[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 11-12635
Non-Argument Calendar

Agency No. A037-825-563

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FEB 16, 2012
JOHN LEY
CLERK

SHELDON SILVERA SCARLETT,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the
Board of Immigration Appeals

(February 16, 2012)

Before PRYOR, MARTIN and KRAVITCH, Circuit Judges.

PER CURIAM:

Sheldon Scarlett, represented by counsel, seeks review of the Board of Immigration Appeal's order denying as untimely his motion to reopen his removal proceedings pursuant to 8 U.S.C. § 1229a(c)(7)(C), 8 C.F.R. § 1003.2(b)(1).

On March 13, 2000, an Immigration Judge ("IJ") ordered Scarlett's removal, based upon his conviction for the aggravated felony of burglary and a related fifty-four-month prison term for violating probation, pursuant to 8 U.S.C. §§ 1101(a)(43)(g), 1227(a)(2)(iii). On October 3, 2000, the BIA dismissed Scarlett's appeal of the IJ's removal order. Scarlett had informed both the IJ and the BIA that he was in the process of appealing his prison sentence. The BIA indicated that it had no evidence of Scarlett's sentencing appeal, but also stated that if Scarlett's sentence was modified, he could file a motion to reopen. As it turned out, a Florida court reversed and remanded Scarlett's prison sentence on August 16, 2000, nearly six weeks before the BIA dismissed Scarlett's immigration appeal on October 3, 2000. As Scarlett correctly argues, the successful appeal of his prison sentence removed his conviction from the category of aggravated felony, thus negating the BIA's basis for his removal.[1] See 8 U.S.C.

[1] Title 8 U.S.C. § 1227(a)(2)(iii) permits removal for conviction of an aggravated felony. Title 8 U.S.C. § 1101(a)(43)(g) defines an aggravated felony as a "burglary offense for which the term of imprisonment is at least one year." Scarlett's Notice to Appear before the Immigration Judge based removal on his burglary conviction and his fifty-four-month prison sentence. Scarlett was initially placed on probation for his burglary offense, but only received his prison

§§ 1101(a)(43)(g), 1227(a)(2)(iii).

Despite Scarlett's successful appeal of his prison sentence, he did not file a motion to reopen his removal proceedings until March 2011. On May 16, 2011 the BIA found Scarlett's motion to reopen to be untimely under 8 U.S.C. § 1229a(c)(7)(C)(i), which requires filing of a motion to reopen "within 90 days of the date of entry of a final administrative order of removal." Further, the BIA noted that Scarlett had failed to provide "a coherent and persuasive explanation for why he waited almost 11 years to file a motion to reopen." Accordingly, the BIA denied Scarlett's motion for lack of jurisdiction.

This Court reviews the denial of a motion to reopen removal proceedings for abuse of discretion. Al Najjar v. Ashcroft, 257 F.3d 1262, 1302 (11th Cir. 2001). Review is limited to determining whether the BIA exercised its discretion in an arbitrary or capricious manner. Abdi v. U.S. Att'y Gen., 430 F.3d 1148, 1149 (11th Cir. 2005).

On appeal, Scarlett does not contest that his motion to reopen was untimely under the statutory time-limit of 8 U.S.C. § 1229a(c)(7)(C). Instead, he cites

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sentence when he violated probation. Therefore, a successful challenge to Scarlett's prison sentence would have left Scarlett with only probation, thus removing him from the scope of §§ 1101(a)(43)(g), 1227(a)(2)(iii). See, e.g., United States v. Guzman-Bera, 216 F.3d 1019, 1020 (11th Cir. 2000).

8 U.S.C. § 1229a(b)(5)(C)(ii), which permits reopening of removal proceedings at "any time if the alien demonstrates that the [he] did not receive notice" of the proceedings. By its clear terms, § 1229a(b)(5)(C)(ii) only applies to an in absentia removal order, where the petitioner did not receive notice of his pending proceedings. See Contreras-Rodriguez v. U.S. Att'y Gen., 462 F.3d 1314, 1317 (11th Cir. 2006). Here, Scarlett has not claimed that the Attorney General failed to notify him of his removal proceedings.

Nevertheless, Scarlett argues that the principle underlying § 1229a(b)(5)(C)(ii) should apply equally to an untimely motion to reopen a pro se proceeding for nunc pro tunc relief. That is to say, because the BIA had incorrectly based Scarlett's removal on a vacated prison sentence, the BIA should have the inherent authority to correct its previous error. The BIA apparently considered exercising its sua sponte authority to reopen the proceeding, but declined to do so, because Scarlett failed to explain the eleven-year delay in filing his motion to reopen. To the extent that Scarlett is challenging the BIA's refusal to exercise its sua sponte authority to reopen the proceedings, we lack jurisdiction to review such a decision by the BIA. Lenis v. U.S. Att'y Gen., 525 F.3d 1291,

1293 (11th Cir. 2008).[2]

For these reasons, we cannot say that the BIA abused its discretion in denying Scarlett's motion to reopen his removal proceedings. Therefore, we DENY the petition.

[2] Scarlett explains on appeal that he waited eleven years because he was misled by incorrect statements of law that the IJ made to him. While Scarlett concedes that his motion to reopen did not specifically address the reason for his delay, he argues that the reason should have been "obvious" to the BIA from the administrative record. This argument necessarily appeals to the BIA's sua sponte authority to reopen proceedings, and as such, we lack jurisdiction to review the BIA's decision on this ground. Lenis, 525 F.3d at 1293.