FILED
United States Court of Appeals
Tenth Circuit

October 8, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

FRANCISCO BARRAGAN-PIEDRA,

Petitioner,

v.

MERRICK B. GARLAND,
United States Attorney General,

Respondent.

Nos. 20-9550 & 20-9612
(Petition for Review)

ORDER AND JUDGMENT*

Before **HARTZ**, **PHILLIPS**, and **EID**, Circuit Judges.

Francisco Barragan-Piedra, a native and citizen of Mexico, seeks review of orders issued by the Board of Immigration Appeals (BIA) that denied his motions to remand (Petition No. 20-9550) and reopen (Petition No. 20-9612) the immigration proceedings. Exercising jurisdiction under 8 U.S.C. § 1252(a)(5), we deny these consolidated petitions.

---

* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

BACKGROUND

Barragan-Piedra entered this country in January 2003 with a Form I-94 authorizing him to remain until June 2003.[1] He remained beyond that date and was charged in Colorado state court with possessing a schedule II controlled substance, driving under the influence (DUI), and operating a motor vehicle while his license was under restraint. In September 2004, he pled guilty to the DUI count and to an added count of possessing a schedule V controlled substance, a violation of Colorado Revised Statute § 18-18-405 (2004). He was placed on probation and left the United States.

Two months later, in November 2004, he returned on a nonimmigrant visitor's visa and did not leave when it expired in May 2005. Nearly eight years later, in April 2013, the Department of Homeland Security (DHS) served him with a notice to appear, charging him with overstaying his visa and having a controlled-substance conviction.

An Immigration Judge (IJ) conducted a hearing in July 2013. The IJ sustained the overstay charge but found that DHS failed to prove Barragan-Piedra's removability on the controlled-substance charge because there was no "official document [identifying] the substance." R., Pet. No. 20-9612, at 231. Next, the IJ concluded that Barragan-Piedra failed to show his conviction did not disqualify him from adjustment of status or cancellation of removal on the overstay charge. Consequently, the IJ ordered Barragan-Piedra removed to Mexico.

[1] An I-94 form "includes the collection of arrival/departure and admission or parole information by DHS" and "is made available to the person about whom the information has been collected." 8 C.F.R. § 1.4.

In January 2015, the BIA dismissed Barragan-Piedra's appeal because he did not show "his conviction is not a statutory bar to his cancellation application or that it does not render him inadmissib[le] for purposes of adjustment of status." *Id.* at 178. But the BIA remanded for the IJ to consider Barragan-Piedra's eligibility for voluntary departure. He did not seek judicial review.

On remand, Barragan-Piedra declined to seek voluntary departure and instead requested a continuance to collaterally attack his conviction in state court. The IJ denied the request and Barragan-Piedra appealed to the BIA.

While the appeal was pending, the Colorado Governor pardoned Barragan-Piedra in December 2018 for his controlled-substance conviction. He then moved to remand his case to the IJ, claiming he was now eligible for adjustment of status or cancellation of removal. The BIA denied the motion, concluding that the pardon did not affect his admissibility. Barragan-Piedra petitioned for judicial review (No. 20-9550).

While that petition was pending before this court, Barragan-Piedra filed in the BIA a motion to reopen. He argued that recent Tenth Circuit decisions show he is not inadmissible due to his controlled-substance conviction. The BIA denied the motion, stating that Barragan-Piedra "again has not demonstrated statutory eligibility for adjustment of status or cancellation of removal, given his controlled substance-related conviction, which renders him inadmissible." R., Pet. No. 20-9612, at 3. Barragan-Piedra petitioned for judicial review (No. 20-9612).

DISCUSSION

I. Motion to Remand (No. 20-9550)[2]

We review for abuse of discretion when the BIA denies a motion to remand. *Banuelos v. Barr*, 953 F.3d 1176, 1179 (10th Cir. 2020), *cert. denied*, 209 L. Ed. 2d 731 (2021). The BIA abuses its discretion if, among other things, it makes a legal error. *Id.*

The BIA did not err in denying Barragan-Piedra's motion to remand based on his pardon. It is true that convictions for crimes of moral turpitude, aggravated felonies, and high speed flight cannot serve as the basis for removal "if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States." 8 U.S.C. § 1227(a)(2)(A)(vi). But the statute has no effect on Barragan-Piedra's removability for overstaying his visa. Nor does it waive an alien's inadmissibility for a controlled-substance conviction, which is the impediment blocking Barragan-Piedra's

[2] The government argues we lack jurisdiction over Petition No. 20-9550 because Barragan-Piedra filed his petition for review over five years after the BIA in 2015 dismissed his appeal from the IJ's removal order and remanded for consideration of voluntary departure. The government relies on *Batubara v. Holder*, 733 F.3d 1040 (10th Cir. 2013), in which this court joined other circuits and held that a remand for voluntary-departure purposes does not extend the time for seeking review of a BIA order denying relief from removal. *Id.* at 1042-43. But *Batubara* does not apply here. Barragan-Piedra is not challenging the BIA's 2015 decision; rather, he is challenging the BIA's April 2020 decision denying his motion to remand based on his 2018 pardon. Barragan-Piedra conferred jurisdiction in this court by timely filing his petition for review after the BIA's decision denying remand. *See Vakker v. Att'y Gen.*, 519 F.3d 143, 147 (3d Cir. 2008) ("Certainly, orders denying motions to remand, like orders denying motions to reopen or reconsider, can qualify as independent final orders over which this court can, in appropriate circumstances, assume jurisdiction."); *see, e.g.*, *Banuelos v. Barr*, 953 F.3d 1176, 1179 (10th Cir. 2020), *cert. denied*, 209 L. Ed. 2d 731 (2021).

eligibility for adjustment of status and cancellation of removal, *see id.* § 1255(a) (conditioning eligibility for adjustment of status on, among other things, being "admissible to the United States for permanent residence"); *id.* § 1182(a)(2)(A)(i) (providing that an alien convicted of any law "relating to a [federal] controlled substance . . . is inadmissible"); *id.* § 1229b(b)(1)(C) (authorizing the Attorney General to cancel removal of an inadmissible alien who "has not been convicted of an offense under section 1182(a)(2)"). As other circuits have observed, "a full pardon for a controlled substance conviction [does not] extinguish[ ] the immigration consequences of that offense," *Aristy-Rosa v. Att'y Gen.*, 994 F.3d 112, 115 (3d Cir. 2021); *see, e.g.*, *Balogun v. U.S. Atty. Gen.*, 425 F.3d 1356, 1362 (11th Cir. 2005) (stating that § 1182 "does not have a pardon provision like section 1227 does, and . . . that if Congress had intended to extend the pardon waiver to inadmissible aliens, it would have done so").

Apparently recognizing the pardon-waiver statute's inapplicability, Barragan-Piedra argues the statute violates equal protection. We disagree.

"Th[e] guarantee of equal protection applies to the federal government through the Fifth Amendment Due Process Clause and provides that a statute shall not treat similarly situated persons differently unless the dissimilar treatment is rationally related to a legitimate legislative objective." *Jurado-Gutierrez v. Greene*, 190 F.3d 1135, 1152 (10th Cir. 1999). "Our review of immigration legislation is especially limited because over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." *Id.* (internal quotation marks omitted).

Barragan-Piedra first argues the statute violates equal protection by waiving removability but not inadmissibility. Although the pardon-waiver statute covers only removability, all aliens, whether removable or inadmissible because of a controlled-substance conviction, are excluded from the statute's coverage. Thus, the statute does not treat similarly situated aliens differently. *See Aguilera-Montero v. Mukasey*, 548 F.3d 1248, 1254 (9th Cir. 2008) (rejecting same "equal protection claim . . . because deportable aliens and inadmissible aliens with controlled substance convictions are similarly ineligible for a pardon-based waiver").

Next, Barragan-Piedra contends the statute violates equal protection by treating aggravated-felony convictions more favorably than convictions for minor, controlled-substance crimes. But "Congress could have rationally decided that controlled substance offenses warrant removal because of the impact such crimes have *on the entire community*." *Aristy-Rosa*, 994 F.3d at 116 (emphasis added). Moreover, we fail to see how Barragan-Piedra has standing to complain that the statute's benefit may accrue to aliens convicted of "more serious" crimes, Pet'r's Opening Br. at 32, given that he is both removable and inadmissible without regard to the comparative "seriousness" of his offense. Specifically, as noted above, he is removable for overstaying his visa and inadmissible, which the statute does not cover.

Finally, Barragan-Piedra suggests the statute treats presidential pardons more favorably than state pardons because Congress cannot constitutionally limit the presidential pardon power. In other words, he contends there is no limit to the type of conviction a president may pardon, but there is a limit (legitimately imposed by

Congress) to the type of conviction a governor may pardon. We need not address the merits of this suggestion, as Barragan-Piedra is not the recipient of a presidential pardon. *See Aristy-Rosa*, 994 F.3d at 117 (rejecting the same argument because "[t]hese separation of powers concerns are absent" where the alien's "case concerns only a state pardon, and a state does not have the authority to make immigration-law determinations" (internal quotation marks omitted)).

We conclude the BIA did not abuse its discretion in denying Barragan-Piedra's motion to remand.

II. Motion to Reopen

In his motion to reopen, Barragan-Piedra argued that this court's decisions in *United States v. McKibbon*, 878 F.3d 967 (10th Cir. 2017), and *United States v. Almanza-Vigil*, 912 F.3d 1310 (10th Cir. 2019), cast doubt on the BIA's initial inadmissibility determination. The BIA denied the motion, stating only that Barragan-Piedra had again failed to show he was eligible for relief given his controlled-substance conviction. We conclude the BIA did not abuse its discretion. *See Qiu v. Sessions*, 870 F.3d 1200, 1202 (10th Cir. 2017) (noting that orders denying reopening are reviewed for abuse of discretion).

To better understand the effect of *McKibbon* and *Almanza-Vigil* on Barragan-Piedra's eligibility for relief, we briefly recount the analysis applicable to whether Barragan-Piedra's 2004 Colorado conviction for possessing a controlled substance categorically "relat[es] to a [federally] controlled substance," 8 U.S.C. § 1182(a)(2)(A)(i)(II). First, the parties do not dispute that the 2004 Colorado

controlled-substance schedules include some drugs not on the federal schedules. That overbreadth requires an examination into whether § 18-18-405 is divisible, meaning that the statute lists potential offense elements in the alternative, and thus "comprises multiple, alternative versions of the crime." *Descamps v. United States*, 570 U.S. 254, 262 (2013). A divisible statute "renders opaque which element played a part in the defendant's conviction." *Id.* at 260.

Barragan-Piedra's statute of conviction provides that "it is unlawful for any person knowingly to manufacture, dispense, sell, distribute, *possess*, or to possess with intent to manufacture, dispense, sell, or distribute a controlled substance," Colo. Rev. Stat. § 18-18-405(1)(a) (2004) (emphasis added), and that a violation of subsection (1) constitutes a class 2, 3, 4, or 5 felony, or a class 1 misdemeanor, depending on which drug schedule lists the applicable controlled substance, *see id.* § 18-18-405(2)(a)(I)-(IV). "Th[is] statutory language suggests that the schedule of the controlled substance is an element, while the specific identity of the substance . . . is a means to satisfy that element." *Johnson v. Barr*, 967 F.3d 1103, 1108 (10th Cir. 2020) (emphasis and internal quotation marks omitted)); *see also Mathis v. United States*, 136 S. Ct. 2243, 2248, 2249 (2016) (explaining that elements are "the things the prosecution must prove to sustain a conviction," whereas means "merely . . . spell[ ] out various factual ways of committing some component of the offense"). Indeed, the alternative schedules in subsection (2)(a) "must be elements" because they "carry different punishments." *Mathis*, 136 S. Ct. at 2256. Consequently, § 18-18-405 is divisible because the drug schedules provide alternative versions of the crime.

"To determine exactly which offense in a divisible statute an individual committed, [the Supreme] Court has told judges to employ a modified categorical approach, reviewing the record materials to discover which of the enumerated alternatives played a part in the . . . prior conviction." *Pereida v. Wilkinson*, 141 S. Ct. 754, 763 (2021) (brackets and internal quotation marks omitted). Barragan-Piedra has taken a variety of positions regarding what the record materials show about the precise identity of his conviction. Before the IJ, his counsel argued—consistent with state court plea and sentencing records—that he pled guilty to possessing an unspecified Schedule V substance. In the BIA, he argued on appeal through different counsel that "the record of conviction is incomplete," and then later in his motion to reopen through current counsel he argued that *McKibbon* and *Almanza-Vigil* have changed the analysis of his "Schedule V" conviction. R., Pet. No. 20-9612 at 46, 198. Now, in his opening brief to this court, he claims the record shows he entered an *Alford* plea, which "indicates that he [was] unwilling or unable to admit that he, or anyone demonstrated that he, was guilty [of] possession of a schedule V substance." Pet'r's Opening Br. at 24-25.

We make two observations concerning these evolving strategies. First, Barragan-Piedra does not cite any portion of the record supporting his *Alford* plea characterization or showing where he raised that argument to the BIA, which did not address it even sua sponte. The argument is therefore unexhausted, as a petitioner "may not add new theories seriatim as the litigation progresses from the agency into the courts." *Garcia-Carbajal v. Holder*, 625 F.3d 1233, 1238 (10th Cir. 2010); *see also* Fed. R. App. P. 28(a)(8)(A) (requiring that an opening brief identify "appellant's contentions and the

reasons for them, with citations to the authorities and parts of the record on which the appellant relies").

Second, even if Barragan-Piedra's "conviction record[ ] fails to state which drug, if any, from Colorado Schedule V that [he] possessed," Pet'r's Opening Br. at 23, the Supreme Court has explained that (1) an alien bears the burden of "prov[ing] that his actual, historical offense of conviction" does not foreclose relief from removal, and (2) "evidentiary gaps . . . work against the alien seeking relief from a lawful removal order." *Pereida*, 141 S. Ct. at 763, 766. Barragan-Piedra has not shown that his controlled-substance conviction was not based on Colorado's schedule V. All drugs in that schedule are also contained in the federal schedules. *Compare* Colo. Rev. Stat. § 18-18-207 (2004) (buprenorphine, codeine, dihydrocodeine, ethylmorphine, diphenoxylate, opium, difenoxin, and pyrovalerone), *with* 21 C.F.R. § 1308.15 (2004) (codeine, dihydrocodeine, ethylmorphine, diphenoxylate, opium, difenoxin, and pyrovalerone), *and id.* § 1308.13(e)(2) (buprenorphine). Thus, Barragan-Piedra's conviction, if based on schedule V, categorically relates to a federal drug offense, rendering him ineligible for adjustment of status or cancellation of removal.[3]

[3] A panel of this court reached the same conclusion with respect to an alien's 1998 "Colorado conviction for possession of a Schedule V controlled substance," *Arellano v. Barr*, 784 F. App'x 609, 610 (10th Cir. 2019). Although *Arellano* is unpublished, this court in *Johnson* expressly endorsed its analysis. *See Johnson*, 967 F.3d at 1109, 1110. And although the *Johnson* court ultimately reached a result different than *Arellano*, it did so based on the 2016 version of Colorado's possession statute and because the particular Colorado drug schedule applicable in *Johnson* listed a drug not in the federal schedules, *Johnson*, 967 F.3d at 1105, 1109, rather than due to any disagreement with *Arellano*'s analysis or its conclusion that

Neither *McKibbon* nor *Almanza-Vigil* dictates a contrary conclusion. *McKibbon* involved a 2014 § 18-18-405 conviction for distribution of a controlled substance. This court determined the statute was indivisible insofar as it "does not provide different punishments depending on whether a defendant manufactured or distributed or offered to sell a controlled substance," 878 F.3d at 975-76. But *McKibbon* says nothing about whether the statute is divisible *based on the particular drug schedule*, which is the critical component of Barragan-Piedra's possession conviction.

Barragan-Piedra's reliance on *Almanza-Vigil* is also unavailing. There, this court held that while Almanza-Vigil's 2007 conviction for selling or distributing a controlled substance in violation of § 18-18-405 did not categorically qualify as an aggravated felony, it did qualify as a State law relating to a controlled substance, thereby rendering him ineligible for cancellation of removal. *Almanza-Vigil*, 912 F.3d at 1325. We fail to see how this holding helps Barragan-Piedra in any way.

CONCLUSION

We deny Barragan-Piedra's petitions for review.

Entered for the Court

Allison H. Eid
Circuit Judge

Arellano's Colorado conviction "categorical[ly] match[ed] . . . the federal schedule[s]," *Arellano*, 784 F. App'x at 613-14.