6-15-2023

Ricardo Gayle v. Attorney General United States of America

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-1811

RICARDO GAYLE,
Petitioner

v.

ATTORNEY GENERAL UNITED STATES OF AMERICA.

On Petition for Review of an
Order of the Board of Immigration Appeals
(Agency No. A056-493-021)
Immigration Judge: Pallavi Shirole

Argued on May 18, 2023

Before: GREENAWAY, JR., PHIPPS, and CHUNG, Circuit Judges.

(Opinion filed: June 15, 2023)

OPINION*

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* This disposition is not an opinion of the full Court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

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CHUNG, Circuit Judge.

Ricardo Gayle seeks review of a Board of Immigration Appeals ("BIA") decision ordering his removal and dismissing his appeal. The BIA found that the Immigration Judge ("IJ") correctly concluded that Gayle was removable as an aggravated felon. Since the BIA properly determined that Gayle's prior conviction is an aggravated felony for removability purposes, we will deny Gayle's petition for review.

I. Factual and Procedural History

Gayle is a Jamaican national. He was admitted to the United States as a permanent resident in 2003. In 2017, Gayle pleaded guilty to possessing with intent to distribute heroin in violation of N.J. Stat. Ann. ("N.J.S.A.") §§ 2C:35-5(a)(1) and based on the quantity and drug he possessed – over five ounces of heroin – that offense was graded as a crime of the first degree under N.J.SA. § 2C:35-5(b)(1).[1] In 2021, the

[1] N.J.S.A. §§ 2C:35-5(a)(1) and (b)(1) reads as follows:

> a. Except as authorized by P.L.1970, c. 226 (C.24:21-1 et seq.), it shall be unlawful for any person knowingly or purposely: (1) To manufacture, distribute or dispense, or to possess or have under his control with intent to manufacture, distribute or dispense, a controlled dangerous substance or controlled substance analog; or
>
> …
>
> b. Any person who violates subsection a. with respect to: (1) Heroin, or its analog, or coca leaves and any salt, compound, derivative, or preparation of coca leaves,

Department of Homeland Security ("DHS") issued a Notice to Appear charging Gayle as removable for being a noncitizen convicted of an aggravated felony and a controlled substance offense. The basis for the aggravated felony charge was Gayle's 2017 conviction. DHS later added a third ground of removability for being an individual convicted of two crimes involving moral turpitude. Gayle admitted to the allegations and conceded two charges of removability,[2] but challenged the charge of removability as an aggravated felon. He also filed applications for cancellation of removal, asylum, withholding of removal, and protection under the Convention Against Torture ("CAT"). The IJ sustained the aggravated felony charge, and Gayle appealed the IJ's decision to the BIA. The BIA affirmed the IJ's determination that Gayle's conviction was an aggravated felony rendering him removable under 8 U.S.C. § 1227(a)(2)(A)(iii) and dismissed the appeal.

Gayle timely petitioned this Court for review of the BIA's dismissal.

> and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, or analogs, except that the substances shall not include decocainized coca leaves or extractions which do not contain cocaine or ecogine, or 3,4-methylenedioxymethamphetamine or 3,4-methylenedioxyamphetamine, in a quantity of five ounces or more including any adulterants or dilutants is guilty of a crime of the first degree. The defendant shall, except as provided in N.J.S.2C:35-12, be sentenced to a term of imprisonment by the court. The term of imprisonment shall include the imposition of a minimum term which shall be fixed at, or between, one-third and one-half of the sentence imposed, during which the defendant shall be ineligible for parole. Notwithstanding the provisions of subsection a. of N.J.S.2C:43-3, a fine of up to $500,000 may be imposed[.]

[2] Gayle conceded that he was removable under the Immigration and Nationality Act ("INA") §§ 237(a)(2)(B)(i) (individual convicted of a controlled substance offense) and 237(a)(2)(A)(ii) (individual convicted of two crimes involving moral turpitude).

II. Legal Standard[3]

Our jurisdiction to review orders removing aggravated felons is limited to "constitutional claims [and] questions of law." 8 U.S.C. §§ 1252(a)(2)(C), (D). "When the BIA issues its own decision on the merits, rather than a summary affirmance, we review its decision, not that of the IJ." Chavez-Alvarez v. Att'y Gen., 783 F.3d 478, 482 (3d Cir. 2015) (quoting Syblis v. Att'y Gen., 763 F.3d 348, 352 (3d Cir. 2014)). Legal conclusions, including whether an offense constitutes an aggravated felony under the INA, are reviewed de novo. Darby v. Att'y Gen., 1 F.4th 151, 159 (3d Cir. 2021); Chavez-Alvarez, 783 F.3d at 482 (quoting Restrepo v. Att'y Gen., 617 F.3d 787, 790 (3d Cir. 2010)).

III. Analysis

Gayle contends that his prior conviction under N.J.S.A. § 2C:35-5 for possession cannot qualify as an aggravated felony under the INA because § 2C:35-5 is categorically overbroad insofar as it proscribes more conduct than its generic federal analogue.[4] Because we determine that Gayle's conviction is an aggravated felony under the INA, we

[3] The BIA had jurisdiction under 8 C.F.R. § 1003.1(b)(3). We have jurisdiction under 8 U.S.C. § 1252(a)(1). The Government notes that we do not have jurisdiction over the BIA's discretionary ruling that Gayle was ineligible for cancellation of removable. See Gov. Br. at 2–4 (citing 8 U.S.C. § 1252(a)(2)(C)). We agree and only exercise jurisdiction over the question of law presented, i.e., whether Gayle's offense constitutes an aggravated felony, pursuant to 8 U.S.C. § 1252(a)(2)(D).

[4] The BIA determined, and the parties do not contest, that the relevant federal analog is 21 U.S.C. §§ 841(a) and (b). See Wilson v. Ashcroft, 350 F.3d 377, 381 (3d Cir. 2003) (using 21 U.S.C. § 841(a)(1) as the appropriate comparator for N.J. Stat. § 2C:35 5(b)(11)).

will deny Gayle's petition.[5]

A. The Modified Categorial Approach

A noncitizen is statutorily removable and ineligible for cancellation of removal if convicted of an "aggravated felony." 8 U.S.C. § 1227(a)(2)(A)(iii); 8 U.S.C. § 1229b(b)(1). An aggravated felony includes crimes of "illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18)." 8 U.S.C. § 1101(a)(43)(B); see also Moncrieffe v. Holder, 569 U.S. 184, 188 (2013) (citing Lopez v. Gonzales, 549 U.S. 47, 60 (2006)). Courts employ the categorical approach to determine whether a noncitizen's conviction under state law qualifies as an aggravated felony. Moncrieffe, 569 U.S. at 190. Under the categorical approach, courts examine the proscribed conduct under state law and compare it to the conduct proscribed by the relevant federal analogue. Mathis v. United States, 579 U.S. 500, 505 (2016); Vurimindi v. Att'y Gen., 46 F.4th 134, 141–42 (3d Cir. 2022). If the state statute is broader than federal law, meaning it proscribes more conduct than its federal counterpart, a conviction under that statute does not qualify as an aggravated felony. Vurimindi, 46 F.4th at 142.

In assessing the state statute and the crime a petitioner is convicted of, courts employ a divisibility analysis. If the state statute consists of a single crime, then the

[5] Gayle also argues that the BIA erred in its reliance on In re Laguerre, 28 I. & N. Dec. 437 (B.I.A.2022) and failed to apply the proper framework to establish whether § 2C:35-5(b)(1) is divisible. We need not determine whether the BIA erred in relying on Laguerre, because we determine, based on de novo review, that § 2C:35-5 is divisible by type of controlled substance, an element of the statute.

statute is indivisible. Rosa v. Att'y Gen., 950 F.3d 67, 75 (3d Cir. 2020) (citing Mathis, 579 U.S. 500 at 505-06). This analysis is "straightforward" and requires a court to align the state statute elements with the generic offense. Mathis, 579 U.S. at 505. Some state statutes are divisible, however. These statutes define multiple crimes in subdivisions by listing alternative elements of a crime. Rosa, 950 F.3d at 75. When faced with divisible statutes, courts must "go an extra step" and employ a modified categorical approach to determine whether a noncitizen's conviction qualifies as an aggravated felony. Id. at 75 (citing Mathis, 579 U.S. at 505). Under the modified categorical approach, courts may examine a "limited class of documents … solely to determine under which portion of the statute and under which elements … the defendant was convicted." Id., 950 F.3d at 75. Once it is determined "what crime, with what elements, a defendant was convicted of" the court will then compare that crime with its federal analogue, that is, the relevant generic federal offense. Id. at 75-76 (citing Mathis, 579 U.S. at 505). If the offense of conviction is broader than its federal analogue, then the conviction does not qualify as an aggravated felony.

When a statute lists "elements in the alternative, and thereby define[s] multiple crimes," it is divisible by those elements. Mathis v. United States, 579 U.S. 500, 505 (2016). Elements are facts that must be found beyond a reasonable doubt by a unanimous jury or admitted by a defendant when he pleads guilty. Id. at 504. A statutory alternative subjecting a defendant to a higher punishment, is an element that must be found unanimously by a jury and the statute is divisible as to that element. Id. at 518.

B. The BIA Decision

In its review of the IJ's decision, the BIA first acknowledged that § 2C:35-5(b)(1) proscribes the possession of more controlled substances, and is hence broader, than its federal counterpart, 21 U.S.C. § 841(a)(1).[6] After de novo review, the BIA also found that § 2C:35-5(b)(1) is divisible because the type of a controlled substance is an element of § 2C:35-5(b)(1). Upon application of the modified categorical approach, the BIA determined that Gayle's conviction, which involved a federally controlled substance (heroin), is an aggravated felony. Accordingly, the BIA found that Gayle could not seek cancellation of removal and that he was ineligible for withholding of removal.

Gayle argues that the BIA erred in applying the modified categorical approach because under § 2C:35-5(b)(1), the listed controlled substances are merely ways one can violate the statute (i.e., means), not elements of the offense; therefore, the statute is not

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[6] Section 2C:35-5(b)(1) regulates "coca leaves and any salt compound, derivative, or preparation of coca leaves" but federal law specifically exempts a type of cocaine derivative, ioflupane. See Schedules of Controlled Substances: Removal of [123 I]Ioflupane from Schedule II of the Controlled Substances Act, 80 Fed. Reg. 54,715, 54,715 (Sept. 11, 2015).

The Government argues, for the first time on appeal, that New Jersey has "a unique statutory scheme that makes federal law the default for determining which substances it controls, absent an objection by the State"; therefore, even if the statute were not divisible, it would still categorically match federal law because "Ioflupane was not controlled by New Jersey at the time of Gayle's 2017 conviction given that it was removed from federal schedule in 2015." Gov. Br. at 14-15; see N.J. Stat. § 24:21-3(c); N.J. Admin Code § 13:45H-10.1(a)-(b); State v. Nicolas, 219 A.3d 1077, 1081 (N.J. App. Div. 2019). This argument was never presented to the BIA or the IJ, and we decline to consider it. See Argueta-Orellana v. Att'y Gen., 35 F.4th 144, 146 (3d Cir. 2022) (noting that this Court generally does not "consider the new arguments raised for the first time on appeal").

divisible by controlled substance. Gayle thus argues that, because § 2C:35-5(b)(1) regulates controlled substances that federal law exempts, § 2C:35-5(b)(1) is overbroad and requires us to conclude that Gayle's conviction cannot qualify as an aggravated felony. The Government disagrees and argues that the BIA correctly determined that § 2C:35-5(b) is divisible by controlled substance.

C. The Type of Controlled Substance is an Element of Offenses Charged under Sections 2C:35-5(a)(1) and (b)(1)

We agree with the Government that the type of a controlled substance is an element of § 2C:35-5(b)(1) for determining divisibility under the modified categorical approach.

Any fact that "increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," and therefore must be an element. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000); see also, Mathis, 579 U.S. at 518. Thus, when the "type of controlled substance involved …. increases the possible range of penalties, [it] is an element of the crime." United States v. Abbott, 748 F.3d 154, 159 (3d Cir. 2014); see also Apprendi, 530 U.S. at 521 (Thomas, J., concurring) (noting that if "a fact is by law the basis for imposing or increasing punishment … it is an element.").

Following Apprendi, we have recognized that when the type of controlled substance relates to grading, i.e., when it increases the punishment for the crime, it is an element of the offense. We have thus found that, under 21 U.S.C. §§ 841(a) and (b), drug type and quantity are elements for any offense charged with increased statutory

maximums. See, e.g., United States v. Lacy, 446 F.3d 448, 454 (3d Cir. 2006) ("[I]n this case, both the drug type and amount serve to increase the maximum statutory penalty, and must be treated as 'elements' of the offense."); United States v. Henry, 282 F.3d 242, 244 (3d Cir. 2002) (concluding that drug type was an element because it was "relevant to determining the statutory maximum"); United States v. Barbosa, 271 F.3d 438, 453, 458 (3d Cir. 2001).

Section 2C:35-5(b), like its federal analogue 21 U.S.C. § 841(b), imposes higher penalties depending on the type of controlled substance and quantity charged. See, e.g., § 2C:35-5(b)(1)-(2) (imposing statutory maximum sentences of 10 and 20 years for increasing quantities of heroin and cocaine); § 2C:35-5(b)(6)-(7) (imposing statutory maximum sentences of 10 and 20 years for increasing quantities of LSD and PCP); § 2C:35-5(b)(8)-(9) (imposing statutory maximum sentences of 10 and 20 years for increasing quantities of methamphetamine and phenyl-2-propanone (P2P)). Under §2C:35-5(b)(1), the subsection at issue for Gayle, a defendant is subject to an increased statutory maximum of 20 years if the quantity of heroin or cocaine involved is over 5 ounces.

Reading the statute as a whole reveals that each controlled substance is treated as its own element. Air Courier Conf. of Am./Int'l Comm. v. U.S. Postal Serv., 959 F.2d 1213, 1217 (3d Cir. 1992) ("We do not ... construe statutory phrases in isolation; we read statutes as a whole." (quoting United States v. Morton, 467 U.S. 822, 828 (1984)))); see also State v. Friedman, 209 N.J. 102, 117 (2012) ("We must, however, read the statute as a whole and not seize upon one or two words as a fixed guide to the meaning of the

entirety."). That is, an increased penalty is assigned to the level of harm the legislature ascribed to each controlled substance by quantity. See, e.g., § 2C:35-5(b) (imposing statutory maximum sentences of 20 years for offenses involving five ounces or more of heroin, cocaine, methamphetamine, and P2P; 100 milligrams or more of LSD; 10 grams or more of PCP; 25 pounds or more of marijuana; and five pounds or more of hashish). Although the drafters could have tracked the structure of 21 U.S.C. § 841(b) and grouped drugs by penalty (i.e. all first-degree offenses in one subsection), the drafters instead appear to have grouped drugs by type; e.g. common street drugs in subsections (b)(1)-(3), narcotics in subsections (b)(4)-(b)(5), psychedelics in subsections (b)(6)-(b)(7), amphetamines in subsections (b)(8)-(b)(9), and depressants in (b)(10).

Gayle takes the position, essentially, that because heroin and cocaine are addressed together in subsection (b)(1) and carry the same penalty for the same quantity possessed, they are means. We decline to join Gayle in elevating form over substance. As noted above, this grouping appears merely to reflect the drafters' decision to address drugs by type and, reading the statute as a whole, such groupings do not reflect a desire to treat grouped substances interchangeably as means. Indeed, Petitioner acknowledged at oral argument that LSD and PCP are elements, despite being listed in the *same* subsection. See, e.g., § 2C:35-5(b)(6) (prescribing 20-year maximum penalty for offenses involving 100 milligrams or more of LSD and 10 grams or more of PCP).

If we were to accept Gayle's argument that the controlled substances listed are merely means of committing the offense, we would be forced to endorse an outcome wherein a defendant would face a twenty-year statutory maximum – when he would

otherwise be acquitted entirely – based on a non-unanimous jury determination as to the appropriate substance. For example, if a defendant and four passengers were stopped in a car and one five-ounce package of heroin was found under the passenger seat and one five-ounce package of cocaine were found in the trunk, under Gayle's reading of the statute, a defendant could face a 20-year sentence based on only six jurors determining that he possessed the five ounces of heroin under the seat and only six jurors determining that he possessed the five ounces of cocaine in the trunk. At oral argument, Gayle acknowledged that this would result in an acquittal if the type of a controlled substance is an element under §2C:35-5(b)(1). Gayle nonetheless advocates for a position wherein this non-unanimous jury finding would expose a defendant to the statutory maximum penalty of twenty years.[7] This is inconsistent with the holding in Apprendi. Explicitly put, Gayle's position would expose defendants to statutory maximum punishments without unanimous findings by juries.

Resisting this conclusion, Gayle mainly relies on two state court cases, State v. Torres, 563 A.2d 1141 (N.J. Super. Ct. App. Div. 1989) and State v. Edwards, 607 A.2d 1312 (N.J. Super. Ct. App. Div. 1992), which he argues "show[] that the substances listed in (b)(1) are only means of committing the crime." Pet. Br. at 21, 21–28. But both cases

[7] And since Gayle does not argue that 2C:35-5(b) as a whole is indivisible (i.e., he does not argue that (b)(1) and (b)(8) are indivisible from each other), this reading of § 2C:35-5(b) seems particularly fraught when considering that under such reading the aforementioned hypothetical would result in a conviction when the packages contained heroin and cocaine, but an acquittal when the packages contained heroin and methamphetamine. See § 2C:35-5(b)(8) (20-year maximum sentence for offenses involving five ounces or more of methamphetamine).

fail to support Gayle's argument. Most significantly, both cases were decided pre-Apprendi, and the courts did not use the term "element" in the same way as Apprendi and Mathis. In both Torres and Edwards, the court analyzed whether drug type was an "element" in order to determine whether the state needed to prove the defendant's *knowledge* of the type of drug at issue; this is a substantively distinct analysis from the grading analysis under Apprendi.

When contemplating whether drug type must be proven beyond a reasonable doubt for grading purposes, however, the courts in both Torres and Edwards found that "the jury must find that defendant manufactured, distributed, dispensed or possessed the relevant quantity or quality of [controlled substance] by proof beyond a reasonable doubt." Torres, 563 A.2d at 1145; Edwards, 607 A.2d at 1314 (relying on Torres and noting that controlled substance is relevant for grading purposes). Thus, because a unanimous jury must agree on the type and quantity of controlled substance for grading purposes, those attributes must be elements under Apprendi. See Mathis, 579 U.S. at 518 ("If statutory alternatives carry different punishments . . . they must be elements.") (referencing Apprendi).

We find that the statute is therefore divisible by controlled substance for purposes of the categorical approach. Gayle's conviction involved heroin, a federally controlled substance,[8] so, his conviction matches the federal offense and is an aggravated felony.

[8] See 21 U.S.C. § 812(c), scheds. I(b)(10); 21 C.F.R. § 1308.11(c)(11).

IV. Conclusion

For the foregoing reasons, the BIA properly determined that Gayle's prior conviction under §§ 2C:35-5(a)(1) and (b)(1) is an aggravated felony rendering him removable and ineligible for cancellation of removal. We therefore deny Gayle's petition.