UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CRIMINAL MINUTES - GENERAL

Case	U.S.A. v. Alfonso Anorve Verduzco, CR 10-00330 -PSG	Date	February 4, 2011
Present:	The Honorable Philip S. Gutierrez, United States District Judge		
Interpreter	n/a		

Wendy K. Hernandez		
Deputy Clerk	*Court Reporter*	*Assistant U.S. Attorney*

U.S.A. v. Defendant(s):	Present	Cust.	Bond	Attorneys for Defendant(s):	Present	App.	Ret.

Proceedings: Order imposing 16-Level Sentencing Enhancement Under § 2L1.2(b)

After considering the arguments proffered by the government and by Defendant Alfonso Anorve -Verduzco ("Defendant") as to whether a 16-level enhancement to Defendant's offense level is appropriate, the Court concludes that the 16-level enhancement is warranted. The following discussion explains the Court's reasoning in so holding.

I. Issue

Section 2L1.2(b)(1)(A)(i) of the United States Sentencing Guidelines provides for a 16-point enhancement if a defendant has been convicted of a "drug trafficking offense" for which he received a sentence of more than 13 months. *See* U.S.S.G. § 2L1.2(b)(1)(A)(i). The guidelines define a "drug trafficking offense" as "an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense." U.S.S.G. § 2L1.2, Note (1)(B)(iv).

Thus, to determine whether a 16-point sentencing enhancement is appropriate, the Court must evaluate whether Defendant's prior conviction under California Health and Safety Code § 11351 qualifies as a "drug trafficking offense" within the meaning of § 2L1.2(b)(1)(A)(i). This inquiry is evaluated under the categorical and modified categorical approaches set forth in *Taylor v. United States*, 495 U.S. 575, 598, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990).

II. Analysis

A. *Categorical Approach*

In considering whether Defendant's conviction under § 11351 qualifies as a "drug trafficking offense," the Court must first engage in the categorical analysis. Under this approach, courts "look only to the fact of conviction and the statutory definition of the prior offense." *Taylor*, 495 U.S. at 602. As applied here, the dispositive inquiry is whether § 11351 criminalizes any conduct that would *not* constitute a "drug trafficking offense" under federal sentencing law. *U.S. v. Morales-Perez*, 467 F.3d 1219, 1221 (9th Cir. 2006). If so, the statute is overbroad and therefore not a categorical drug trafficking offense.

Although the Ninth Circuit has never opined in a published decision whether a conviction under § 11351 is categorically a conviction for a "drug trafficking offense,"[1] it stands to reason that the California statute is categorically overbroad. Section 11351 punishes activities involving controlled substances specified in the schedules of the California Uniform Controlled Substances Act. *See* Cal. Health & Safety Code § 11351. As the Ninth Circuit has noted (in the context of other California statutes involving controlled substances), the California Uniform Controlled Substances Act defines "controlled substance" to include numerous substances that are not similarly regulated by the federal controlled substance regulations. *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1078 (9th Cir. 2007). In other words, California prohibits the possession or purchase for sale of a wider range of controlled substances than federal law. *Id.*

Thus, because the statutory definition of the conduct criminalized by § 11351 embraces activity relating to some drugs which are not listed on the federal controlled substance schedules, Defendant was therefore not *necessarily* convicted of a crime involving a "controlled substance" within the meaning of federal law. Accordingly, the Court finds that Defendant was not categorically convicted of a "drug trafficking offense" under U.S.S.G. § 2L1.2(b)(1)(A)(i).[2] *Cf. Mielewczyk v. Holder*, 575 F.3d 992, 995 (9th Cir. 2009).

B. *Modified Categorical Approach*

Next, the Court turns to the modified categorical approach, under which it must analyze whether "documentation or judicially noticeable facts" clearly establish that Defendant's conviction

[1] As the parties' papers point out, there are unpublished Ninth Circuit decisions cutting both ways. However, under Fed. Rule of Appellate Procedure 32.1 and Ninth Circuit Rule 36-3, these memorandum opinions are not precedential authority.

[2] In another case recently before the Court, *United States v. Jose Leal-Vega*, CR 10-756-PSG (Dkt. # 32, 1:27-2:8 (Dec. 9, 2010)), the government expressly asserted that the Court must proceed to the modified categorical analysis because California controlled substances schedules are broader than the federal controlled substance schedules. However, it later retracted this assertion.

under § 11351 qualifies as a "drug trafficking offense." *See United States v. Benitez-Perez*, 367 F.3d 1200, 1203 (9th Cir. 2004) (internal quotations omitted). In *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005), the Supreme Court listed the following as types of documents courts may consider in applying the modified categorical approach: "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Id.* at 16; *see also Ruiz-Vidal*, 473 F.3d at 1078 (courts applying the modified categorical analysis "may consider the charging documents in conjunction with the plea agreement, the transcript of a plea proceeding, or the judgment to determine whether the defendant pled guilty to the elements of the generic crime.") (internal citations omitted). While charging papers alone have been deemed insufficient, *United States v. Velasco-Medina*, 305 F.3d 839, 852 (9th Cir. 2002) (holding that the information alone was insufficient under the modified categorical approach because it merely showed what the government intended to prove), the Ninth Circuit has held that "charging papers may be considered in combination with a signed plea agreement." *Ruiz-Vidal*, 473 F.3d at 1078.

Here, the government submitted two documents into record of conviction that relate to Defendant's offense under § 11351: the information and an abstract of judgment. The information reflects that Defendant was charged under § 11351 with unlawful possession of a controlled substance, "to wit, cocaine." *Gov't Response*, Ex. A (Count Four). The abstract of judgment shows that Defendant pled guilty to the violation of § 11351 articulated in Count Four of the information. *Gov't Response*, Ex. B.

Defendant may well be correct that, because the abstract of judgment does not indicate that he pleaded guilty "as charged in the information," the information's assertion that the substance at issue was cocaine would not – without more – suffice to establish a "drug trafficking offense" under the modified categorical analysis. *See U.S. v. Vidal*, 504 F.3d 1072, 1087 (9th Cir. 2007) (en banc). But here, there is more. The abstract of judgment describes the predicate conviction in shorthand as possession of a *narcotic* controlled substance for sale. *Gov't Response*, Ex. B (emphasis added). All of the substances defined as "narcotics" under California Law, *see* Cal. Health & Safety Code § 11019, are classified as controlled substances under the federal Controlled Substances Act, 21 U.S.C. §§ 812,813. Accordingly, when Defendant pleaded guilty to possession for sale of narcotics under Cal. Health & Safety Code § 11351, he necessarily pleaded guilty to an offense involving a controlled substance that is included on the federal controlled substance schedule. Thus, because a state drug conviction must involve a substance on the federal controlled substance schedule to qualify as a "drug trafficking offense" under § 2L1.2(b)(1)(A)(i), it therefore follows that when Defendant pleaded guilty to possession of a narcotic controlled substance in violation of § 11351, he pleaded guilty to a "drug trafficking offense" within the meaning of § 2L1.2(b)(1)(A)(i).[3]

[3] As a point of comparison, the Court notes that this case is distinguishable from *United States v. Jose Leal-Vega*, CR 10-756-PSG. In *Leal-Vega*, Count I of the Complaint – much like the information submitted in this case – charged the defendant with "possession for purpose of sale a controlled substance, to wit, tar heroin[,]." Importantly, however, the abstract of judgment proffered by the

III. Conclusion

For the foregoing reasons, the Court finds that the record of conviction for Defendant's conviction under § 11351 demonstrates that Defendant pleaded guilty to all of the elements constituting a generic "drug trafficking offense" under the sentencing guidelines, U.S.S.G. § 2L1.2(b)(1)(A)(i). Accordingly, the Court concludes that the 16-level enhancement is warranted.

IT IS SO ORDERED.

_____ : _____

Initials of Deputy Clerk _____

cc:

government in *Leal-Vega* indicated only that the defendant pleaded guilty to "selling controlled substances" under § 11351. See Dkt. #29-1, 17-18 (Dec. 1, 2010)). Further, neither the minute order nor the "felony plea form" submitted as certified conviction records in the government's Supplemental Sentencing Submission provided a specific description of the drugs which were involved in the offense. See Dkt. # 35-1 (Jan. 12, 2011). Accordingly, the Court held that the defendant's prior conviction did not qualify as a "drug trafficking offense" under the modified categorical analysis.