(2) of the Arizona Revised Statutes, in which the underlying assault was committed by intentionally placing another person in reasonable apprehension of imminent physical injury under section 13-1203(A)(2). The respondent contends that this offense does not require the level of force necessary to constitute a crime of violence pursuant to 18 U.S.C. § 16(a). The Ninth Circuit, however, has held that a conviction for aggravated assault under sections 13-1203(A)(2) and 13-1204(A)(2) of the Arizona Revised Statutes does categorically constitute a crime of violence under 18 U.S.C. § 16(a). *Cabrera-Perez*, 751 F.3d at 1007. As the respondent's offense qualifies as a crime of violence under 18 U.S.C. § 16(a), for which he was sentenced to 3.5 years in prison, we affirm the Immigration Judge's conclusion that the respondent is removable under section 237(a)(2)(A)(iii) of the INA, 8 U.S.C. § 1227(a)(2)(A)(iii), for having been convicted of an aggravated felony crime of violence. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.