FILED
United States Court of Appeals
Tenth Circuit

August 23, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JUAN DEDIOS ARELLANO, a/k/a Juan De Dios Arellano-Valenzuela, a/k/a Juan De Dios Arellano,

Petitioner,

v.

WILLIAM P. BARR,* United States Attorney General,

Respondent.

No. 17-9544
(Petition for Review)

ORDER AND JUDGMENT**

Before **McHUGH**, **MORITZ**, and **EID**, Circuit Judges.

Petitioner Juan De Dios Arellano contends that the Board of Immigration Appeals (BIA) erred by affirming the Immigration Judge's (IJ) ruling that he is ineligible for cancellation of removal. The BIA affirmed the IJ because it agreed that Arellano's Colorado conviction for possession of a Schedule V controlled substance qualifies as a predicate offense under 8 U.S.C. § 1182(a)(2)(A)(i)(II). Concluding that the BIA

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* Pursuant to Fed. R. App. P. 43(c), we have substituted William P. Barr, current United States Attorney General, for Jefferson B. Sessions III, former United States Attorney General.

** This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

correctly determined Arellano is ineligible for cancellation of removal, we affirm.

I.

On April 15, 1991, Arellano, a citizen of Mexico, entered the United States without inspection. App. vol. 3 at 1115. Seven years later, on December 3, 1998, Arellano pleaded guilty to possessing a Schedule V substance (codeine) in violation of Colo. Rev. Stat. § 18-18-405(2)(d)(I). App. vol. 1 at 469, 473–88. Thirteen years after that, the Department of Homeland Security (DHS) initiated removal proceedings against Arellano. DHS contended that Arellano was removable because he is "present in the United States without being admitted or paroled." App. vol. 3 at 1115.

Arellano conceded that he was removable, App. vol. 2 at 524, but applied for cancellation of removal under 8 U.S.C. § 1229b(b), *id.* at 530–37. Arellano sought cancellation based on the hardship his deportation would work on his U.S.-citizen children. *Id.* DHS moved to pretermit Arellano's cancellation application because Arellano's conviction under Colo. Rev. Stat. § 18-18-405(2)(d)(I) "related to a [federal] controlled substance." App. vol. 1 at 203.

The IJ agreed with DHS and pretermitted the application. *See id.* at 50–54. The main issue the IJ considered was whether Arellano's Colorado conviction is a categorical match to the federal schedule of controlled substances. *See id.* The IJ applied the modified categorical approach and concluded that the actual substance—codeine—is an element of the offense. *See id.* at 53. Because codeine is a federal controlled substance, the IJ concluded, Arellano's conviction for possession of codeine categorically qualifies as a federal drug offense. *See id.*

Arellano appealed the adverse ruling to the BIA. *See id.* at 3–5. A single BIA member affirmed the IJ in a two-and-a-half-page order. *See id.* The BIA agreed with the IJ's conclusion that codeine is an element of the offense, and accordingly, dismissed Arellano's appeal. *See id.* Arellano now asks us to reverse the BIA.

II.

We affirm the BIA's order because Arellano's Colorado conviction for possession of codeine "relat[es] to a [federal] controlled substance."[1] As a result, it qualifies as a predicate offense under 8 U.S.C. § 1182(a)(2)(A)(i)(II). We review de novo the BIA's determination that Arellano's Colorado conviction qualifies as a predicate offense under 8 U.S.C. § 1182(a)(2)(A)(i)(II). *See Rodriguez-Heredia v. Holder*, 639 F.3d 1264, 1267 (10th Cir. 2011).

Generally, "[a]n alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible." 8 U.S.C. § 1182(a)(6)(A)(i). But

> [t]he Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien [meets certain requirements and] . . . has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5) . . . .

8 U.S.C. § 1229b(b)(1). An offense under section 1182(a)(2) is a crime of moral

[1] Arellano also contends that the BIA applied the wrong standard of review and that its use of a single BIA member to affirm the IJ was inconsistent with applicable regulations. Because we conclude under de novo review that the BIA reached the correct result on the merits, these arguments—even if they were correct—would not change the result we reach. Consequently, we do not address them.

turpitude or "a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21)." 8 U.S.C. § 1182(a)(2)(A)(i)(II).

To determine whether violation of a state law "relate[s] to a controlled substance (as defined in section 802 of Title 21)," we apply the categorical approach. *See Mellouli v. Lynch*, 135 S. Ct. 1980, 1984, 1987 (2015) (applying categorical approach to 8 U.S.C. § 1227(a)(2)(B)(i), an analogous provision with identical operative wording); *Zu-Chen Horng v. Lynch*, 658 F. App'x 415, 416 (10th Cir. 2016) (applying categorical approach to section 1182). Under the categorical approach, we consider whether the state statute is broader than the federal analogue. *Descamps v. United States*, 570 U.S. 254, 257 (2013). The statute is broader than the federal analogue if it criminalizes a wider range of activity. *See id.* State statutes that criminalize a wider range of activity are not categorical matches. *See id.* If, however, the state statute criminalizes less activity (or the same amount of activity), then it is a categorical match. *See id.*

The fact that the state statute criminalizes more activity than its federal analogue does not end our inquiry. In cases where the statute of conviction is divisible, i.e., it contains alternative elements, we determine the elements of the crime of conviction. *Id.* Once we have determined the elements of the crime of conviction, we consider whether those elements—not the other alternative elements listed in the statute—are a categorical match to the federal statute. To determine "which alternative formed the basis of the . . . conviction," we are permitted "to consult a limited class of documents, such as indictments and jury instructions." *Id.*

A statute is not divisible if it merely lists alternative means of satisfying an element. *Mathis v. United States*, 136 S. Ct. 2243, 2253 (2016). We must therefore determine whether alternative items in a statute are elements or means. *See id.* at 2256–57. "[Elements] are what the jury must find beyond a reasonable doubt to convict the defendant . . . . Facts, by contrast, are mere real-world things . . . . [T]hey need neither be found by a jury nor admitted by a defendant." *Id.* at 2248.

In making this determination, we generally look first to state law. *See id.* at 2256. Sometimes the state statute itself will answer the question. *See id.* Notably, "[i]f statutory alternatives carry different punishments, then under *Apprendi* they must be elements." *Id.* (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). Similarly, a state case may have answered the question. *See id.* at 2256 ("When a ruling of that kind exists, a sentencing judge need only follow what it says."). But if state law fails "to provide clear answers," we may take a "peek" at "the record of a prior conviction itself" for the "sole and limited purpose of determining whether [the listed items are] element[s] of the offense." *Id.* (citations and quotations omitted) (alterations in original).

Here, Arellano contends, and the government concedes, that Colorado has outlawed at least one substance that the federal government has not. Consequently, the Colorado schedule criminalizes a broader range of activity than the federal schedule. But the government contends that the different substances listed in the Colorado schedule are alternative elements and that the statute is divisible on that basis. Under the government's reading of the statute, possession of codeine, rather than possession of a controlled substance, was an element of Arellano's conviction. Codeine is listed on the

federal schedule of controlled substances. Thus, according to the government, possession of codeine, unlike possession of a controlled substance (which the government concedes is satisfied by possession of at least one substance that the federal government has not outlawed), does not sweep broader than the federal schedule. And because it does not sweep broader than the federal schedule, Arellano's Colorado conviction is a categorical match.

Arellano contends that this interpretation is incorrect. *See* Pet'r Br. at 21–22. According to Arellano, the statute is not divisible, and codeine was not an element of his conviction. Rather, codeine was a means of satisfying the "possession of a controlled substance" element. *See id.*

We find that the substance is not an element. But we also find, contrary to Arellano's argument, that the statute is divisible. The statute is divisible based on the schedule because, under the Colorado Uniform Controlled Substances Act of 1998, each of the five schedules generally carries a different offense level and penalty.

Mathis and *Apprendi* lead us to this conclusion. *Mathis* tells us that for purposes of the categorical approach elements are what the jury must necessarily find. *See Mathis*, 136 S. Ct. at 2248. And *Apprendi* tells us that when "statutory alternatives carry different punishments," those "alternatives" must be found by a jury. *Id.* at 2256 (citing *Apprendi*, 530 U.S. at 490). Together, *Matthis* and *Apprendi* tell us that if "statutory alternatives carry different punishments," they must be elements. *See id.* Here, because the schedules are "statutory alternatives [that] carry different punishments," they are elements.

Under this framework, we conclude that the substance is not an element. Unlike the schedules, which are "statutory alternatives [that] carry different punishments," the substances only carry different punishments if they fall in different schedules. For example, absent prior convictions, possession of buprenorphine and possession of codeine are both misdemeanors because they both fall within Schedule V. But possession of codeine and possession of cocaine are not both misdemeanors because cocaine falls within Schedule II and possession of a Schedule II substance is a felony. These two examples illustrate that the schedule the substance is listed in—not the substance itself—ultimately drives a court's determination of the offense level and imposition of the appropriate punishment. In other words, the schedule is the element the jury necessarily has to find under *Mathis* and *Apprendi*.

Arellano's arguments fail to convince us otherwise. Arellano looks to *People v. Abiodun*, 111 P.3d 462, 466 (Colo. 2005), for support. He contends that *Abiodun* stands for the proposition that Colo. Rev. Stat. § 18-18-405 is indivisible. But *Abiodun* did not address the issue in this case, i.e., whether the schedule is an element. *Abiodun* addressed whether the statute defines a single crime even though it prohibits both "possession" and "distribution" of a controlled substance. *See* 111 P.3d at 464. *Abiodun* held that a defendant cannot be charged separately for "possession" and "distribution" of a controlled substance when the defendant possessed and distributed the substance within

the same transaction, because the statute describes a single offense.[2] *See id.* at 468.

Having concluded that the statute is divisible because the schedules are alternative elements, we must consider an issue that the immigration courts did not: whether Arellano's conviction for possession of a Schedule V substance is a categorical match to the federal schedule of controlled substances. In other words, does the 1998 version of Schedule V list substances that the 1998 version of the federal schedule did not? In 1998, Colorado included buprenorphine, codeine, dihydrocodeine, ethylmorphine, diphenoxylate, opium, difenoxin, and pyrovalerone in its Schedule V. *See* Colo. Rev. Stat. § 18-18-207 (1998). All of these are in the 1998 federal schedule of controlled substances. *See* 21 C.F.R. § 1308.15 (1998). Arellano's Colorado conviction, therefore, is a categorical match to the federal schedule.

III.

For the reasons stated above, we conclude that Arellano's conviction relates to a federal drug offense and qualifies as a predicate under 8 U.S.C. § 1182(a)(2)(A)(i)(II).

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[2] The Tenth Circuit applied this decision in *United States v. McKibbon* and held that Colo. Rev. Stat. § 18-18-405(1)(a) is indivisible and overbroad compared to the sentencing guidelines. *See* 878 F.3d 967, 972, 974–75 (10th Cir. 2017). *McKibbon* is inapplicable for the same reason *Abiodun* is. *McKibbon*, like *Abiodun*, did not consider whether the statute was divisible based on the schedule. *See id.* Additionally, Arellano does not contend that section 18-18-405(1)(a)'s indivisibility on the basis of the action performed (e.g., possession versus distribution) renders it overbroad as compared to its federal counterpart. Consequently, we do not consider that issue. *Cf. United States v. Almanza-Vigil*, 912 F.3d 1310, 1319–23 (10th Cir. 2019) (holding section 18-18-405(1)(a) is broader than 8 U.S.C. § 1101(a)(43)(b) because section 18-18-405(1)(a) criminalizes offers to sell controlled substances, regardless of whether they are made with criminal intent, whereas section 1101(a)(43)(b) only covers offers to sell controlled substances that are made with criminal intent).

Accordingly, the BIA correctly concluded Arellano is ineligible for cancellation of removal. We **AFFIRM** the BIA and **DENY** the petition.

Entered for the Court

Allison H. Eid
Circuit Judge