IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SERGIO MANUEL MEDINA,	:	**No. 3:02cv2081**
Petitioner	:	
	:	**(Judge Munley)**
v.	:	
	:	
JOHN ASHCROFT, ATTORNEY	:	
GENERAL OF THE	:	
UNITED STATES,	:	
Respondent	:	

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MEMORANDUM

Before the court for disposition is the petition for a writ of habeas corpus filed by Sergio Manuel Medina (hereinafter "petitioner") who is being detained in the York County Prison, York, Pennsylvania, pursuant to the authority of the Immigration and Naturalization Service. The matter has been fully briefed and is ripe for disposition. For the reasons that follow, the petition for a writ of habeas corpus will be denied.

Background

Petitioner Medina is a citizen of the Dominican Republic. (Govt. Ex. A, Record of Deportable/Inadmissible Alien, Form I-213). He entered the United States on October 18, 1985 as an immigrant. Id. On March 12, 1999, petitioner was convicted in the Northampton County Pennsylvania Court of Common Pleas of possession with intent to deliver a controlled substance, cocaine, a felony in violation of 35 P.S. § 780-113(a)(30). (Govt. Ex. B, Record of Conviction). The court sentenced him to a minimum of one year to a maximum of

two years imprisonment, a $200.00 fine and 500 hours of community service. (Govt. Ex. B, Record of Conviction).

On March 23, 1999, the INS filed a Notice To Appear (NTA) thus commencing removal proceedings against Medina. The NTA charges that Medina's drug conviction renders him removable from the United States pursuant to the following two sections of the immigration law: 8 U.S.C. § 1227(a)(2)(A)(iii); and 8 U.S.C. § 1227 (a)(2)(B)(i). (Govt. Ex. C, Notice To Appear).

On January 30, 2002, an Immigration Judge found petitioner removable from the country as charged and ineligible for relief from removal. The judge ordered him removed from the United States to the Dominican Republic. (Govt. Ex. D, Order of Immigration Judge; Govt. Ex. E, Oral Decision of the Immigration Judge). Medina filed a timely Notice of Appeal with the Board of Immigration Appeals. (Govt. Ex. F, Notice of Appeal). The Board of Immigration Appeals affirmed the decision of the Immigration Judge and dismissed Medina's appeal. (Govt. Ex. G, Board of Immigration Appeals Decision).

Medina filed the instant petition for a writ of habeas corpus on November 19, 2002 along with a request that his deportation be stayed. This court granted a stay of deportation and ordered the INS to respond to the habeas corpus petition. The matter has now been fully briefed and is ripe for disposition.

Jurisdiction

We have jurisdiction over the instant matter pursuant to 28 U.S.C. § 2241. See

Sandoval v. Reno, 166 F.3d 225, 235 (3d Cir. 1999) (holding that district courts have jurisdiction to hear petitions for habeas corpus following removal orders where the petitioner has been convicted of an aggravated felony).

Discussion

The Immigration Judge found the petitioner removable based upon 8 U.S.C. § 1227(a)(2)(A)(iii), which provides: "Any alien who is convicted of an aggravated felony at any time after admission is deportable" and 8 U.S.C. § 1227(a)(2)(B)(i) which provides: "Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21) . . . is deportable."

Petitioner claims that he has not been convicted of an "aggravated felony." If petitioner is not guilty of an aggravated felony then section 1227(a)(2)(B)(i) would be the only grounds for his removal from the country, and he could be eligible for relief from removal under 8 U.S.C. § 1229b(a).[1]

Accordingly, we must determine if the Immigration Judge and the Board of Immigration Appeals were correct in concluding that the petitioner has been convicted of an

[1]This statutory section provides that the United State Attorney General "may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien - - (1) has been an alien lawfully admitted for permanent residence for not less than 5 years, (2) has resided in the United States continuously for 7 years after having been admitted in any status, and (3) has not been convicted of any aggravated felony." 8 U.S.C. § 1229b(a).

"aggravated felony."

"Aggravated felony" is defined by immigration law as: "[I]llicit 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).

A state drug conviction, whether it is a felony or misdemeanor under state law, must either contain a "trafficking" component or be punishable as a felony under federal law in order for it to constitute an "aggravated felony." Gerbier v. Holmes, 280 F.3d 297, 299 (3d Cir. 2002). The Third Circuit has explained as follows:

> [A] state drug conviction constitutes an "aggravated felony" under either of two routes. Under the first route, a felony state drug conviction is an "aggravated felony" under § 924(c)(2) if it contains a trafficking element. Under the second route, a state drug conviction, either a felony or a misdemeanor, is an "aggravated felony" if it would be punishable as a felony under the Controlled Substances Act.

Id. The government argues, and we agree, that the petitioner's conviction is an "aggravated felony" under either route.

A. Does the petitioner's felony state drug conviction contain a trafficking element?

Under the first theory, we must determine whether Medina's state drug conviction contains a trafficking element. An offense contains a trafficking element if it involves the unlawful trading or dealing of any controlled substance. Steele, 236 F.3d at 135. "Essential to the concept of trading or dealing is activity of a business or merchant nature, thus excluding simple possession or transfer without consideration." Id. (internal quotation

marks and citation omitted).

The crime that the petitioner is convicted of is "Possession of Controlled Substance with Intent to Deliver or Manufacture." 35 P.S. 780-113(30). This statute makes the following a crime "the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, or knowingly creating, delivering or possessing with intent to deliver, a counterfeit controlled substance."

The facts of the petitioner's case, as set forth in the Pennsylvania Superior Court decision affirming his sentence, indicate that a trafficking element is present in the instant case. The facts demonstrate that he was selling cocaine out of a bar where he was employed as a cook, which is more than simple possession or transfer without consideration. See Govt. Ex. B, Pennsylvania Superior Court opinion dated May 16, 2000, at pg. 1-2. Accordingly, under the immigration law, the petitioner's state crime is an "aggravated felony," and he is not entitled to habeas corpus relief.[2]

B. Would petitioner's crime have been a felony if prosecuted in federal court?

For completeness, we will also examine the crime to determine if it is an "aggravated felony" in that it would be punishable under federal law as a felony. Gerbier v. Holmes, 280 F.3d 297 (3d Cir. 2002). Under federal criminal law, petitioner's crime would fall under 21

[2]Petitioner asserts that he was convicted of simple possession. The record indicates however, that the petitioner was convicted of possession of cocaine in addition to possession with intent to deliver. (See Govt. Ex. B, Record of Conviction).

U.S.C. 841(a)(1), which provides that it is unlawful "to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." The wording of this federal statute is almost identical to the state court statute under which the petitioner was convicted. See 35 P.S. 780-113(30). A crime is classified as a felony if the maximum term of imprisonment allowed is more than one year. 18 U.S.C. § 3559(a). A review of the penalty section of 21 U.S.C. 841(a)(1) reveals that the maximum term for violating that section is greater than one year. See 21 U.S.C. 841(b). Thus, petitioner's crime would be a felony under federal law and is considered an "aggravated felony" for purposes of removal from the country. Accordingly, this is a second ground that supports the petitioner's removal.

For the above-stated reasons, the instant petition for a writ of habeas corpus will be denied, and the stay of deportation will be lifted. An appropriate order follows.

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GENERAL OF THE	:	
UNITED STATES,	:	
Respondent	:	

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ORDER

AND NOW, to wit, this 10th day of April 2003, the Sergio Manuel Medina's petition for a writ of habeas corpus (Doc. 1) is hereby **DENIED**. In addition, the stay of deportation imposed in this case on November 19, 2002, is **LIFTED**. The Clerk of Court is directed to close this case.

BY THE COURT:

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JUDGE JAMES M. MUNLEY
United States District Court

Filed: April 10, 2003