

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
NEWARK, NEW JERSEY

File No.: **A** :
: **In Removal Proceedings**
:
:
Respondent. :
:

CHARGE: Section 237(a)(2)(A)(ii) Multiple Criminal Convictions
Section 212(a)(2)(A)(i)(I) Crime Involving Moral Turpitude [LODGED
CHARGE: added by Form I-261 filed on
11/2/2010]

APPLICATION: Motion to Terminate Proceedings

ON BEHALF OF RESPONDENT

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ON BEHALF OF DHS

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DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. Facts & Procedural History

, ("Respondent"), is a 50-year-old native and citizen of Trinidad and Tobago who adjusted his status to that of a conditional legal permanent resident ("LPR") under the Immigration and Nationality Act ("INA") § 245 on November 14, 1991. Respondent's status was adjusted to that of a lawful permanent resident (IR6) on September 8, 1993 under INA § 216. On January 27, 1997, Respondent was convicted in the Municipal Court in the City of Orange, New Jersey, for the offense of shoplifting in violation of N.J. Stat. Ann. § 2C:20-11. On April 18, 1997, Respondent was convicted in the New Jersey Superior Court in Essex County of endangering the welfare of a child in violation of N.J. Stat. Ann. § 2C:24-4a. These crimes did not arise out of a single scheme of criminal misconduct.

On May 12, 2010, the Department of Homeland Security ("DHS") served Respondent with a Notice To Appear ("NTA")(Exh. 1) containing the foregoing factual allegations and charging him with removability under INA § 237(a)(2)(A)(ii). Respondent was personally served the NTA on September 9, 2010. On September 20, 2010, Respondent appeared for an initial master calendar hearing without counsel, and so the matter was adjourned to give him the opportunity to retain counsel. On October 26, 2010, Respondent, through counsel, admitted the factual allegations in the NTA and denied the charge of removability contained in the NTA. On

the same day, Respondent filed a brief in support of a motion to terminate proceedings. The motion was accompanied by among other documents: a Judgment of Conviction (“JOC”) for endangering the welfare of a child dated April 18, 1997; transcript from Respondent’s plea hearing on February 24, 1997; letter indicating Respondent’s completion of probation dated August 7, 2007; disposition of Respondent’s conviction in violation of N.J. Stat. Ann. § 2C: 2C: 20-11 for shoplifting dated November 21, 2008; Respondent’s Memorandum of Creation of Record of Lawful Permanent Residence dated November 14, 1991; and sworn statement.

On November 2, 2010, DHS issued “Additional Charges of Inadmissibility/Deportability” charging Respondent with removability pursuant to INA § 212(a)(2)(A)(i)(I). A review of the taped record shows that Respondent denied the charge of removability and admitted the factual allegation that he was paroled into the U.S. at Newark, New Jersey, on or about May 23, 2010. The Court heard oral arguments regarding the issue of whether Respondent’s conviction for endangering the welfare of a child in violation of N.J. Stat. Ann. § 2C:24-4a is a crime involving moral turpitude (“CIMT”). On the same day, DHS submitted a memorandum of law in support of its position that Respondent is inadmissible pursuant to INA § 212(a)(2)(A)(i)(I). While the government conceded that Respondent’s conviction in violation of N.J. Stat. Ann. § 2C:20-11 fell under the petty offenses exception, it maintained that his conviction in violation of N.J. Stat. Ann. § 2C:24-4a for endangering the welfare of a child is a CIMT. The Court adjourned for a written decision.

II. Crimes Involving Moral Turpitude

To qualify as a CIMT, the Board of Immigration Appeals (“Board”) and the Third Circuit Court of Appeals have determined that an offense must involve “conduct that is inherently base, vile, or depraved, contrary to the accepted rules of morality and the duties owed other persons, either individually or to society in general.” Partyka v. Att’y Gen., 417 F.3d 408, 413 (3rd Cir. 2005); Matter of Olquin, 23 I&N Dec. 896, 896 (BIA 2006); Matter of Torres-Varela, 23 I&N Dec. 78, 83 (BIA 2001). Moral turpitude “contains an honesty component ... which includes conduct that is contrary to justice, honesty, or morality.” Smriko v. Ashcroft, 387 F.3d 279, 283 (3d Cir. 2004). Moral turpitude has also been defined as an act which is per se morally reprehensible and intrinsically wrong, or malum in se, so it is the nature of the act itself and not the statutory prohibition of it which renders a crime morally turpitudinous.

Neither the seriousness of the criminal offense nor the severity of the sentence imposed is determinative of whether a crime involves moral turpitude; it is the specific statute under which the conviction occurs that is controlling. Matter of Serna, 20 I&N Dec. 579 (BIA 1992); see also Matter of Khourn, 21 I&N Dec. 1041, 1044 (BIA 1997); Matter of Franklin, 20 I&N Dec. 867, 868-69 (BIA 1994). Moral turpitude also does not depend on whether the crime at issue is a felony or misdemeanor. Matter of Short, 20 I&N Dec. 136, 139 (BIA 1989).

(A) **Whether Shoplifting is a CIMT**

It has been well established and settled that theft crimes are CIMTs. Matter of Jurado-Delgado, 24 I& Dec. 29, 33 (BIA 2006); Matter of De La Nues, 18 I&N Dec. 140, 145 (BIA 1981); Matter of Bahta, 22 I&N Dec. 1381, 1391 (BIA 2000)(determining that the statutory phrase “theft offense” includes offenses “involving knowing receipt, possession, or retention of

property from its rightful owner" and not only the taking of property). In Matter of Jurado-Delgado, the Board determined that the offense of retail theft pursuant to title 18, section 3929(a)(1) of the Pennsylvania Consolidated Statute is a CIMT because the statute required proof that a person took merchandise offered for sale by a store without paying for it and with the intention of depriving a store owner of his goods. *Id.* at 33, 34. To determine whether there was an intention to permanently deprive the owner of his/her property, it is appropriate to consider the nature and circumstances surrounding the theft offense. Matter of Jurado-Delgado, *supra*.

(i) *Categorical Approach*

The Third Circuit Court of Appeals presumptively applies the categorical approach to look at the elements of the statutory offense to ascertain the least culpable conduct hypothetically necessary to sustain the conviction. Jean-Louis v. Att'y Gen., 582 F.3d 462, 471 (3d Cir. 2009)(rejecting the Board's interpretation set forth in Matter of Silva-Trevino, 24 I&N Dec. 687 (AG 2008)(emphasis added); Partyka v. Att'y Gen., 417 F.3d 408, 411 (3d Cir. 2005); *see also* Tran v. Gonzales, 414 F.3d 464, 481 (3d Cir. 2005).

A review of the New Jersey statute for shoplifting shows that it requires a person to purposely take possession, carry away, transfer, conceal, or alter merchandise without paying or with the intent to deprive the merchant of its value. See N.J. Stat. Ann. § 2C:20-11.¹ The

¹ N.J. Stat. Ann. § 2C:20-11 states:

Shoplifting shall consist of any one or more of the following acts:

- (1) For any person purposely to take possession of, carry away, transfer or cause to be carried away or transferred, any merchandise displayed, held, stored or offered for sale by any store or other retail mercantile establishment with the intention of depriving the merchant of the possession, use or benefit of such merchandise or converting the same to the use of such person without paying to the merchant the full retail value thereof.
- (2) For any person purposely to conceal upon his person or otherwise any merchandise offered for sale by any store or other retail mercantile establishment with the intention of depriving the merchant of the processes, use or benefit of such merchandise or converting the same to the use of such person without paying to the merchant the value thereof.
- (3) For any person purposely to alter, transfer or remove any label, price tag or marking indicia of value or any other markings which aid in determining value affixed to any merchandise displayed, held, stored or offered for sale by any store or other retail mercantile establishment and to attempt to purchase such merchandise personally or in consort with another at less than the full retail value with the intention of depriving the merchant of all or some part of the value thereof.
- (4) For any person purposely to transfer any merchandise displayed, held, stored or offered for sale by any store or other retail merchandise establishment from the container in or on which the same shall be displayed to any other container with intent to deprive the merchant of all or some part of the retail value thereof.
- (5) For any person purposely to under-ring with the intention of depriving the merchant of the full retail value thereof.

language of the statute evinces a degree of dishonesty and lack of consideration for the law since a person convicted therein must have the intent of depriving the rightful owner of property. See Da Rosa Silva v. INS, 263 F. Supp. 2d 1005, 1011 (D. Pa. 2003). On January 27, 1997, Respondent pled guilty to violating N.J. Stat. Ann. § 2C:20-11 and was ordered to pay a fine and costs in the amount of \$430. (See Resp't Sub. at Tab J; Resp't Cert. Oct. 25, 2010, at p. 4 ¶ 17). Under 8 C.F.R. § 1003.41(d), the Court considered Respondent's written testimonial, however, the Court did not rely on the extrinsic evidence gained from his statement to add to the record of conviction. See Matter of Pichardo, 21 I&N Dec. at 334-35 (finding it improper for the Immigration Judge to rely on extrinsic evidence to sustain deportability based on the alien's testimony on the incident underlying his weapons conviction); Matter of Roberts, 20 I&N Dec. 294 (BIA 1991)(finding it is well settled that neither the BIA nor the Immigration Judge is permitted to look behind the conviction record and re-litigate the ultimate question of the alien's guilt or innocence).

Specifically, Respondent described the incident that led to his conviction by stating that he "left the [Center Meats] store with the item [two pounds of goat meat] when [he] was approached by a plain clothes officer and told [he] did not pay for the item." (See Resp't Cert. Oct. 25, 2010, at p. 4 ¶ 16). Respondent's conduct corresponds with the presumption that purposely taking possession, carrying away, transferring, concealing merchandise of another is prima facie evidence of an intent to deprive. See N.J. Stat. Ann. § 2C:20-11. Based on the Board's conclusion in Matter of Jurado, 24 I&N Dec. 29 (BIA 2006), that a conviction for retail theft under Pennsylvania law requiring proof that the person took the merchandise offered for sale by a store without paying for it with the intention of depriving the store owner of the goods is a CIMT, the Court finds that the conduct for which Respondent was convicted constitutes a CIMT.

Notably, since the maximum penalty for his offense is a term of imprisonment of six months or less and his punishment entailed paying a \$350 fine (see Resp't Sub. at Tab J), his offense is a "petty offense" as defined in INA § 212(a)(2)(A)(ii)(II).

(B) Whether Endangering the Welfare of a Child is a CIMT

Respondent was also convicted on January 22, 1997 for the offense of endangering the welfare of a child in the third degree under N.J. Stat. Ann. § 2C:24-4a. N.J. Stat. Ann. § 2C:24-4a states:

a. Any person having a legal duty for the care of a child or who has assumed responsibility for the care of a child who engages in sexual conduct which would impair or debauch the morals of the child, or who causes the child harm that would make the child an abused or neglected child as defined in R.S. 9:6-1, R.S. 9:6-3 and

(6) For any person purposely to remove a shopping cart from the premises of a store or other retail mercantile establishment without the consent of the merchant given at the time of such removal with the intention of permanently depriving the merchant of the possession, use or benefit of such cart.

P.L. 1974, c. 119, § 1 (C. 9:6-8.21) is guilty of a crime of the second degree. Any other person who engages in conduct or who causes harm as described in this subsection to a child under the age of 16 is guilty of a crime of the third degree.

Id. (emphasis added).

(i) *Modified Categorical Approach*

When a statute is divisible, i.e. it encompasses crimes that constitute both removable and non-removable offenses, courts apply a modified categorical approach and look to the alien's record of conviction to determine whether he has been convicted of a crime involving moral turpitude. Matter of Sweetser, 22 I&N Dec. 709 (BIA 1999). Since the statute in question is disjunctive, this Court will use the modified categorical approach and consider Respondent's record of conviction. The record of conviction includes the record of indictment, the JOC, jury instructions, a signed guilty plea, or a plea transcript. Gonzales v. Duenas-Alvares, 549 U.S. 183, 193 (2007). In this case, the Court has been presented and will review the JOC dated April 18, 1997 (see Resp't Sub. at Tab G) and the transcript of plea hearing dated February 24, 1997 (Id. at Tab G).

On April 18, 1997, Respondent was convicted of endangering the welfare of a child under N.J. Stat. Ann. § 2C:24-4a in the third degree, sentenced to two years probation, fines and costs, and received credit for 6 days jail time. (See JOC, Apr. 18, 1997). The indictment charges that Respondent that "on or about the 1st day of November, 1995 and on or about the 3rd day of April, 1996 in the City of Orange in the County of Essex, did knowingly engage in sexual conduct which would impair or debauch the morals of S.T, age 5 years contrary to the provisions of N.J.S.A. 2C:24-4a." (See Indictment, Jan. 22, 1997; Resp't Sub. at Tab N). The transcript of the plea allocution further shows that Respondent stated the following: "I had been drinking and (child's name unintelligible) was upstairs messing around with the phone. I got mad and inappropriately touched her, disciplined her." (See Plea Transcript, Feb. 27, 2010 at p. 5, lines 21-24). The Court was satisfied that the foregoing allocution contained all the factual and legal elements necessary to sustain a binding and final judgment of Respondent's guilt under N.J. Stat. Ann. § 2C:24-4a. (Id. at p. 6, lines 3-5).

As the transcript of the plea hearing demonstrates, Respondent pled guilty and was convicted as a person "who causes the child harm that would make the child an abused or neglected child as defined in R.S. 9:6-1, R.S. 9:6-3 and P.L. 1974, c. 119, § 1 (C. 9:6-8.21)," which falls under the non-sexual subsection of N.J. Stat. Ann. § 2C:24-4a. An offense under this subsection is not categorically a CIMT because of the breadth of conduct which might sustain a conviction for this offense. Additionally, based on a review of the precedent case law, the dearth of law addressing convictions for endangering the welfare of a child under the non-sexual subsection of the statute, Respondent's JOC and plea hearing, the Court finds that the conduct for which Respondent was convicted does not contain the necessary characteristics of a CIMT, i.e. that it has "an honesty component." Smriko v. Ashcroft, 387 F.3d 279, 283 (3d Cir. 2004). And while undoubtedly frowned upon, this Court further finds that the conduct for which Respondent was convicted, that is, disciplining his stepdaughter, is not likely to be viewed as "inherently base, vile, or depraved, contrary to the accepted rules of morality and the duties owed

other persons, either individually or to society in general.” Matter of Olquin, 23 I&N Dec. 896, 896 (BIA 2006). While DHS maintains that “the conduct required to sustain a conviction under NJSA 2C:24-4, committed under such circumstances is certainly contrary to the accepted rules of morality and the duties owed between persons or to society in general,” the Court finds that such contention is overreaching when the specific conduct for which he was convicted is considered. (See DHS Memo, Nov. 2, 2010). As detailed above, the record of conviction contains no evidence that the actions taken by Respondent constitute a CIMT. Accordingly, this Court finds that the conduct underlying Respondent’s conviction for violating N.J. Stat. Ann. § 2C:24-4a does not constitute a CIMT.

Given that Respondent’s conviction for violating N.J. Stat. Ann. § 2C:20-11 falls under the petty offense exception and his conviction for violating N.J. Stat. Ann. § 2C:24-4a in the third degree is not deemed a CIMT, DHS has failed to meet its burden to establish by clear and convincing evidence that Respondent is removable pursuant to INA § 212(a)(2)(A)(i)(I) and the charge is not sustained.

ORDER

IT IS ORDERED that Respondent’s motion to terminate removal proceedings is granted.

11-23-2010
Date

Margaret Reichenberg
Margaret Reichenberg
Immigration Judge