7-23-2019

Herold St. Pierre v. Attorney General United States

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

18-3280

HEROLD ST. PIERRE,
Petitioner

v.

ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA,
Respondent

On Petition for Review of an Order of the
Board of Immigration Appeals
(No. A038-763-897)
Immigration Judge: Honorable Leon A. Finston

Submitted Under Third Circuit L.A.R. 34.1(a)
July 9, 2019

Before: SHWARTZ, KRAUSE, and FUENTES, *Circuit Judges*

(Opinion filed: July 23, 2019)

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.

KRAUSE, *Circuit Judge.*

Herold St. Pierre, a citizen of Haiti, petitions for review of a decision by the Board of Immigration Appeals (BIA) ordering him removed based on his convictions for "two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct." 8 U.S.C. § 1227(a)(2)(A)(ii). Because the BIA properly applied its standard as to what constitutes a "single scheme," we will affirm.

I. Background

The incidents giving rise to St. Pierre's conviction occurred on the evening of April 18, 1996. At approximately 6:00 p.m., St. Pierre received a stolen vehicle, and then drove himself and two friends from Essex County, New Jersey to a mall about 40 miles away. At the mall, a police officer spotted St. Pierre sitting in the vehicle, which was parked in a fire zone, but when the officer approached, St. Pierre sped away. After driving around the facility, St. Pierre came back to the mall to pick up his friends. At approximately 9:00 p.m., the officer, after spotting the vehicle again and having headquarters run the license plate number, discovered the vehicle had been reported stolen. When he ordered the vehicle to stop, the car sped away a second time, striking and injuring the officer in the process. After reaching speeds of up to 100 miles per hour and running several red lights in his attempt to escape police, St. Pierre crashed into another automobile, killing its driver. After a jury trial, St. Pierre was convicted of, among other offenses, receiving a stolen vehicle in violation of N.J. Stat. Ann. § 2C:20-7 and aggravated manslaughter in violation of N.J. Stat. Ann. § 2C:11-4a.

As a result of these convictions, the Immigration and Naturalization Service, predecessor to the Department of Homeland Security (DHS), initiated removal proceedings. As relevant here, DHS eventually charged St. Pierre as removable under 8 U.S.C. § 1227(a)(2)(A)(ii), which provides that "[a]ny 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 therefor and regardless of whether the convictions were in a single trial, is deportable." The Immigration Judge (IJ) sustained the charge, concluding that St. Pierre's convictions for crimes involving moral turpitude (CIMTs), namely receiving a stolen vehicle and aggravated manslaughter,[1] did not "arise out of a single scheme." AR 159. The BIA affirmed, and this appeal followed.

II. Discussion[2]

St. Pierre argues that the BIA erred by (1) applying a categorical analysis, and (2) not applying its own circumstance-specific test to determine whether St. Pierre's CIMTs arose out of a single scheme. We address these arguments in reverse order as the BIA's

[1] St. Pierre does not contest that his convictions for receiving a stolen vehicle and aggravated manslaughter qualified as CIMTs.

[2] St. Pierre was ordered removed on the basis of 8 U.S.C. § 1227(a)(2)(A)(ii), and therefore, we have jurisdiction to review his petition only to the extent it raises constitutional claims or questions of law, 8 U.S.C. § 1252(a)(2)(D). Given the circumstance-specific analysis that applies to determining whether or not multiple CIMTs arise from a single scheme, our task is to decide whether "the facts found by the IJ (and that the BIA determines are not clearly erroneous) meet the legal requirements" for removal under § 1227(a)(2)(A)(ii). *Kaplun v. Att'y Gen.*, 602 F.3d 260, 271 (3d Cir. 2010). This is a question of law subject to de novo review. *See id.*

extensive discussion of the factual circumstances here makes apparent that it did not apply a categorical rule in this case.

First, the BIA's analysis demonstrates that it both acknowledged and applied the circumstance-specific test it endorsed in *Matter of Adetiba*, 20 I. & N. Dec. 506 (BIA 1992), and *Matter of Islam*, 25 I. & N. Dec. 637 (BIA 2011), to determine whether St. Pierre's CIMTs were part of a single scheme. Finding the BIA's interpretation of "single scheme" reasonable, we have accorded it *Chevron* deference. *See Chavez-Alvarez v. Att'y Gen.*, 850 F.3d 583, 587 (3d Cir. 2017) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844-45 (1984)).

The BIA has interpreted the phrase "arising out of a single scheme of criminal misconduct," 8 U.S.C. § 1227(a)(2)(A)(ii), to be satisfied either (1) "where one crime constituted a lesser offense of another," or (2) "where the two crimes flow from and are the natural consequence of a single act of criminal misconduct," *Adetiba*, 20 I. & N. Dec. at 509. For one crime to flow from another, "the scheme must take place at one time, meaning there must be no substantial interruption that would allow the participant to disassociate himself from his enterprise and reflect on what he has done." *Id.* at 509-10. The BIA has since explained that determining whether CIMTs are part of a "single scheme" is "a 'circumstance-specific' inquiry in which all relevant evidence may be consulted." *Islam*, 25 I. & N. Dec. at 641 (citation omitted).

In *Chavez-Alvarez*, we affirmed the BIA's conclusion that a petitioner's two convictions—for sodomy and for making false statements about whether he committed sodomy—did not arise out of a "single scheme" of criminal misconduct because,

although they took place only seven hours apart, the petitioner "had the opportunity to reflect on what he had done but chose—on two separate occasions—to make false statements denying his actions." 850 F.3d at 587. Noting that the petitioner had sufficient time to reflect, we upheld the BIA's ruling that "there was a substantial interruption of time between" the crimes to render them separate. *Id*.; *see also Szonyi v. Whitaker*, 915 F.3d 1228, 1231-32 (9th Cir. 2019) (holding that one man's sexual assaults on multiple women over a period of five to six hours were not part of a single scheme); *Akindemowo v. INS*, 61 F.3d 282, 283 (4th Cir. 1995) (holding that tendering two separate fraudulent checks in the same mall and during the same trip but at two different stores did not constitute a single scheme).

Here, too, the BIA properly concluded that St. Pierre's convictions did not arise from a "single scheme." Rather, consistent with and citing to *Matter of Adetiba* and *Matter of Islam*, it undertook a circumstance-specific analysis, recounting the specific facts of the case, and noting, in particular, the substantial interruption between St. Pierre's receipt of the stolen vehicle "earlier in the day" and the subsequent incident in which he crashed that vehicle. AR 4. The BIA further explained that "[t]he act of receiving stolen property is distinct from the subsequent flight from police" and even more attenuated from "[t]he resulting crash that killed a bystander." AR 4. From these specific circumstances, the BIA drew the conclusion that "[a]ggravated manslaughter is not the natural consequence of receiving a stolen automobile." AR 4. Thus, under its own precedent as well as that of our Court, the BIA properly concluded that St. Pierre's

crimes did not "aris[e] out of a single scheme of criminal misconduct." 8 U.S.C. § 1227(a)(2)(A)(ii).

That takes us to St. Pierre's second argument: that the BIA erred as a matter of law by invoking and applying a "categorical rule" at odds with the BIA's own standard. Pet'r's Br. at 17. As the foregoing discussion makes clear, that contention is belied by the BIA's opinion itself. In the context of its recitation and analysis of the facts underlying St. Pierre's convictions, the BIA's statement that "[a]ggravated manslaughter is not the natural consequence of receiving a stolen automobile," AR 4, reflects not a categorical rule, but that the two CIMTs were sufficiently attenuated by time and intervening events that they did not constitute a "single scheme." That was a faithful application of the BIA's own legal standard, *Islam*, 25 I. & N. Dec. at 641, and provides no basis for the relief that St. Pierre seeks.

III. Conclusion

For the aforementioned reasons, we will deny St. Pierre's petition for review.