Beckford v. MukaseyA38-581-571

308 Fed.Appx. 556 (2009) | Cited 0 times | Second Circuit | February 2, 2009

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to summary orders filed after January 1, 2007, is permitted and is governed by this court's Local Rule 32.1 and Federal Rule of Appellate Procedure 32.1. In a brief or other paper in which a litigant cites a summary order, in each paragraph in which a citation appears, at least one citation must either be to the Federal Appendix or be accompanied by the notation: "(summary order)." A party citing a summary order must serve a copy of that summary order together with the paper in which the summary order is cited on any party not represented by counsel unless the summary order is available in an electronic database which is publicly accessible without payment of fee (such as the database available at http://www.ca2.uscourts.gov/). If no copy is served by reason of the availability of the order on such a database, the citation must include reference to that database and the docket number of the case in which the order was entered.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 2nd day of February, two thousand and nine.

PRESENT: HON. ROGER J. MINER, HON. SONIA SOTOMAYOR, HON. ROBERT A. KATZMANN, Circuit Judges,

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, AND DECREED that the petition for review of a decision of the Board of Immigration Appeals ("BIA") is GRANTED, the decision of the BIA is VACATED, and the case is REMANDED for further proceedings consistent with this summary order.

Joel B. Beckford seeks review of a January 10, 2008 decision of the BIA finding him ineligible for cancellation of removal under section 240A of the Immigration and Nationality Act ("INA"), and denying him voluntary departure under section 240B of the INA, on the ground that he had previously been convicted of New York State law offenses that qualify as "aggravated felonies" for immigration purposes. We assume the parties' familiarity with the underlying facts, the case's procedural history, and the issues on appeal.

Since oral argument was heard in this appeal, two other panels of this Court have published opinions addressing the central issues in this case. The parties have submitted letter briefs regarding each of

these decisions, and the government has withdrawn its argument that Beckford should be considered an aggravated felon pursuant to the recidivist possession provision of the Controlled Substances Act ("CSA"), 21 U.S.C. § 844(a), in light of this Court's decision in Alsol v. Mukasey, 548 F.3d 207, 216--17 (2d Cir. 2008) (holding a second simple drug possession under New York law is not an aggravated felony for purposes of the INA unless recidivist status is admitted in guilty plea or found by court or jury in prosecution for second or subsequent offense).

Reviewing de novo, see Mugalli v. Ashcroft, 258 F.3d 52, 55--56 (2d Cir. 2001) (reviewing BIA interpretations of criminal laws de novo "because the BIA is not charged with administration of these laws" (quotation marks omitted)), we conclude that Beckford's convictions, by plea of guilty, for criminal sale of marijuana in the fourth degree in violation of New York State Penal Law section 221.40 do not constitute aggravated felonies because the CSA contains a "mitigating exception" that "punishes distribution of a small amount of marihuana for no remuneration as a misdemeanor, see 21 U.S.C. § 841(b)(4)," Martinez v. Mukasey, -- F.3d --, No. 07-3031-ag, 2008 WL 5248177, at *1 (2d Cir. Dec. 18, 2008) (quotation marks omitted).

We are not persuaded that Martinez can be distinguished, as the government contends, on the basis that Beckford actually committed a sale for remuneration and therefore would not have qualified for the mitigating exception under the CSA. The government relies upon an affidavit by a police officer stating that an undercover officer purchased marijuana from Beckford in exchange for U.S. currency. But the IJ refused to accept that document into the administrative record upon which we must base our decision, 8 U.S.C. § 1252(b)(4)(A), because it was submitted after the government had expressly rested on its evidence of removability. The government has not challenged that determination or presented any other basis by which we might consider the document now.

Even if we could consider the document, we would reject it as inconclusive because it is not clear whether the document is the instrument by which Beckford was charged and to which he pled guilty, or if it is merely an affidavit offered to the state court in support of charges against Beckford. Cf. Shepard v. United States, 544 U.S. 13, 20--23 (2005) (rejecting, in sentencing context, argument that court applying modified categorical approach should be permitted to look "beyond conclusive records made or used in adjudicating guilt," such as transcript of plea colloquy or written plea agreement in cases involving convictions by plea). The header of the document is partially obscured, and the document is not referenced in the state court "certificate of disposition" for the charges against Beckford to which the government has also cited. The government has offered no explanation of the document's role in Beckford's record of conviction and has not identified any other item in the record of conviction showing that Beckford admitted in his guilty plea to engaging in a sale for remuneration as opposed to distribution without remuneration. Nor does either of the documents suggest that Beckford's conviction would not qualify for the mitigating exception of the CSA on the ground that it involved distribution of more than a "small amount" of marijuana. 21 U.S.C. § 841(b)(4). Finally, the other crimes with which Beckford was charged were simple possessory crimes, which are not aggravated felonies absent a finding of recidivism. Alsol, 548 F.3d at 216--17.

For the reasons stated above, we conclude that Beckford's convictions under state law are not aggravated felonies for purposes of the INA and that he therefore is not ineligible for cancellation of removal on that ground. Accordingly, we GRANT the petition for review, VACATE the decision of the BIA, and REMAND the case for further proceedings consistent with this summary order.

1. Pursuant to Rule 43(c)(2) of the Federal Rules of Appellate Procedure, Acting Attorney General Mark Filip is automatically substituted for former Attorney General Michael B. Mukasey as a defendant in this case.