IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-4353
Summary Calendar

KLEBER DOUGLAS CELLERI-SOTO,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order of the
Immigration and Naturalization Service
(A41 195 925)

(November 3, 1993)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

I

The petitioner, Kleber Celleri-Soto, a citizen of Ecuador, was admitted to the United States as a permanent resident in 1987. On August 26, 1992, he was convicted in New York criminal court of committing two crimes, the first being Celleri's attempt to steal

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

a computer from a hand-truck and the second an attempt to take cordless telephones and answering machines from a store without paying for them. He was subsequently charged with deportability under 8 U.S.C. § 1251(a)(2)(A)(ii), as an alien who committed two or more crimes of moral turpitude arising from more than a single scheme of criminal misconduct.

At the first session of his immigration hearing, Celleri was given a continuance to find counsel. The record reflects that he was given a list of free legal services to contact. At his resumed hearing, Celleri stated that he had been unsuccessful in obtaining a lawyer because "I don't have the funds" and announced, "I'm going to represent myself." He also told the immigration judge, "I want the proceedings to proceed." Celleri applied for no relief from deportation, and the immigration judge found him to be deportable under 8 U.S.C. § 1251(a)(2)(A)(ii) as having committed two crimes of moral turpitude not arising out of a single criminal scheme. Celleri was ordered to be deported to Ecuador.

Celleri appealed to the Board of Immigration Appeals (the "Board"), which concluded that Celleri presented no basis on which to challenge the constitutionality of the deportation provision as applied to him. The Board issued its decision dismissing his appeal on March 22, 1993.

II

Celleri suggests that his constitutional rights were violated in two respects: (1) by the lack of counsel at his immigration

hearing, and (2) by the application of a deportation provision that he states finds no parallel in the Act's exclusion provisions. Claims by aliens that due process rights were denied in immigration proceedings are reviewed de novo. Ogbemudia v. INS, 988 F.2d 595, 598 (5th Cir. 1993).

A

Celleri's complaint regarding his lack of representation is meritless. First, there is no Sixth Amendment right to counsel in deportation hearings. Ogbemudia, 988 F.2d at 598-99; Paul v. INS, 521 F.2d 194, 197 (5th Cir. 1975). The absence of an attorney, therefore, may create a constitutional violation only if the defect "`impinge[s] upon the fundamental fairness of the hearing in violation of the fifth amendment.'" Ogbemudia, 988 F.2d at 598 (quoting Paul, 521 F.2d at 198). An alien claiming such a due process violation must show prejudice from the absence of counsel at the hearing. Cuandras v. INS, 910 F.2d 567, 573 (9th Cir. 1990); see Mantell v. INS, 798 F.2d 124, 127 (5th Cir 1986) (ineffective assistance case); Paul 521 F.2d at 199 (same). Celleri has not pointed to any evidence that an attorney might have submitted for him, or meritorious arguments that an attorney might have made. Thus, Celleri has shown no violation of his right to Fifth Amendment due process.

Furthermore, the immigration judge fulfilled his duty with regard to Celleri's statutory right to obtain counsel at his own expense. See 8 U.S.C. § 1362; 8 C.F.R. § 242.16 (1993). Here, the

immigration judge provided petitioner with a list of local legal service organizations to enable petitioner to find counsel and allowed petitioner a two-week continuance of his hearing in order to find counsel. At the resumed hearing, petitioner himself announced that "I'm going to represent myself," and "I want the proceedings to proceed." Under similar circumstances, this court stated that "[Alien's] lack of counsel cannot be blamed on the IJ, but is solely the result of [Alien's] lack of diligence." Ogbemudia, 988 F.2d at 599.

B

Celleri argues that his deportation under 8 U.S.C. § 1251(a)(2)(A)(ii) violates his rights to due process and equal protection under the Fifth and Fourteenth Amendments. His argument is premised on the fact that 8 U.S.C. § 1182(a)(2)(B), which deals with the original entry of aliens, excludes aliens with two or more convictions only if "the aggregate sentences to confinement actually imposed were 5 years or more." 8 U.S.C. § 1182(a)(2)(B). He argues that because the immigration statute under which he is charged as a deportable alien has no parallel length-of-sentence requirement as the one applicable to excludable aliens, his constitutional right to equal protection has been violated. Celleri's argument is misplaced for two reasons.

First, the deportation statute under which Celleri was charged does have a very close parallel in the section dealing with the exclusion of aliens. The statute cited by Celleri applies to

crimes regardless of whether they involve moral turpitude. On the other hand, 8 U.S.C. § 1182(a)(2)(A), in general, excludes any alien convicted of "a crime involving moral turpitude." Congress granted an exception to this general exclusion to aliens who committed only one crime if their sentence was particularly short. But no exception applies if the alien committed two or more crimes of moral turpitude. The exclusion, therefore, does parallel the deportation statute under which Celleri is being deported, at least with respect to aliens who have committed more than one crime involving moral turpitude. See 8 U.S.C. § 1251(a)(2)(A)(ii).

Second, a variance between the two immigration statutes, even if applicable to the case at hand, would not create a constitutional violation. "`The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.'" Fiallo v. Bell, 430 U.S. 787, 796 (1977) (quoting Mathews v. Diaz, 426 U.S. 67, 81-82 (1976)). In fact, a government regulation and/or alleged policy extending immigration benefits selectively should be found constitutional unless "wholly irrational." Mathews, 426 U.S. at 83; Narenji v. Civiletti, 617 F.2d 745, 747 (D.C. Cir. 1979), cert. denied, 446 U.S. 957 (1980).

As recognized by the Ninth Circuit in Cabasug v. INS, 847 F.2d 1321 (9th Cir. 1988), the systems set up by Congress to provide for the screening of aliens' entry by exclusion and the expulsion of

aliens by deportation are different and serve a different purpose. Id. at 1323-24. Celleri has been convicted of two crimes of moral turpitude under the criminal justice rules applicable to all criminal proceedings conducted in the United States, including the presumption of innocence, the Fifth Amendment privilege against self-incrimination, the Sixth Amendment right to counsel, and the beyond-a-reasonable-doubt conviction standard. An alien seeking to enter this country, by contrast, may have accumulated convictions for crimes under systems of justice whose results are less reliable because reached after procedures less rigorous in protecting the rights of criminal defendants. The statute about which Celleri complains is clearly not "wholly irrational."

Moreover, Congress's conclusion that deportation is proper in the cases of individuals who violate the hospitality of the United States by committing two unrelated crimes of moral turpitude while they are here is clearly rational. In the words of the Ninth Circuit, "We . . . do not agree with [Celleri's] implicit proposition that the Constitution requires Congress to lay out crimes on a spectrum." Cabasug, 847 F.2d at 1327.

III

For the foregoing reasons, we find that Celleri has not been denied any right owed to him under the Constitution of the United States, and the Order of the Board of Immigration Appeals is therefore

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