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##### MEMBER

NJ, NY & FL BARS

February 7, 2011

Immigration Consequences of Eluding NJSA 2C:29-2a(3)(b)

a crime of the third degree

I am of the opinion that Mr. Jones will NOT be subject to deportation should he be forced to pled guilty to NJSA 2C:29-2a(3)(b). I would however suggest that defense counsel ask the State to permit Mr. Jones to pled guilty to NJSA 2C:29-2a without any allocution regarding the flight.

Dear Mr. Attorney:

Thank you for referring the above defendant with respect to the immigration consequences of his pending New Jersey criminal violations. I appreciate the time that you and Mr. Jones have spent with me on the telephone and in my office.

Here are the relevant Federal Statutes regarding the deportation of foreign nationals:

(2) Criminal offenses

(A) General crimes

(i) *Crimes of moral turpitude*

Any alien who--

(I) is convicted of a crime involving moral turpitude committed within five years after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed,

is deportable.

(ii) *Multiple criminal convictions*

Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefore and regardless of whether the convictions were in a single trial, is deportable.

(iii) *Aggravated felony*

Any alien who is convicted of an aggravated felony at any time after admission is deportable. *A "crime of violence" is an* ***aggravated felony*** *ONLY if the defendant has been sentenced to one year of prison.*

A. AGGRAVATED FELONY

The first issue that we must explore is whether a conviction for eluding a police officer pursuant to NJSA 2C:29-2a(3)(b) constitutes an "Aggravated Felony" within the meaning of 8 U.S.C. § 1227(a) thereby mandating removal (deportation). In order to determine this, one must engage in the "categorical approach". This simply means that one must compare the elements of the N.J. Statute of Conviction to the Federal grounds of removal. The thrust of the analysis is that the Federal (deportation) crime must be similar to the NJ State statute of conviction (SOC). If the SOC encompasses criminal activity that is not prohibited by the Federal crime, then there is no "categorical" match and one must engage in the "modified categorical approach". This means the statute is divisible and one must look to the record of conviction to determine which section of the statute applies. Here, the most likely Federal (deportation) crime would be a "crime of violence":

Section 101(a)(43)(F) of the Immigration and Nationality Act defines an "aggravated felony" as "a crime of violence (as defined in section 16 of title 18, United States Code, but not

including a purely political offense) for which the term of imprisonment [is]

at least one year."

The term "crime of violence" is defined in 18 U.S.C. § 16

as:

(a) an offense that has as an element the use, attempted use, or threatened

use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a

substantial risk that physical force against the person or property of another

may be used in the course of committing the offense.

**NJSA 2C:29-2a(3)(b)**

Any person, while operating a motor vehicle on any street or highway in this State or any vessel, as defined pursuant to section 2 of P.L.1995, c . 401 (C.12:7-71), on the waters of this State, who knowingly flees or attempts to elude any police or law enforcement officer commits a crime of the third degree; except that, a person is guilty of a crime of the second degree if the flight or attempt to elude creates a risk of death or injury to any person. For purposes of this subsection, there shall be a permissive inference that the flight or attempt to elude creates a risk of death or injury to any person if the person's conduct involves a violation of chapter 4 of Title 39 or chapter 7 of Title 12 of the Revised Statutes.

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| --- | --- | --- |
| **NJSA 2C:29-2a(3)(b)**  **Statute of Conviction**  **(SOC)** | **GENERIC CRIME OF VIOLENCE**  **18 USC § 16 (a) OR (b)** | **REMARKS** |
| (1) Any person | 18 USC § 16(a)  (1) an offense that has as an element the use, attempted use, or threatened  use of physical force against the person or property of another  18 USC § 16(b)  (1) any other offense that is a felony and that, by its nature, involves a  substantial risk that physical force against the person or property of another may be used in the course of committing the offense.  Use of force in (b) must be intentional. Insufficient: strict liability, negligence and recklessness (where risk not recognized) | There is no element of use, attempted use or threatened use of physical force in our NJ SOC therefore this federal subsection is not applicable.  The SOC is a "felony"(Second Degree). In addition, if there is a violation of chapter 4 (we have several...reckless, improper passing, etc.), the flight creates a risk of death or injury. This could be interpreted as "a substantial risk that physical force" against the person may be used". How does one cause death or injury without some form of physical force?  However, the force must be intentional. |
| (2) while operating a motor vehicle |  |  |
| (3) who knowingly flees any police or law enforcement officer; or |  |  |
| (3) attempts to elude any police or law enforcement officer |  |  |
| (4) after having received any signal from such officer to bring the vehicle to a full stop |  |  |
| (5) there shall be a permissive inference that the flight or attempt to elude **creates a risk of death or injury** to any person if the person's conduct involves a violation of chapter 4 of Title 39 |  | The NJ SOC does not require intent to create a risk of death or injury. The use of force in 18 USC § 16(b) requires that it be intentional. Insufficient: strict liability, negligence and recklessness (where risk not recognized). |

The above analysis indicates that it is not evident that an individual who commits eluding necessarily disregards the substantial risk that, in the course of his eluding, he might be required intentionally to use physical force against a victim. Although Mr. Jones blew through several red lights and could have seriously injured someone, it is not evident that if he did injury someone that his actions would have been intentional. A defendant could be found guilty of the NJ eluding statute and never have placed persons or properties at risk of harm. Therefore, eluding is NOT an aggravated felony.

B. CRIME INVOLVING MORAL TURPITUDE

The second issue that we must explore is whether a conviction for eluding a police officer pursuant to NJSA 2C:29-2a(3)(b) constitutes a crime involving moral turpitude. The use of physical force or violence or other means that create a substantial risk of causing physical injury is a crime of the third degree. The use of a car is also a crime of the third degree.

To determine whether a conviction is for a crime involving moral turpitude, we must: (1) look to the statute of conviction under the categorical inquiry and determine whether there is a “realistic probability” that the State or Federal criminal statute pursuant to which the alien was convicted would be applied to reach conduct that does not involve moral turpitude; (2) if the categorical inquiry does not resolve the question, engage in a modified categorical inquiry and examine the record of conviction, including documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript; and (3) if the record of conviction is inconclusive, consider any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. Matter of Silva-Trevino, 24 I&N Dec. 687 (A.G. 2008).

Further, to qualify as a crime involving moral turpitude, a crime must involve both reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness. Id. The Immigration Courts and Immigration Board of Appeals have held that a criminal offense involves “moral turpitude” if the relevant statute defines the offense in such a manner that it necessarily entails conduct that is inherently base, vile, or depraved, and contrary to the accepted rules of morality and duties owed between persons or to society in general. Matter of Torres-Varela, 23 I&N Dec. 78, 83 (BIA 2001). In Matter of Louissaint, 24 I&N Dec. 754 (BIA 2009), the Board decided that the categorical approach for determining if a particular crime involves moral turpitude set forth in the Matter of Silva-Trevino requires the traditional categorical analysis, which was used by the United States Supreme Court in Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007), and includes an inquiry into whether there is a “realistic probability” that the statute under which the alien was convicted would be applied to reach conduct that does not involve moral turpitude.

In New Jersey, there have been convictions under NJSA 2C:29-2a(3)(b) that did not involve moral turpitude. State v. Mendez, 345 N.J. Super. 498 (App. Div. 2001). Mr. Mendez operated his motor vehicle 5 miles per hour during his flight as opposed to exceeding the speed limit. However, if we continue with the analysis and examine Mr. Jones's discovery, we find that moral turpitude may exist. Mr. Jones's conduct consisted of operating a motorcycle at a high rate of speed, disregard of several red traffic lights at different intersections, improperly passing vehicles while attempting to evade a patrol car that had activated its overhead lights and siren. He placed persons and properties at risk of harm while driving away from the officer...this has and can be viewed as "reprehensible conduct" which is the hallmark of moral turpitude.

However, there is good news. As indicated above, a deportation can result from a crime involving moral turpitude committed within five years after the date of admission. Mr. Jones has had his green card for many more years that 5 years. Secondly, any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefore and regardless of whether the convictions were in a single trial, is deportable. Mr. Jones has not been convicted of any prior violations. His record indicates that he received a diversionary program, namely the pre-trial intervention program. The charges were presumably dismissed and do not count.

Therefore, if (1) Mr. Jones is forced to pled guilty to NJSA 2C:29-2a(3)(b); and (2) the Newark Immigration Court view that conviction as a crime involving moral turpitude; and (3) he has had his been legally admitted to this county for more than 5 years; and (4) he has no prior convictions, he would not be subject to (i), (ii) or (iii):

*(i) Crimes of moral turpitude*

Any alien who--

(I) is convicted of a crime involving moral turpitude committed within five years after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed,

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*(iii) Aggravated felony*

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I am thus of the opinion that Mr. Jones will NOT be subject to deportation should he be forced to pled guilty to NJSA 2C:29-2a(3)(b). However, perhaps the State would be willing to have Mr. Jones pled guilty to NJSA 2C:29-2a without any allocution regarding the flight?

Thank you again for referring Mr. Jones to my office. Please contact me at the above number should you wish to discuss Mr. Jones's case further.

Very truly yours,

Ronald P. Mondello

RPM/cab

Enc.

cc: Joe Jones