Class A Misdemeanors in New York (retroactive reduction to 364 day max penalty)

Peguero Vasquez v. Garland, No. 21-6380 (2d Cir. 2023)

The Second Circuit said it can't apply retroactively even though the law says it applies retroactively.

I. Background

Under 8 U.S.C. § 1227(a)(2)(A)(i) — which is Section 237(a)(2)(A)(i) of the Immigration and Nationality Act ("INA") — a non-citizen "is deportable" if "convicted of a crime of moral turpitude" (committed within a specified period "after the date of admission") "for which a sentence of one year or longer may be imposed." (emphasis added).

"Peguero Vasquez . . . was admitted to the United States as a permanent resident in 2012." See Opinion ("Op") at 5. In 2017, he pleaded guilty to the New York offense of criminal possession of a forged instrument in the third degree, a Class A misdemeanor, because of "his use of a fraudulent license plate." Op at 3-5; see N.Y. Penal Law § 170.20.

But "[i]n 2019, the New York legislature reduced the maximum possible sentence for Class A misdemeanors … (including the forged instrument offense to which Peguero Vasquez pleaded guilty) from one year to 364 days ." Op at 4 (emphasis added). And New York made the law retroactive. Op at 4, 6-7. "The provision, Penal Law Section 70.15(1-a)," expressly provides that any misdemeanor sentence of one year or 365 days that was imposed before the statute's effective date "'shall, by operation of law, be changed to, mean and be interpreted and applied as a sentence of three hundred sixty-four days.'" Op at 4 (quoting N.Y. Penal Law § 70.15(c)) (emphasis added).

New York's "objective … was to eliminate what its sponsor considered 'arbitrary,' '[u]nnecessary deportations' and 'unduly harsh immigration consequences' for aliens who have committed misdemeanors." Op at 25-26 (quoting N.Y. State Assembly Memorandum in Support of Legislation, Bill No.

A05964 (2019)); see Op at 7 ("The 'legislature's intent in enacting Penal Law § 70.15(1-a) was to help undocumented persons avoid deportation as a result of one-year or 365 day sentences on misdemeanor convictions.'") (quoting People v. Janvier, 130 N.Y.S.3d 486, 491 (2d Dep't 2020)).

In 2020, removal proceedings were initiated against Peguero Vasquez. Op at 6. "[T]he issue of removability depend[ed] on the forgery conviction only." Id. (footnote omitted). And Petitioner argued to the Immigration Judge ("IJ") that "his conviction for criminal possession of a forged instrument no longer made him removable" — after New York enacted Penal Law § 70.15 — because it wasn't an offense carrying a possible sentence of one year or more. Op at 7-8.

The IJ ruled against Petitioner, denying "retroactive effect to [N.Y.] Section 70.15 … and therefore sustained the charge of removability under Section 237." Op at 8. The Board of Immigration Appeals ("BIA") affirmed. Op at 8, 10.

Peguero Vasquez petitioned the Second Circuit to review the BIA's decision, arguing: (1) that the IJ and BIA erred by finding him removable, in light of N.Y. Penal Law 70.15(1-a); and (2) that the term "crime involving moral turpitude" is unconstitutionally vague. Op at 8.

The Panel Majority ruled against Petitioner on both grounds.

II. The Panel Majority holds that, under INA § 237(a)(2)(A)(i), the maximum sentence for a prior conviction is determined by "the state law applicable at the time of the *criminal* proceedings, not at the time of the *removal* proceedings." Op at 4 (emphasis in original).

Standard of Review:

Whether a conviction subjects a person to removal under the INA is a legal question reviewed de novo. Op at 9. However, "because the administration of that statute is entrusted to the BIA," the Circuit accords Chevron-deference to a BIA decisions asking: (i) "'whether Congress has directly spoken to the precise question at issue;'" and (ii) "[i]f the statute 'is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.'" See Op at 9 (quoting Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842, 843 (1984)).

N.Y.'s "retroactive" reduction in misdemeanor sentences isn't given effect for federal immigration laws:

In its ruling against Petitioner, the BIA found that Penal Law § 70.15(1-a) shouldn't "be given effect for purposes of federal immigration laws[,]" relying principally on its decision in Matter of Velasquez-Rios, 27 I. & N. Dec. 470, 472 (2018), "which denied effect to a similarly retroactive California law that reduced the maximum possible sentence for a class of misdemeanors to 364 days." Op at 10.

In Velasquez-Rios, the BIA construed INA § 237 as requiring "a backward-looking inquiry into the maximum possible sentence" that a person "could have received for his … offense at the time of his conviction." Op at 11. "For this conclusion," it relied on McNeill v. United States, 563 U.S. 816 (2011), which interpreted a provision of the Armed Career Criminal Act ("ACCA"), under which a prior state drug conviction qualified as a "serious drug offense," to enhance a person's sentence, if "a maximum term of imprisonment of ten years or more is prescribed by law" for the offense. McNeill, 563 U.S. at 817; see 18 U.S.C. § 924(e)(2)(A)(ii). McNeill had sustained six North Carolina drug-trafficking convictions, and "[w]hen [he] committed those crimes between 1991 and [September] 1994, each carried a

10–year maximum sentence[.]" Id. at 818. "But as of October 1, 1994, North Carolina reduced the maximum sentence for selling cocaine to 38 months and the maximum sentence for possessing cocaine with intent to sell to 30 months." Id. At his later federal sentencing (in 2009), McNeill argued that none of his drug offenses qualified as "serious drug offenses" because "the 'maximum term of imprisonment' for those offenses is 30 or 38 months." Id. at 818, 821. The McNeill Court ruled against him, holding that the maximum sentence for a prior drug offense is determined by the law that applied at the time of the conviction, not the law applicable later at the time of the federal sentencing. McNeill, 563 U.S. at 820-21.

But — as the dissent points out — the sentence-reduction statute in McNeill wasn't retroactive. See Dissenting Op at 7-8. The North Carolina statute provided: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date." McNeill, id. at 824 (quoting the state statute) (emphasis added). Thus, the McNeill Court stated: "[T]his case does not concern a situation in which a State subsequently lowers the maximum penalty applicable to an offense and makes that reduction available to defendants previously convicted and sentenced for that offense. We do not address whether or under what circumstances a federal court could consider the effect of that state action." McNeill, id. at 825 n.1 (citations omitted).

Nevertheless, the BIA, in Velasquez-Rios, stated that the logic "'embodied in McNeill'" applies to Section 237 of the INA. Op at 12. And the Circuit Majority, in this case, concurred. Op at 11-14.

Section 237 of INA isn't ambiguous. The Majority also concluded that Section 237 wasn't ambiguous. Op at 14-22. So, "the rule of lenity has no application in this case because … Section 237 unambiguously refers to the law at the time of the alien's conviction." Op at 26 n.10.

Any federalism issue? The Panel Majority also rejected Petitioner's argument that the BIA's interpretation of Section 237 violated principles of federalism "by encroaching on New York's police powers by preventing the state from controlling the immigration consequences of prior state law convictions." Op at 23. Whether a person "'has been 'convicted' within the language of [federal] statutes is necessarily … a question of federal, not state law, despite the fact that the predicate offense and its punishment are defined by the laws of the State.'" Op at 24 (quoting United States v. Campbell, 167 F.3d 94, 97 (2d Cir. 1999)). The Majority stated that, "nothing about the INA conflicts with a retroactive modification to state sentences for purposes of state law. New York may release every misdemeanant one day early if it chooses." Op at 24-25.

The Majority noted disapprovingly that "it appears that the purpose of th[e] state law amendment is to circumvent federal law." Op at 25 (citation and internal quotation marks omitted). It stated: "whatever 'understandable frustrations' a state may have with immigration policy, it 'may not pursue policies that undermine federal law.'" Op at 26 (citation omitted). But it recognized that the change in New York law would likely impact immigration policy going forward, saying: "[I]t seems that aliens convicted of Class A misdemeanors [in New York] going forward will avoid federal removal proceedings." Op at 25 (footnote omitted).

III. The Panel Majority holds that the term "crime involving moral turpitude" ("CIMT") isn't unconstitutionally vague, as applied to this Petitioner.

"Absent First Amendment concerns, [the Circuit] assess[es] vagueness challenges to a statute as applied, rather than facially." Op at 27 (citation omitted). The Supreme Court "rejected [Petitioner's] vagueness challenge seventy years ago in Jordan v. De George, [341 U.S. 223, 232 (1951)], holding that '[w]hatever else the phrase 'crime involving moral turpitude'

may mean in peripheral cases, the decided cases make it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude.'"Id. And Petitioner "does not deny that the state law conviction on which the agency premised his removal includes 'fraud [as] an ingredient.'" Id.

IV. The Dissent

Judge Robinson dissented from the Majority's conclusion that Petitioner's 2017 New York misdemeanor conviction was "a crime for which a sentence of one year or longer may be imposed," as required by INA § 237.

The Dissent criticized the Majority opinion for failing to appreciate how retroactive statutes function. Under Section 237(a)(2)(A)(i) of the INA, "whether the [prior] crime was subject to a sentence of one year or longer is determined with reference to state law at the time of the conviction." Dissenting Op at 3. And New York Penal Law § 70.15 (1-a) "retroactively overrides any prior statutory maximum for the [Petitioner's] 2017 conviction and renders it a legal nullity." Id. It "establishes the maximum sentence for Peguero Vasquez's 2017 conviction was 364 days." Id. Thus, "[g]iven the express terms of NYPL § 70.15 (1-a)," the Majority's "assertion that under the law in effect in 2017 Peguero Vasquez was subject to a penalty of one year's imprisonment for violating NYPL § 170.20 is legally incorrect. That's how retroactive, or 'nunc pro tunc' statutes and orders work. They establish the applicable law at a past time, legally erasing any prior understanding of the law in effect at that time." See Dissenting Op at 3-4 (emphasis in original).

The Dissent noted that the decisions on which the Majority relied, McNeill and Doe v. Sessions, 863 F.3d 203 (2d Cir. 2018), did not concern statutes with retroactive reach. Dissenting Op at 5-8. And the BIA's decision (in

Velasquez-Rios) wasn't entitled to deference because it was based on a flawed understanding of McNeill and other cases. Id. at 8-16.

The Dissent also pushed back on the "majority's suggestion that we should ignore NYPL § 70.15 (1-a) because the New York legislature is attempting to undermine federal immigration law[.]" Dissenting Op at 16. If Congress didn't want state laws to affect federal immigration policy, it " could have created an independent federal framework for determining what criminal convictions render a noncitizen removable, rendering state laws irrelevant to the analysis." Id. (emphasis in original). "But it didn't." Id. Instead, Congress chose to rely on state sentencing law to establish a critical element of removability under Section 237(a)(2)(A)(i), and "it did not create any exception based on the motives imputed to a state legislature." Id.

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