

U.S. Department of Justice  
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

INDEX

Falls Church, Virginia 22041

File: A29 207 582 - Los Angeles

Date:

SEP 23 1999

In re: MICHAEL VINCENT CALLAHAN

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Andrew M. Stein, Esquire  
10120 Alondra Boulevard  
Bellflower, California 90706

ON BEHALF OF SERVICE: Jerrold E. Rishe  
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1229(a)(2)(A)(iii)] -  
Convicted of an aggravated felony as a fraud offense

Lodged: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1229(a)(2)(A)(iii)] -  
Convicted of an aggravated felony as a theft offense

APPLICATION: Termination of proceedings

In a decision dated February 5, 1999, an Immigration Judge determined that the Immigration and Naturalization Service ("Service") had not met its burden to demonstrate that the respondent's conviction for mail fraud under 18 U.S.C. § 1341, was an aggravated felony as defined in section 101(a)(43)(M) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(M). However, the Immigration Judge found that respondent's conviction for mail fraud was sufficient to sustain the charge of removability as an alien convicted of a theft related aggravated felony as defined in section 101(a)(43)(G) of the Act. The Immigration Judge determined that the elements of a theft offense "mirror the elements of mail fraud" and that the definition of theft and mail fraud offenses were "comparable" (I.J. at 7). The Immigration Judge found the respondent ineligible for any relief from removal and ordered the respondent removed and deported to Canada. The respondent appealed. The Service adopted the Immigration Judge's decision.

The only issue raised on appeal is whether the Immigration Judge erred in finding the respondent removable as an alien convicted of an aggravated felony under section 101(a)(43)(G) of the Act. The respondent contends that his conviction for mail fraud does not constitute a conviction for theft as the elements of theft are not included in the elements of mail fraud. The respondent argues that the Immigration Judge erred in adopting the "inherent relationship" test to determine whether a conviction for mail fraud is also a conviction for a theft.

In Schmuck v. United States, 489 U.S. 705 (1989), the Supreme Court adopted the "elements" test to decide whether an offense is a lesser included offense of another. Under the elements test, one offense is not "necessarily included" in another unless the elements of the lesser offense are a subset of the elements of the charged offense. Schmuck v. United States, *supra*, at 717; United States v. Spencer, 905 F.2d 1260, 1261 (9th Cir. 1989) (holding that receiving stolen property is not a lesser included offense of taking property as intent to steal is different from knowing that something is stolen); United States v. Gregory, 891 F.2d 732, 734 (9th Cir. 1989) (finding that bank larceny is not a lesser included offense of bank robbery because bank larceny requires proof of specific intent and bank robbery does not). Here, we must determine whether the elements of theft are a subset of the elements of mail fraud.

18 U.S.C. § 1341 defines mail fraud as:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

The essential elements of mail fraud under 18 U.S.C. § 1341 are (1) the existence of or an intent to devise a scheme to defraud, (2) using or causing the use of the mail to execute the scheme, and (3) specific intent to deceive or defraud. United States v. Sayakhom, --- F.3d --- 1999 WL 536693 (9th Cir. 1999); United States v. Serang, 156 F.3d 910, 914 (9th Cir.), *cert. denied*, --- U.S. ---, 119 S.Ct. 627 (1998).

Section § 484 of title 13 of the California Penal Code defines theft as:

Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft . . . .

13 Cal. Penal. Code § 484 (emphasis added).

The essential elements of theft relevant to the instant case are (1) taking the property of another, (2) by fraudulent representation or pretense, and (3) with specific intent to defraud the owner of his property. Id.; see generally People v. Gentry, 234 Cal.App.3d 131, 285 Cal.Rptr. 591, 595 (Ct.App. 1991); Alvarez v. Gomez, --- F.3d ---, 1999 WL 680346 (9th Cir. 1999).

We further note that Black's Law Dictionary defines theft generally as "the act of stealing" and "taking of property without the owner's consent." Black's Law Dictionary 1477 (6th ed. 1990). Black's Law Dictionary specifies that a "person is guilty of theft by deception if he purposely obtains property of another by deception." Id. Also, theft by false pretenses is defined as "obtaining property by means of false pretext with intent to deprive owner of value of property without his consent and to appropriate to own use, followed by such appropriation." Id. The various definitions of theft as set forth in Black's Law Dictionary indicate that appropriation of another's property is an element of the offense of theft. Id.

Our analysis leads us to conclude that the elements of theft are not subsets of the elements of mail fraud. Schmuck v. United States, supra, United States v. Spencer, supra. While both mail fraud and fraud related theft require specific intent to defraud, the crime of theft requires appropriation of another's money, labor, or property. Compare 18 U.S.C. § 1341; People v. Gentry, supra; Alvarez v. Gomez, supra, with section 484 of the California Penal Code; Black's Law Dictionary 1477 (6th ed. 1990). However, for a mail fraud conviction, it is sufficient that an individual merely intending to devise a scheme to defraud uses or causes to be used the mail to execute his scheme. 18 U.S.C. § 1341; United States v. Sayakhom, --- F.3d --- 1999 WL 536693 (9th Cir. 1999); United States v. Serang, 156 F.3d 910, 914 (9th Cir.), cert. denied, --- U.S. ---, 119 S.Ct. 627 (1998). The elements of mail fraud do not require that money, labor, or property be appropriated from another. Id.

As mail fraud does not encompass the offense of theft, we do not find that the Service has met its burden to demonstrate that the respondent has been convicted of an aggravated felony as defined under section 101(a)(43)(G) of the Act. Accordingly, the respondent's appeal will be sustained and the proceedings terminated.

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ORDER: The respondent's appeal is sustained and removal proceedings are terminated.

A handwritten signature in black ink, appearing to be "D. B. White", written above a horizontal line.

FOR THE BOARD