

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4366
Summary Calendar

KENTON GOODE,

Petitioner,

VERSUS

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order of the Immigration
and Naturalization Service
(A28 350 023)

(January 19, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:¹

Kenton Goode challenges the dismissal by the Board of Immigration Appeals (BIA) of his appeal of a deportation order. We **DENY** the petition for review.

I.

Goode, a native of Jamaica, entered the United States lawfully in August 1982 as an agricultural worker. His status was adjusted to lawful permanent resident in September 1986. He married, but is

¹ Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

now divorced from, an American citizen; he has five children, all American citizens.

Goode was arrested in April 1989 in Florida. Police, responding to a report of gunfire, were told by a complaining witness that Goode had fired two shots, one at the complainant's feet. They found Goode sitting in a car, with a gun (containing two spent bullet casings) in an open gun case on the floor of the car. There were bullet fragments on the ground nearby.

In a two-count information, Goode was charged with assault with a deadly weapon, a felony, in violation of Fla. Stat. Ann. § 784.021 (count one); and with openly carrying a firearm on or about his person, a misdemeanor, in violation of Fla. Stat. Ann. § 790.053 (count two).² In December 1989, he pleaded guilty to count two, the firearms charge.³ He was sentenced to time served and 18 months probation.

The INS took Goode into custody, and issued an Order to Show Cause (OSC) why he should not be deported pursuant to § 241(a)(2)(c) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(2)(c),⁴ as a result of the Florida firearm conviction. In

² Fla. Stat. Ann. § 790.053 provides that "[e]xcept as otherwise provided by law, it shall be unlawful for any person to openly carry on or about his person any firearm.... Any person violating this section shall be guilty of a misdemeanor in the second degree...." (West 1987).

³ Goode also pleaded guilty to a reduced charge (aggravated assault without a firearm) on count one. The adjudication of guilt on that count was withheld.

⁴ Section 241(a)(2)(C) of the Act, 8 U.S.C. § 1251(a)(2)(C), provides that "[a]ny alien who at any time after entry is convicted under any law of purchasing, selling, offering for sale,

a September 1992 hearing before an Immigration Judge (IJ) on the OSC, Goode challenged only the OSC's claim that he had been convicted of a deportable offense under § 241(a)(2)(c).

The INS made an offer of proof of the official record of Goode's Florida conviction; this was accepted without objection. That record showed that Goode had pleaded guilty to "unlawfully, openly carry[ing] on or about his person ... a handgun," in violation of Fla. Stat. Ann. § 790.053; and that he had been adjudged guilty by the court and sentenced to time served. The IJ found Goode deportable under § 241(a)(2)(c), and denied relief from deportation under §§ 212(c)⁵ and 245⁶ of the Act.

Goode appealed the IJ's decision to the BIA, alleging that the Florida firearms conviction was a misdemeanor, that the weapon involved had not been used in the commission of a crime, and that

exchanging, using, owning, possessing, or carrying in violation of any law, any weapon, ... which is a firearm ... is deportable."

⁵ Section 212(c) of the Act, 8 U.S.C. § 1182(c), provides for a waiver of deportation for aliens who have been legal permanent residents continuously domiciled in the United States for seven years at the time of the deportable offense. The IJ held that it was not available to Goode, because he had not been a permanent resident for the requisite period of time, and because it is not applicable where a § 241(a)(2)(C) offense is the basis for the deportation order. Goode does not challenge this here.

⁶ Section 245(d) of the Act, 8 U.S.C. 1255(d), provides for relief from adjustment of status for aliens who, *inter alia*, are married to United States citizens, or who are the beneficiaries of valid visa petitions by a citizen spouse or child. The IJ held that this section also did not apply to Goode, because he was divorced from his wife, a United States citizen; and their children were minors, so that there was no adult citizen who could make a visa petition on his behalf. Again, Goode does not challenge this here.

therefore the conviction was not a deportable offense.⁷ In briefs filed in support of his appeal, Goode also asserted that the conviction was not a deportable offense because it had been merely a "plea of convenience". And, in his reply brief, he contended that the conviction was a conviction only for "constructive possession" of the firearm, and not for "actual possession", because he had not been carrying the firearm on his person. Accordingly, Goode contended, the conviction was not a deportable offense contemplated by § 241(a)(2)(c). The BIA dismissed the appeal.

II.

Goode asserts only that the Florida conviction is not a deportable offense under § 241(a)(2)(c). In so doing, he urges us to look behind his conviction, contending that it was meant to be only a "slap on the wrist", not to result in deportation. Even if Goode's gloss on his conviction is correct, we "must affirm the decision of the BIA if it has made no error in law and if reasonable, substantial, and probative evidence on the record considered as a whole supports its factual findings." **Howard v. INS**, 930 F.2d 432, 434 (5th Cir. 1991) (citations omitted); 8 U.S.C. § 1105a(a)(4); **INS v. Elias-Zacarias**, ___ U.S. ___, 112 S. Ct. 812, 815 (1992).

⁷ He also maintained that the IJ abused his discretion in denying Goode's application for relief from deportation under § 212(c). The BIA found no merit in this allegation, and Goode does not raise it, or any issue regarding relief from deportation or adjustment of status, here.

To establish that an alien is deportable, the INS must prove by "clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true." *Woodby v. INS*, 385 U.S. 276, 286 (1966). Where the basis for deportation is a criminal offense, the IJ or BIA must look solely to the judicial record of the conviction; they may not make an independent assessment of the validity of a guilty plea or conviction. *E.g.*, *Brown v. INS*, 856 F.2d 728, 731 (5th Cir. 1988) (alien "may not collaterally attack the legitimacy of ... convictions in [petition for review] proceeding[s]") (citations omitted); *Zinnanti v. INS*, 651 F.2d 420, 421 (5th Cir. 1981); see also *De la Cruz v. INS*, 951 F.2d 226, 228 (9th Cir. 1991) (holding that "INS has no power to adjudicate the validity of state convictions underlying deportation hearings").

The record of the deportation proceeding shows that Goode was convicted of a firearms offense, which is a deportable offense under a plain reading of § 241(a)(2)(C) of the Act; that section makes no distinction between misdemeanors and felonies, nor does it make an exception for weapons not used in the commission of a crime. The BIA correctly refused to "look behind" Goode's conviction record.

III.

Accordingly, the petition for review is

DENIED.