APPENDIX A

847 Fed.Appx. 436
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Carlos Elias CRUZ-BERMUDEZ, aka
Carlos Elias Bermuda Cruz, aka Carlos Cruz
Bermudez, aka Carlos Elias Bermudez, aka
Carlos Elias Cruz Bermudez, aka Carlos
E. Cruz-Bermudez, Defendant-Appellant.

No. 19-50314
|
Submitted February 2, 2021 * Pasadena, California
|
FILED March 01, 2021

Synopsis

Background: Noncitizen who had been convicted of multiple felonies after being given temporary protected status while his appeal of his deportation was pending, and who subsequently was deported, re-entered United States, was charged with committing another crime, and moved to dismiss indictment based on alleged due process defects in prior removal proceeding. The United States District Court for the Central District of California, David O. Carter, J., denied noncitizen's motion. Noncitizen ultimately pleaded guilty to illegal re-entry. Noncitizen appealed.

Holdings: The Court of Appeals held that:

[1] noncitizen was not entitled to asylum;

[2] prior removal order was not fundamentally unfair; and

[3] noncitizen was precluded from challenging validity of prior removal order.

Affirmed.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

West Headnotes (3)

[1] Aliens, Immigration, and Citizenship Asylum, Refugees, and Withholding of Removal

Constitutional Law Asylum, refugees, and withholding of removal

Noncitizen who pleaded guilty to illegal re-entry was not entitled to asylum when he first entered United States without inspection, and thus his prior removal order, from which noncitizen had sought relief only on grounds of asylum, did not violate due process and did not prejudice noncitizen; noncitizen admitted to an immigration judge that he did not fear persecution or torture if he returned to his home country, and noncitizen had been convicted of two aggravated felonies by time when his immigration proceedings were resolved and he was deported. U.S. Const. Amend. 14; Immigration and Nationality Act § 276, 8 U.S.C.A. § 1326(d); Cal. Veh. Code § 10851.

[2] Aliens, Immigration, and Citizenship Denial of Admission and Removal

Aliens, Immigration, and Citizenship Asylum, Refugees, and Withholding of Removal

Constitutional Law Admission and exclusion; deportation

Noncitizen's prior removal order was not fundamentally unfair, did not violate due process, and did not prejudice noncitizen, although he had been given temporary protected status while his appeal of his deportation was pending; noncitizen's temporary protected status properly terminated due to his convictions for two aggravated felonies, immigration judge properly and fully complied with Board of Immigration Appeals' (BIA) remand, and noncitizen failed to show that he would have

been granted asylum or any other form of deportation relief, for which he was ineligible. U.S. Const. Amend. 14; Immigration and Nationality Act § 276, 8 U.S.C.A. § 1326(d).

[3] **Aliens, Immigration, and Citizenship** Exhaustion of remedies in general

Aliens, Immigration, and Citizenship Right of review or intervention; standing

Noncitizen who pleaded guilty to illegal re-entry was precluded from challenging validity of prior removal order; noncitizen failed to demonstrate that he exhausted his administrative remedies or that his immigration proceeding denied him judicial review, and noncitizen, at a hearing on his prior immigration proceedings, had made a waiver of his right to appeal removal order that was considered, intelligent, and made with actual knowledge of his right to appeal. Immigration and Nationality Act § 276, 8 U.S.C.A. §§ 1326(d)(1), 1326(d)(2).

***437** Appeal from the United States District Court for the Central District of California, David O. Carter, District Judge, Presiding, D.C. No. 8:18-cr-00247-DOC-1

Attorneys and Law Firms

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Marisa Conroy, Law Office of Marisa L. D. Conroy, Encinitas, CA, for Defendant-Appellant

Before: GOULD, LEE, and VANDYKE, Circuit Judges.

MEMORANDUM **

In 1998, Carlos Elias Cruz-Bermudez ("Cruz") entered the United States without inspection. He was placed in immigration proceedings and ordered deported. Cruz appealed, and while the appeal was pending, he was given Temporary Protected Status ("TPS"). From 2003 to 2005, Cruz was convicted of multiple felonies. Cruz's immigration proceedings were reinstated in 2007, and he was again ordered deported. Cruz also waived his right to file a second appeal.

Cruz re-entered the United States without inspection and in 2018 committed still another crime. He was then federally prosecuted, and he pleaded guilty to re-entering the United States in violation of 8 U.S.C. § 1326. Cruz filed a motion to dismiss the indictment, and the motion was denied by the district court. As part of his plea agreement, Cruz could appeal the district court's denial of his motion to dismiss the indictment based on what Cruz alleged to be due process defects in the prior removal proceeding. This appeal followed.

We review the denial of a § 1326(d) motion *de novo*, but the underlying findings of fact are reviewed for clear error. *United States v. Sandoval-Orellana*, 714 F.3d 1174, 1178 (9th Cir. 2013). The Court also reviews *de novo* the determination of whether a prior conviction is an aggravated felony. *United States v. Bonilla-Montenegro*, 331 F.3d 1047, 1049 (9th Cir. 2003).

To determine whether convictions are aggravated felonies at the time of the 2007 hearing, we employ the two-part test set forth in *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990). In the first step, called the "categorical approach," an offense is an aggravated felony if, on the face of the statute of conviction, "the full range of conduct covered ... falls within the meaning of [an aggravated felony]." *Penuliar v. Gonzales*, 435 F.3d 961, 966 (9th Cir. 2006) (citation omitted), *cert. granted, judgment vacated*, ***438** 549 U.S. 1178, 127 S.Ct. 1146, 166 L.Ed.2d 992 (2007). But if the statute of conviction reaches both conduct constituting an aggravated felony and conduct that would not do so, we employ the second step, called the "modified categorical approach." *Id.*

When charged with illegal reentry under 8 U.S.C. § 1326, a defendant has a limited right to bring a collateral attack challenging the validity of his underlying removal order. *See*

United States v. Ubaldo-Figueroa, 364 F.3d 1042, 1047–48 (9th Cir. 2004). To succeed under 8 U.S.C. § 1326(d), a defendant must demonstrate that: (1) he "exhausted any administrative remedies that may have been available to seek relief against the order"; (2) "the deportation proceedings at which the order was issued improperly deprived [him] of the opportunity for judicial review"; and (3) "the entry of the order was fundamentally unfair." 8 U.S.C. § 1326(d).

To satisfy the third requirement, a defendant must establish both (1) a violation of his due process rights from defects in the underlying removal proceeding, and (2) prejudice flowing from those defects. *Ubaldo-Figueroa*, 364 F.3d at 1048. Further, the defendant has the burden to prove prejudice under § 1326(d)(3). *United States v. Gomez*, 757 F.3d 885, 898 (9th Cir. 2014). To meet his burden, an alien must demonstrate it was " 'plausible' that he would have received some form of relief from removal had his rights not been violated in the removal proceedings." *Id.* (citation omitted). A showing of plausibility requires a showing greater than "mere possibility or conceivability." *United States. v. Valdez-Novoa*, 780 F.3d 906, 915 (9th Cir. 2015) (citations omitted). To demonstrate prejudice, an alien must show that he is not barred from receiving relief. If he is barred from receiving relief, his claim is not plausible. *Gomez*, 757 F.3d at 898.

For the following reasons, we affirm Cruz's conviction. First, even if Cruz could satisfy the procedural requirements of § 1326(d)(1) and (2), his arguments are incorrect because his removal order was not fundamentally unfair. Cruz's only basis for relief from removal, which he sought in his removal proceeding and in the district court, was asylum. Both the IJ and district court properly held that Cruz was not entitled to asylum.

[1] There are two reasons for this. First, Cruz did not demonstrate a credible fear of persecution or torture. *See Mejia v. Ashcroft*, 298 F.3d 873, 879 (9th Cir. 2002). He told the IJ that he did not fear persecution or torture if returned to El Salvador. Second, by 2007, Cruz had been convicted of two aggravated felonies. One would have been enough to disqualify him for asylum. The district court properly concluded that Cruz's car theft convictions under California Vehicle Code § 10851 were aggravated felonies. Because Cruz did not qualify for asylum, there was no due process violation, and thus no prejudice.

[2] Second, Cruz has not shown any fundamental unfairness. Cruz's TPS was properly terminated due to his felony convictions. The IJ properly and fully complied with the BIA's remand. Finally, Cruz was ineligible for other forms of deportation relief. The IJ's actions did not constitute due process violations. Also, Cruz did not suffer prejudice. None of Cruz's arguments persuasively show that he would have been granted asylum or any of the other forms of relief.

[3] Finally, Cruz cannot satisfy the requirements of § 1326(d)(1) or (2), because Cruz did not demonstrate that he exhausted his administrative remedies, and that his immigration proceeding denied him judicial review. Cruz waived his right to ***439** appeal the removal order at his 2007 immigration hearing. Further, this waiver was considered, intelligent, and made with actual knowledge of his right to appeal.

AFFIRMED.

All Citations

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Footnotes

* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

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APPENDIX B

United States Code Annotated
Title 8. Aliens and Nationality (Refs & Annos)
Chapter 12. Immigration and Nationality (Refs & Annos)
Subchapter II. Immigration
Part VIII. General Penalty Provisions

8 U.S.C.A. § 1326

§ 1326. Reentry of removed aliens

Effective: September 30, 1996
Currentness

(a) In general

Subject to subsection (b), any alien who--

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under Title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a), in the case of any alien described in such subsection--

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both;

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under Title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence. [1] or

(4) who was removed from the United States pursuant to section 1231(a)(4)(B) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under Title 18, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

(c) Reentry of alien deported prior to completion of term of imprisonment

Any alien deported pursuant to section 1252(h)(2)[2] of this title who enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be incarcerated for the remainder of the sentence of imprisonment which was pending at the time of deportation without any reduction for parole or supervised release. Such alien shall be subject to such other penalties relating to the reentry of deported aliens as may be available under this section or any other provision of law.

(d) Limitation on collateral attack on underlying deportation order

In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) unless the alien demonstrates that--

(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;

(2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.

CREDIT(S)

(June 27, 1952, c. 477, Title II, ch. 8, § 276, 66 Stat. 229; Pub.L. 100-690, Title VII, § 7345(a), Nov. 18, 1988, 102 Stat. 4471; Pub.L. 101-649, Title V, § 543(b)(3), Nov. 29, 1990, 104 Stat. 5059; Pub.L. 103-322, Title XIII, § 130001(b), Sept. 13, 1994, 108 Stat. 2023; Pub.L. 104-132, Title IV, §§ 401(c), 438(b), 441(a), Apr. 24, 1996, 110 Stat. 1267, 1276, 1279; Pub.L. 104-208, Div. C, Title III, §§ 305(b), 308(d)(4)(J), (e)(1)(K), (14)(A), 324(a), (b), Sept. 30, 1996, 110 Stat. 3009-606, 3009-618 to 3009-620, 3009-629.)

Footnotes

1 So in original. The period probably should be a semicolon.

2 So in original. Section 1252 of this title, was amended by Pub.L. 104-208, Div. C, Title III, § 306(a)(2), Sept. 30, 1996, 110 Stat. 3009-607, and as so amended, does not contain a subsec. (h); for provisions similar to those formerly contained in section 1252(h)(2) of this title, see 8 U.S.C.A. § 1231(a)(4).

8 U.S.C.A. § 1326, 8 USCA § 1326

Current through PL 117-26 with the exception of PL 116-283, Div. A, Title XVIII, which takes effect January 1, 2022.

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