FILED
United States Court of Appeals
Tenth Circuit

September 11, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DARNELL WILKS,

Defendant - Appellant.

No. 19-3040
(D.C. No. 6:17-CR-10066-EFM-1)
(D. Kan.)

ORDER AND JUDGMENT*

Before **SEYMOUR**, **BALDOCK**, and **MURPHY**, Circuit Judges.

Darnell Wilks pled guilty and was convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). At sentencing, Mr. Wilks filed a *pro se* objection to the Pre-Sentence Investigation Report (PSR). He contended that his two prior convictions under Illinois law[1] do not qualify as controlled substance

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[1] Mr. Wilks was convicted in Illinois of the following: (1) a 2000 conviction for Manufacture/Delivery of "1 gram or more but less than 15 grams of any substance containing cocaine, or an analog thereof," and (2) a 2004 conviction for Manufacture/Delivery of "1 gram or more but less than 15 grams of any substance

offenses which trigger increased sentencing under the U.S. Sentencing Guidelines § 4B1.1. The district court was not persuaded and imposed a sentence of 87 months' imprisonment. On appeal, Mr. Wilks reasserts that the sentence is procedurally unreasonable. We affirm.

Based upon Mr. Wilks' two prior Illinois convictions, the United States Probation Office prepared a PSR recommending a controlled substance sentencing enhancement under U.S.S.G. § 4B1.1.[2] The PSR accordingly determined Mr. Wilks' base-level offense to be 24 and then subtracted 3 levels to reflect his acceptance of responsibility. The total offense level 21 combined with Mr. Wilks' criminal history category VI provided a guideline range of 77 to 96 months' imprisonment.

Mr. Wilks objected to the enhancement on the basis that the Illinois statute, § 570/401(c)(2), criminalizes broader conduct than U.S.S.G. § 4B1.1. Mr. Wilks argued that a conviction could arise from a transaction involving only an analog of cocaine under the Illinois statute's language, "cocaine, or an analog thereof," 720 Ill. Comp. Stat. 570/401(c)(2), but such a transaction does not satisfy U.S.S.G. § 4B1,

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containing cocaine, or an analog thereof." *See* 720 Ill. Comp. Stat. 570/401(c)(2) (2000 & 2004).

[2] The guidelines impose a career offender enhancement under § 4B1.1(a)(3) where "the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense."

which does not include the term "analog" when defining "controlled substance offense."[3]

The district court disagreed and determined that Mr. Wilks' Illinois convictions qualified as controlled substance offenses, thereafter imposing a sentence of 87 months' imprisonment. Mr. Wilks timely filed his notice of appeal and reasserts that his sentence is not procedurally reasonable because the sentence enhancement is based upon convictions under an Illinois statute that criminalizes a broader range of conduct than the federal definition of "controlled substance offense." The government counters that both federal law and the guidelines include substances and their analogues[4] within the meaning of "controlled substances" under § 4B1.1. Therefore, prior convictions involving either cocaine or an analogue support a sentence enhancement.

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[3] Section 4B1.2 provides the definitions of terms used in § 4B1.1:

> The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of 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. § 4B1.2(b).

[4] The Illinois statute, § 570/401(c)(2), uses the spelling "analog," while the federal statutes and the U.S. Sentencing Guidelines, cited *infra* at 5, use the more traditional "analogue" spelling. Despite the difference in spelling, we recognize the terms to be interchangeable.

The district court's interpretation of the sentencing guidelines is a legal question that we review *de novo*. *See United States v. Plotts*, 347 F.3d 873, 875 (10th Cir. 2003) (citation omitted). A state crime cannot qualify as a predicate offense under the guidelines where the elements of the state offense are broader than, rather than "congruent with," the elements of the generic offense. *See United States v. Domiguez-Rodriguez*, 817 F.3d 1190, 1195 (10th Cir. 2016) (citation omitted); *see also Matthis v. United States*, 136 S. Ct. 2243, 2251 (2016) (explaining that enhancements under the ACCA are not applicable where state offense elements are broader than the generic offense's elements) (citation omitted). We assume that the offenses enumerated in the guidelines refer to the "generic, contemporary meaning of that offense," and we look to federal statutes for clarification of the elements of the offense. *See Domiguez-Rodriguez*, 817 F.3d at 1195 (citation omitted). To determine whether a prior conviction qualifies as a controlled substance offense under the guidelines, courts apply a "categorical approach" focusing "on whether the elements of the crime of conviction sufficiently match the elements" of the generic offense, "while ignoring the particular facts of the case." *Matthis*, 136 S. Ct. at 2248 (citation omitted). Therefore, a crime counts under the guidelines if "its *elements* are the same as, or narrower than, those of the generic offense." *Id.* (alteration in original).

Mr. Wilks contends the Illinois statute at issue is broader than the "controlled substance offense" as defined in the guidelines because it criminalizes conduct that does not qualify as a controlled substance offense. We disagree. While U.S.S.G.

§ 4B1.2 does not include the term "analog" in defining a "controlled substance offense," elsewhere Congress has indicated a clear intent that analogues be considered "controlled substances" under federal law. The Controlled Substance Analogue Enforcement Act of 1986 instructs courts to treat "controlled substance analogue[s]" as controlled substances in schedule I "for the purposes of any Federal law." *See* 21 U.S.C. § 813 (2015); *see also McFadden v. United States*, 135 S. Ct. 2298, 2302 (2015) ("The Controlled Substance Analogue Enforcement Act of 1986 (Analogue Act) identifies a category of substances substantially similar to those listed on the federal controlled substance schedules, 21 U.S.C. § 802(32)(A), and then instructs courts to treat those analogues . . . as controlled substances listed on schedule I for purposes of federal law, § 813.").

Moreover, the guidelines also indicate that analogues are intended to be included within the general definition of "controlled substances." The guidelines chapter dealing with offenses involving drugs and narco-terrorism provides that "[a]ny reference to a particular controlled substance in these guidelines includes . . . any analogue of that controlled substance." U.S.S.G. § 2D1.1, cmt. 6. Furthermore, the commentary to § 2D1.1 makes clear that the term "analogue" shares the same meaning as "the term 'controlled substance analogue' in 21 U.S.C. § 802(32)."[5] *Id.*

[5] In 21 U.S.C. § 802(32)(A), Congress defined "controlled substance analogue" as:

> a substance –(i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II; (ii) which has a stimulant, depressant, or

The guidelines impose a sentence enhancement for defendants who have "two prior felony convictions of either a crime of violence or a controlled substance offense." U.S.S.G. § 4B1.1(a)(3). Because the term "controlled substance" is intended to carry its generic meaning that includes analogue substances, a conviction under 720 Ill. Comp. Stat. 570/401(c)(2) is not materially different from a "controlled substance offense" as defined by U.S.S.G. § 4B1.2. Accordingly, Mr. Wilks' two prior convictions under 720 Ill. Comp. Stat. 570/401 qualify as controlled substance offenses under U.S.S.G. §§ 4B1.1 and 4B1.2.

We AFFIRM.

Entered for the Court

Stephanie K. Seymour
Circuit Judge

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hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or (iii) with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.