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

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A[redacted] – Florence, AZ   Date: NOV 30 2018

In re: [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Philip L. Torrey, Esquire
Harry Larson & Joy Lee, Law Students

ON BEHALF OF DHS: Jeffery D. Lindsay
Assistant Chief Counsel

APPLICATION: Termination

The Department of Homeland Security ("DHS") appeals the Immigration Judge's [redacted], 2018, decision terminating removal proceedings against the respondent, a native and citizen of Mexico and a lawful permanent resident of the United States. *See* sections 237(a)(2)(B)(i) and 240(c)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1227(a)(2)(B)(i), 1229a(c)(3). The respondent submitted a brief opposing the appeal. The appeal will be dismissed.

We review 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). 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).

The Immigration Judge concluded that the respondent's 2016 conviction for attempted possession of narcotic drugs for sale under Ariz. Rev. Stat. Ann. § 13-3408 is categorically not for a controlled substance offense under section 237(a)(2)(B)(i) of the Act (IJ at 2-8). Specifically, the Immigration Judge concluded that the respondent's offense is both overbroad and indivisible as to the type of narcotic drug at issue (IJ at 2-8). On appeal, the DHS argues that the respondent's conviction is categorically for a controlled substance offense because the two substances not listed in the federal schedule, benzylfentanyl and thenylfentanyl, are sufficiently related to the substance fentanyl under the federal controlled substance schedule (DHS's Br. at 5-12). The DHS also argues in the alternative that Ariz. Rev. Stat. Ann. § 13-3408 is divisible as to the specific identity of the narcotic drug and that the respondent's record of conviction indicates that he was convicted of a federally-controlled substance (DHS's Br. at 12-21).

Upon our review, we affirm the Immigration Judge's conclusion that the respondent's 2016 conviction under Ariz. Rev. Stat. Ann. § 13-3408 is categorically not for a controlled substance offense under section 237(a)(2)(B)(i) of the Act. We also affirm the Immigration Judge's conclusion that Ariz. Rev. Stat. Ann. § 13-3408 is not divisible as to the identity of the narcotic drug because the different narcotic drugs are alternate means of committing a single crime rather than alternative elements of separate crimes.

Section 13-3408(A)(2) of the Arizona Revised Statutes is broader than section 237(a)(2)(B)(i) of the Act because Arizona's definition of "narcotic drugs" is broader than the federal definition of a "controlled substance" under the federal Controlled Substance Act, 21 U.S.C. § 812. *See* Ariz. Rev. Stat. Ann. § 13-3401(20)(n), (cccc) (benzylfentanyl and thenylfentanyl); *compare* Ariz. Rev. Stat. Ann. § 13-3401 *with* 21 U.S.C. § 802 (showing that the lists are otherwise the same). Thus, under the first step of the categorical approach, a conviction under Ariz. Rev. Stat. Ann. § 13-3408 does not qualify as a controlled substance offense under section 237(a)(2)(B)(i) of the Act.

DHS argues, however, that the two substances listed as narcotic drugs that are not included in the federal CSA schedule, benzylfentanyl and thenylfentanyl, are nevertheless sufficiently related to the federally-controlled fentanyl to make section 13-3408 a categorical match to a controlled substance offense under the Act. Specifically, the DHS argues that these substances are similar to the chemical structure of fentanyl, and that the "relating to" language in the controlled substance offense provision of the Act "broadens that section to cover offenses involving controlled substances other than those on the federal controlled substance schedules, provided there is a connection to a federally-controlled substance." (DHS's Br. at 8, 11).

Although the DHS cites *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015), in support of this contention, the United States Supreme Court's reasoning in that case forecloses this legal argument. Specifically, the Court stated that the historical background of section 237(a)(2)(B)(i) of the Act "demonstrates that Congress and the BIA have long required a direct link between an [applicant's] crime of conviction and a particular federally controlled drug," and that construction of section 237(a)(2)(B)(i) of the Act "must be faithful to the text, which limits the meaning of 'controlled substance,' for removal purposes, to the substances controlled under § 802 [of the CSA]." *Id.* at 1990-91.[1] We therefore conclude that the respondent's 2016 conviction under Ariz. Rev. Stat. Ann. § 13-3408 is not categorically for a controlled substance offense under section 237(a)(2)(B)(i) of the Act.[2]

We turn next to whether Ariz. Rev. Stat. Ann. § 13-3408 is divisible as to the specific identity of the narcotic drug criminalized such that a modified categorical inquiry is appropriate in this case. On its face, the language of section 13-3408 does not specify whether the identity of the narcotic drug which is possessed for sale is an "element" of the offense that must be proven beyond

[1] The DHS also contends that benzylfentanyl and thenylfentanyl were controlled substance analogues at the time of the respondent's conviction in 2016, and thus should be considered controlled substances for purposes of section 237(a)(2)(B)(i) of the Act (DHS's Br. at 8-10). However, because a "controlled substance analogue" is not a "controlled substance" under the CSA, it therefore does not trigger the controlled substance offense ground of removability. *See* 21 U.S.C. § 802(6), (32)(c)(i); section 237(a)(2)(B)(i) of the Act.

[2] Moreover, although not challenged by the DHS on appeal, there is a realistic probability that section 13-3408 could be used to prosecute conduct that does not constitute a controlled substance offense under the Act. *See Lorenzo v. Sessions*, 902 F.3d 930, 937 (9th Cir. 2018) (holding that there is a realistic probability of prosecution when "the mismatch between the federal and state statutes is apparent on the face of the statutes").

a reasonable doubt and a jury must unanimously agree on, or merely a "brute fact" about which a jury can disagree while still rendering a guilty verdict. *See Mathis v. United States*, 136 S. Ct. 2243 (2016); *Descamps v. United States*, 133 S. Ct. 2276 (2013). Likewise, a review of Arizona state law does not definitively answer whether section 13-3408 is divisible as to the identity of the narcotic drug.

The Arizona Supreme Court has held that the elements of possession of a narcotic drug for sale under section 13-3408 are the following: "1) exercise of dominion and control over the substance; 2) knowledge that the substance is present; 3) knowledge that the substance is a narcotic; and 4) possession of the substance for the purpose of sale." *State v. Salinas*, 887 P.2d 985, 987 (Ariz. 1994) (citing *State v. Arce,* 483 P.2d 1395, 1399 (Ariz. 1971)). Moreover, the relevant Arizona model jury instruction requires proof that "(l) the defendant knowingly possessed a narcotic drug; (2) the substance was in fact a narcotic drug; and (3) the possession must be for purposes of sale." Rev. Ariz. Jury Instructions (Criminal) 34.082 (4th ed.).[3] Thus, the relevant element could be interpreted as requiring only that the substance is a narcotic drug and not a further inquiry into the actual identity of the substance.[4] However, we are not convinced that these sources of state law definitively resolve the question of whether the identity of the narcotic drug is an element of section 13-3408. *See Mathis v. United States*, 136 S. Ct. at 2256.

The DHS cites to instances in which Arizona courts have upheld prosecutions under Arizona drug statutes where the defendant is convicted of multiple counts because he possessed different narcotic drugs (DHS's Br. at 13-15). *See, e.g., State v. Aikens*, 497 P.2d 835, 837, 843 (Ariz. Ct. App. 1972). Furthermore, in addressing a California drug statute, the United States Court of Appeals for the Ninth Circuit has held that a statute is divisible when "defendants are routinely subjected" to multiple convictions under a single statute for a single act as it relates to multiple controlled substances when "such convictions are recognized as separate crimes by the California Supreme Court." *United States v. Martinez-Lopez*, 864 F.3d 1034, 1040-41 (9th Cir. 2017) (en banc). Thus, although the DHS has demonstrated that defendants are routinely subjected to multiple convictions under section 13-3408 for multiple narcotic drugs from a single act, the Arizona Supreme Court has not recognized these convictions as separate crimes such that the identity of the narcotic drug may be deemed an element of section 13-3408.

The DHS also argues that given these prosecutions of multiple counts based on multiple narcotic drugs, the principles of double jeopardy require the identity of the narcotic drug to be an

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[3] We acknowledge that Arizona jury instructions are persuasive rather than binding authority. *See State v. Logan*, 30 P.3d 631, 633 (Ariz. 2001) (since 1996, Arizona jury instructions have been created by the bar association and do not bear the approval of the Arizona Supreme Court).

[4] In *State v. Prescott*, the Arizona Court of Appeals held that possession for sale of a dangerous drug under Ariz. Rev. Stat. § 13-3407(A), an offense that is similar to section 13-3408, is "one crime, regardless of whether the drug possessed or sold is methamphetamine, MOMA, or any other substance the statutes define as a dangerous drug," and that a "defendant is not entitled to a unanimous verdict on the precise manner in which the [offense] was committed." No. 1 CA-CR 15-0188, 2016 WL 611656, at *2 (Ariz. Ct. App. Feb. 16, 2016) (unpublished).

element under section 13-3408, because otherwise a defendant could be punished multiple times for the same underlying offense (DHS's Br. at 13-15). However, we are not convinced that the principles of double jeopardy, which are typically applied when a defendant is charged under different criminal statutes for the same underlying conduct and not when a defendant is charged with multiple counts of the same criminal statute, require the identity of the narcotic drug to be an element of section 13-3408. *See, e.g., State v. Eagle*, 992 P.2d 1122, 1126-27 (Ariz. Ct. App. 1998) (holding that double jeopardy is implicated only when the "same act or transaction" violates two distinct criminal statutes); *see also State v. Brown*, 177 P.3d 878 (Ariz. Ct. App. 2008) (holding that convictions for both sale and transfer of narcotics for each of the defendant's drug transactions violated his double jeopardy rights). Instead, this issue appears to be unresolved – to our knowledge the Arizona courts have not expressly ruled on whether multiple convictions under section 13-3408 for different narcotic drugs is a violation of double jeopardy principles.

When state law does not provide clear answers as to the divisibility of a statute, as is the case here, we may peek at the record of conviction for the sole and limited purpose of determining whether the listed items are elements of the offense. *See Mathis v. United States*, 136 S. Ct. at 2256-57. However, a peek at the record of conviction in this case is also inconclusive.

As argued by the DHS, the original count 39 of the respondent's indictment charged him with knowingly possessing heroin for sale (Exh. 2). *See Mathis v. United States*, 136 S. Ct. at 2256-57 (stating that an indictment could indicate, "by referencing one alternative term to the exclusion of all others, that the statute contains a list of elements, each one of which goes toward a separate crime."). However, the amended count 39 of the respondent's indictment charged him with attempted possession of narcotic drugs for sale, without specifying the identity of the narcotic drug (Exh. 2). The judgment further reflects that the respondent entered a guilty plea to this amended charge (Exh. 2). Thus, a peek at the respondent's record of conviction in this case does not definitively answer whether section 13-3408 is divisible. We therefore conclude that section 13-3408 is not divisible as to the identity of the narcotic drug. *See Lopez-Valencia v. Lynch*, 798 F.3d 863, 868-69 (9th Cir. 2015) (holding that "divisibility hinges on whether the jury must unanimously agree on the fact critical to the federal statute.").

In sum, we conclude that the respondent's conviction for attempted possession of narcotic drugs for sale under Ariz. Rev. Stat. Ann. § 13-3408 is categorically overbroad and indivisible as to the identity of the narcotic drug.[5] We therefore affirm the decision of the Immigration Judge and conclude that the DHS has not met its burden of establishing that the respondent's conviction constitutes a controlled substance offense under section 237(a)(2)(B)(i) of the Act. *See* section 240(c)(3) of the Act. Accordingly, the following order will be entered.

ORDER: The DHS's appeal is dismissed.

FOR THE BOARD

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[5] We note that the Ninth Circuit recently reached the same result in an unpublished decision. *Madrid-Farfan v. Sessions*, 729 Fed. App'x. 621 (9th Cir. 2018).