U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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A[redacted]

Date of this notice: 12/6/2017

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:
Pauley, Roger

GilbeauR
Userteam: Docket

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

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: [redacted] - Tacoma, WA

Date: DEC - 6 2017

In re: Eh MOO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Camila Maturana, Esquire

ON BEHALF OF DHS: Kathleen W. Patrick
Assistant Chief Counsel

APPLICATION: Termination

The Department of Homeland Security ("DHS") appeals from an Immigration Judge's decision dated June 13, 2017, granting the respondent's motion to terminate proceedings.[1] In that decision, the Immigration Judge determined the DHS did not meet its burden to show by clear and convincing evidence that the respondent's 2012 Washington assault in third degree conviction constitutes a crime involving moral turpitude under section 237(a)(2)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(i). The appeal will be dismissed.

The Board reviews the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i) (2017). We review all other issues, including issues of law, discretion, or judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii) (2017).

On de novo review, we are not persuaded by the DHS's appellate arguments to disturb the Immigration Judge's decision to terminate these removal proceedings. We agree with the Immigration Judge's conclusion, as set forth in his well-reasoned decision, that applying the precedent decisions of the Board and the Ninth Circuit, the sexual motivation sentencing enhancement added to the respondent's conviction for the offense of assault in third degree in violation of RCW § 9A-36.031(1)(f) does not elevate a "categorically non-morally turpitudinous crime into a crime involving moral turpitude" (IJ at 9).

"Although the immigration statutes do not specifically define offenses constituting crimes involving moral turpitude, a crime involving moral turpitude is generally a crime that '(1) is vile, base, or depraved and (2) violates accepted moral standards" *Escobar v. Lynch*, 846 F.3d 1019, 1023 (9th Cir. 2017); *Hernandez-Gonzales v. Holder*, 778 F.3d 793, 801 (9th Cir. 2015); *see also Matter of Silva-Trevino III*, 26 I&N Dec. 826, 834 (BIA 2016) ("To involve moral turpitude, a crime requires two essential elements: reprehensible conduct and a culpable mental

[1] We acknowledge and appreciate the briefs submitted by the parties and by the amicus curiae representing the Washington Defender Association.

state."). As noted by the Immigration Judge, the Board and the Ninth Circuit, "have consistently held that simple assault cannot be a crime involving moral turpitude because it does not require the requisite evil intent or vicious motive" (IJ at 5). *See Uppal v. Holder*, 605 F.3d 712, 716 (9th Cir. 2010); *Matter of Solon*, 24 I&N Dec. 239, 241 (BIA 2007).

In *Matter of Tavdidishvili*, 27 I&N Dec. 142 (BIA 2017), we acknowledged that "moral turpitude inheres in crimes involving serious misconduct committed with at least a culpable mental state of recklessness—that is, 'a conscious disregard of a substantial and unjustifiable risk.'" *Id.* at 143-44 (citing *Matter of Franklin*, 20 I&N Dec. 867, 870 (BIA 1994) (holding that recklessly causing the death of another person was a crime involving moral turpitude), aff'd *Franklin v. INS*, 72 F.3d 571 (8th Cir. 1995). However, we also noted that "[b]y contrast, crimes committed with 'criminal negligence' are generally not morally turpitudinous, because neither 'intent' nor a 'conscious disregard of a substantial and unjustifiable risk' is required for conviction—that is, no sufficiently culpable mental state is necessary to commit such an offense." *Matter of Tavdidishvili*, 27 I&N Dec. at 144 (citing cases).

As noted by the Immigration Judge "[o]utside of the simple assault context, assault statutes, are reviewed under a totality of the circumstances approach, including a consideration of the level consciousness, resulting harm to the victim, and any other aggravating factors" (IJ at 5). Therefore, as moral turpitude entails a reprehensible act committed with an appreciable level of consciousness or deliberation, we addressed in *Matter of Perez-Contreras*, 20 I&N Dec. 615 (BIA 1992), the Washington State offense of assault in third degree in violation of RCW § 9A-36.031(1)(f)—the respondent's statute of conviction in this case—and held "that an assault committed with 'criminal negligence' under Washington law, which occurs "when the perpetrator 'fails to be aware of a substantial risk that a wrongful act may occur,' does not involve moral turpitude." *Id.* at 619 (citing RCW § 9A-36.031(1)(f)).

Thus, the respondent's Washington State conviction for assault in the third degree, standing alone, is not categorically for a crime involving moral turpitude. *See id.* at 617-20. However, we are not persuaded by the DHS's appellate arguments that the added sentencing enhancement of sexual motivation serves to elevate the mens rea necessary for a conviction for assault in third degree, *i.e*, criminal negligence, to now provide the requisite scienter for the offense to constitute a crime involving moral turpitude.[2] As noted by the Immigration Judge, in *Matter of Solon*, the Board held that where, as in this case, "no conscious behavior is required, there can be no finding of moral turpitude, regardless of the resulting harm" (IJ at 5). *See Matter of Solon*, 24 I&N Dec.at 242; *see also Ceron v. Holder*, 747 F.3d 773, 782-83 (9th Cir. 2014) (quoting and citing to the Board's reasoning in *Matter of Solon*).

"Sexual motivation," pursuant to the Washington State statutes, "means that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification," *See* RCW § 9.94A.030(48). While it is undisputed that the inclusion of sexual

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[2] Pursuant to the Washington State statutes, a person is criminally negligent or acts with criminal negligence when he fails to be aware of a substantial risk that a wrongful act may occur and his failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable man would exercise in the same situation. *See* RCW § 9A.08.010(d).

motivation is an element for purposes of analyzing the sentencing for the respondent's conviction, the addition of the sentencing enhancement of sexual motivation does not add an element of sexual conduct, sexual contact, or actual harm to the respondent's conviction for assault in the third degree. The inclusion of the sexual motivation allegation only serves to increase the punishment and requires only that it constitutes one of the purposes—not the only, primary, or substantial factor to be proven as influencing the respondent's conduct when committing the offense. Rather, in order to establish sexual motivation, the prosecution must present evidence of "some identifiable conduct during the course of the event," which establishes proof of sexual motivation. *See State v. Halstien*, 857 P.2d 270 (Wash. 1993). However, there is no requirement of criminal sexual conduct for the prosecution to obtain a sentencing enhancement of sexual motivation. *See id.* at 277-78 (holding the statute makes sexual motivation manifested by the defendant's conduct in the course of committing the offense an aggravating factor in sentencing).

As noted by the Immigration Judge, "acting for the purpose of one's own sexual gratification [or acting with a sexual motivation under the Washington State statutes] is not itself categorically morally turpitudinous conduct" (IJ at 8). Even though the Washington State legislature elected to increase the punishment for the offense of assault in third degree under RCW § 9A-36.031(1)(f), where one of the purposes of the illegal conduct is sexual gratification, the DHS has presented no evidence of any case law from the State of Washington or the Ninth Circuit in support of its contention that the addition of the sentencing enhancement alters the meaning of criminal negligence under RCW § 9A.08.010(d), or otherwise raises the mens rea of the offense as a whole, to establish the requisite scienter for finding a crime involving moral turpitude. *See, e.g., Hernandez-Gonzales v. Holder*, 778 F.3d at 804 (the court reasoned that "[t]he gang [sentencing] enhancement does not provide a sufficient 'evil intent' to transform an otherwise non-turpitudinous crime into one involving moral turpitude").

Therefore, we agree with the Immigration Judge that the sentencing enhancement of sexual motivation which was added to the respondent's conviction for the offense of assault in third degree in violation of RCW § 9A-36.031(1)(f) does not elevate the "categorically non-morally turpitudinous crime into a crime involving moral turpitude" (IJ at 9). As the respondent is not subject to removal as charged under section 237(a)(2)(A)(i) of the Act on that basis, the DHS's appeal of the Immigration Judge's decision to terminate these removal proceedings will be dismissed.

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

FOR THE BOARD