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United States Court of Appeals
Tenth Circuit

October 19, 2021

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

PATRICK LAJUAN JONES, JR.,

Defendant - Appellant.

No. 20-6112

**Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. 5:19-CR-00346-D-1)**

Kyle E. Wackenheim, Assistant Federal Public Defender, Oklahoma City, Oklahoma for Defendant-Appellant.

Nick M. Coffey, Assistant United States Attorney (Timothy J. Downing, United States Attorney with him on the brief), Oklahoma City, Oklahoma for Plaintiff-Appellee.

Before **HARTZ**, **PHILLIPS**, and **CARSON**, Circuit Judges.

CARSON, Circuit Judge.

Meaning derives from and depends on interpretation. And in interpreting the United States Sentencing Guidelines ("Guidelines" or "U.S.S.G"), we focus on the Sentencing Commission's intent. Defendant Patrick LaJuan Jones, Jr. contends the Sentencing Commission did not intend to include state convictions based on a

controlled substance not identified in the Controlled Substances Act ("CSA") to serve as predicate offenses when determining a defendant's base-offense level under U.S.S.G. § 2K2.1(a)(4). Although Application Note 1 of § 2K2.1(a)(4) directs us to § 4B1.2(b) where the Guidelines define "controlled substance offense," Defendant disregards the note's ordinary meaning and instead claims the Sentencing Commission intended to only include those controlled substances identified in the CSA. Based on a plain reading of § 4B1.2(b), the district court determined that the Sentencing Commission did not limit "controlled substance" to mean only substances identified in the CSA. We exercise jurisdiction under 28 U.S.C. § 1291 and affirm.

I.

Defendant pleaded guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Because Defendant pleaded guilty to a firearms offense, the United States Probation and Pretrial Services Office ("Probation Office") relied on U.S.S.G. § 2K2.1 in calculating Defendant's Presentence Investigation Report ("PSR"). Section 2K2.1 sets forth the base-offense level to apply in a firearms offense. Offense levels may vary based on different criteria, including a prior felony conviction of a controlled-substance offense. See U.S.S.G. § 2K2.1(a)(4)(A). Defendant's criminal-record history includes an Oklahoma conviction of possession with intent to distribute a controlled substance. Application Note 1 to § 2K2.1 provides a cross reference, which states that "controlled substance offense" has the meaning given to that term in § 4B1.2(b). Section 4B1.2(b) defines "controlled substance offense" as

> 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.

Based on a plain reading of § 4B1.2(b)'s controlled-substance-offense definition, the Probation Office calculated Defendant's base-offense level at 20 under U.S.S.G. § 2K2.1(a)(4)(A) based on his prior state-court felony conviction of a controlled-substance offense. After applying various enhancements and reductions, the Probation Office calculated Defendant's initial PSR offense level to be 21.[1] The Probation office calculated an advisory-guideline range of 70–87 months. Defendant did not object.

While this case was pending, we decided United States v. Cantu, 964 F.3d 924 (10th Cir. 2020). There we concluded that Oklahoma's drug offense at issue did not match the Armed Career Criminal Act's ("ACCA") definition of "serious drug offense." Id. at 934. Here, the Probation Office determined that under Cantu, the definition of "controlled substance offense" required a controlled substance identified in a state offense to match a controlled substance identified in the CSA. So the Probation Office revised Defendant's PSR—reducing his base-offense level to 14 under U.S.S.G. § 2K1.2(a)(6)(A). The Probation Office then applied the enhancement and various reductions resulting in a total-offense level of 15 and

[1] The Probation Office applied a four-level enhancement for firearm use in connection with a felony offense. It then reduced the offense level by three for acceptance of responsibility under U.S.S.G. § 3E1.1.(a)–(b).

criminal-history category of V. These applications led to a guideline range of 37–46 months. The government objected and argued Cantu did not apply because Defendant's state conviction remained a "controlled substance offense" despite our decision in Cantu.

At sentencing, the parties restated their positions on whether Cantu affected Defendant's guideline calculation. The district court sustained the government's objection. The district court determined that Application Note 1 to U.S.S.G. § 2K2.1 cross-references § 4B1.2(b)'s definition of "controlled substance offense" and includes state-law possession offenses punishable by more than one year in prison. The district court determined this definition included any state-law controlled-substance-possession offense—not just those identified by the CSA.

Thus, the district court determined Defendant's advisory-guideline range to be 70–87 months based on factors including his state conviction under Okla. Stat. tit. 63 § 2-401. The district court varied downward and sentenced Defendant to 60 months' imprisonment. Defendant now challenges that sentence calculation as procedurally unreasonable.

II.

We review the district court's sentencing decision for an abuse of discretion. United States v. Lente, 647 F.3d 1021, 1030 (10th Cir. 2011). In doing so we review the decision for procedural error. Id. A procedural error may occur when the district court fails to properly calculate the Guidelines range. Id. To ensure a calculation error did not occur, we review the district court's legal conclusions when calculating

Sentencing Guidelines de novo. United States v. Todd, 515 F.3d 1128, 1135 (10th Cir. 2008).

Defendant contends that his prior Oklahoma drug conviction does not fall within U.S.S.G § 4B1.2(b)'s definition of "controlled substance offense."[2] He argues that a prior state offense qualifies as a controlled-substance offense under § 4B1.2(b) only if it matches those controlled substances identified by the CSA. We disagree.

III.

When interpreting the Guidelines, we must "determine the intent of the Sentencing Commission." United States v. Rivera-Oros, 590 F.3d 1123, 1129 (10th Cir. 2009). To determine the intent, we apply traditional canons of statutory construction. United States v. Thomas, 939 F.3d 1121, 1123 (10th Cir. 2019) (citation omitted). We begin by examining a phrase or word's ordinary, everyday meaning. See United States v. Marrufo, 661 F.3d 1204, 1207 (10th Cir. 2011) ("When a term is not defined in the Guidelines, we give it its plain meaning."). The Guidelines define "controlled substance offense" as

> 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.

[2] Defendant does not dispute that his conviction satisfies the time requirement. Nor does he dispute that the state convicted him of possession with intent to distribute a controlled substance under state law.

U.S.S.G. § 4B1.2(b) (emphasis added). But § 4B1.2(b) does not define "controlled substance." See id. So we must do so now.

Defendant relies on decisions from the Second, Ninth, and Fifth Circuits to support his position that § 4B1.2(b) refers only to those controlled substances identified by the CSA.[3] To conclude that § 4B1.2 refers *only* to federally controlled substances these Circuits relied on the Jerome presumption—a presumption that "assume[s], in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law." Jerome v. United States, 318 U.S. 101, 104 (1943). But we need not apply the Jerome presumption here because § 4B1.2(b), by its plain language, references "state law." So § 4B1.2(b)'s controlled-substance-offense definition necessarily applies to and includes state-law controlled-substance offenses. See id.

To support our plain-language analysis, we need only turn to the text. Section 4B1.2(b) requires an "offense under federal *or* state law" to trigger the enhancement. Black's Law Dictionary defines "offense" as "[a] violation of the law." Offense, Black's Law Dictionary (11th ed. 2019). And "federal or state law" modifies "offense."

[3] See United States v. Townsend, 897 F.3d 66, 70–71 (2d Cir. 2018) ("Because the Guidelines presume the application of federal standards unless they explicitly provide otherwise, the ambiguity in defining 'controlled substance' must be resolved according to federal—not state—standards."); United States v. Leal-Vega, 680 F.3d 1160, 1167 (9th Cir. 2012) ("[W]e hold that the term 'controlled substance,' as used in the 'drug trafficking offense' definition in USSG § 2L1.2, means those substances listed in the CSA."); United States v. Gomez-Alvarez, 781 F.3d 787, 793–94 (5th Cir. 2015) (relying on the Ninth Circuit and concluding that "[f]or a prior conviction to qualify as a 'drug trafficking offense,' the government must establish that the substance underlying that conviction [was] covered by the CSA").

U.S.S.G. § 4B1.2(b). So to trigger the enhancement, a defendant must violate a federal or state law.

Section 4B1.2(b) also requires that the federal or state law be "punishable by imprisonment for a term exceeding one year." Id. The provision addresses the prohibited acts. Id. Thus, when a defendant's conviction arises under a state statute, we turn to the state law defining the offense for its punishment term and the prohibited conduct. See id. The prohibited acts include Defendant's state conviction—possession of a controlled substance with intent to distribute. Okla. Stat. tit. 63 § 2-401. And the phrase "under federal or state law" modifies the entire provision. U.S.S.G. § 4B1.2(b). So the plain meaning of the text shows that a predicate offense arises under "federal *or* state law" assuming it satisfies the other two criteria.

We are not alone in this conclusion. The Fourth, Seventh, and Eighth Circuits agree that § 4B1.2(b), by its plain language, refers to state as well as federal law. See United States v. Henderson, 11 F.4th 713, 718–19 (8th Cir. 2021) (agreeing that "there is no textual basis to graft a federal law limitation onto a career-offender guideline that specifically includes in its definition of controlled substance offense, 'an offense under . . . state law'"); United States v. Ward, 972 F.3d 364, 372 (4th Cir. 2020) (rejecting that a "controlled substance offense" qualifies for only those controlled substances identified in the CSA); United States v. Ruth, 966 F.3d 642, 654 (7th Cir. 2020) (concluding no

textual basis exists engrafting the CSA's definition into the career-offender guideline). So too have panels in the Sixth and Eleventh Circuits, albeit in unpublished cases.[4]

And we have rejected a similar attempt to limit the meaning of a different, but related phrase in § 4B1.2(b) in United States v. Thomas, 939 F.3d 1121 (10th Cir. 2019). In Thomas, the defendant sought to limit the definition of "counterfeit substances" to those identified by the CSA. Id. at 1125–26. But we rejected that argument because § 4B1.2(b) did not cross-reference the CSA's definition. Id. at 1128–29. And given that the Sentencing Commission explicitly cross-referenced the CSA's definition before, we reasoned that had it intended to do so in § 4B1.2(b), it would have. Id.

Defendant contends Thomas provides only dicta on this issue. Still its reasoning informs ours. And the plain reading of not only § 4B1.2(b), but also consideration of it in the context of the Guidelines as a whole, supports our conclusion. The Guidelines explicitly cross-reference the CSA in other provisions.[5] And § 4B1.2 expressly references other Guidelines provisions and federal statutes. See U.S.S.G. § 4B1.2(a)(2)

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[4] See United States v. Howard, 767 F. App'x 779, 784 n.5 (11th Cir. 2019) (unpublished) (rejecting that "controlled substance" in § 4B1.2 refers only to federally controlled substances); United States v. Smith, 681 F. App'x 483, 489 (6th Cir. 2017) (unpublished) (concluding that no requirement exists that "the particular controlled substance underlying a state conviction also be controlled by the federal government . . ." and that just because some substances are not "criminalized under federal law does not prevent conduct under the Illinois statue from qualifying as a predicate offense").

[5] See, e.g., U.S.S.G. § 2D1.1, appl. n.6 ("Unless otherwise specified, 'analogue,' for purposes of this guideline, has the meaning given the term 'controlled substance analogue' in 21 U.S.C. § 802(32)."); § 2K2.1, appl. n.1 ("'Destructive device' has the meaning given that term in 26 U.S.C. § 5845(f)"); id. ("'Firearm' has the meaning given that term in 18 U.S.C. § 921(a)(3)").

(citing 25 U.S.C. § 5845(a) and 18 U.S.C. § 841(c)). But no such cross-reference suggests we use the CSA definition of "controlled substance" or the federal drug schedules in applying § 4B1.2(b).

Defendant also argues that under Cantu, we should conclude that "controlled substance" in § 4B1.2(b) includes only those substances identified in the CSA. According to Defendant, Cantu requires that a predicate controlled-substance offense considered under § 4B1.2(b) must also match the CSA. But Defendant's reliance on Cantu is misplaced.

In Cantu, the defendant appealed the enhancement of his sentence in a different context—under the ACCA, 18 U.S.C. § 924(e)(1). 964 F.3d at 926. Cantu contended that two of his prior state drug-offense convictions did not satisfy the ACCA's definition of "serious drug offense." Id. So we applied the categorical approach from United States v. Smith, 652 F.3d 1244 (10th Cir. 2011), and concluded that because the elements of the state offense did not overlap with the definition of "serious drug offense" in the ACCA, the state-offense conviction could not be a predicate offense for the ACCA. Id. at 926–27. We then analyzed whether the Oklahoma statute was divisible based on each individual drug listed in Oklahoma's drug schedules. Id. at 928–29. We concluded that Oklahoma case law provided no certainty about whether the Oklahoma statute was divisible by drug and vacated the district court's sentence based on the ACCA enhancement because the offenses did not meet the statute's definition of "serious drug offense." Id. at 930–31, 936.

Textual differences in the ACCA and § 4B1.2(b) foreclose Defendant's Cantu-based argument. The ACCA defines "serious drug offense" as "involving . . . a controlled substance (as defined in section 102 of the Controlled Substances Act . . .)." 18 U.S.C. § 924(e)(2)(A)(ii). Thus, it contains an express textual reference to the CSA's definition of controlled substance. See id. Controlled-substance offenses triggering a § 4B1.2(b) enhancement are, however, not similarly limited. And "[i]t is a well-settled principle of statutory construction that when Congress (or, as here, the Sentencing Commission) 'includes particular language in one section of' a statute or Guideline, 'it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" United States v. Lucero, 747 F.3d 1242, 1249 (10th Cir. 2014) (quoting Keene Corp. v. United States, 508 U.S. 200, 208 (1993)). So, by not referencing the Controlled Substance Act definition in § 4B1.2(b), the Commission evidenced its intent that the enhancement extend to situations in which the state-law offense involved controlled substances not listed in the Controlled Substance Act.

Defendant violated Oklahoma's law prohibiting distribution of a controlled substance. That crime is punishable by imprisonment for a term exceeding one year. See Okla. Stat. tit 63 § 2-401. So Defendant's state conviction qualifies as a "controlled substance offense" under § 4B1.2(b).

Looking outside § 4B1.2(b)'s text, Defendant contends that Congress's enabling statute at 28 U.S.C. § 994(h) limits the term "controlled substance" in § 4B1.2(b) to substances listed in the CSA. Section 994(h) requires that the

Guidelines "specify a term of imprisonment at or near the maximum term authorized" when a defendant "has been convicted of a felony" that is a crime of violence or "an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46," and has been convicted of two or more prior felonies "each of which is" a crime of violence or "an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46." In Defendant's view, because § 994(h)(2) mentions the CSA and does not specifically mention state-law drug offenses, the statute limits application of § 4B1.2(b) to offenses involving a conviction for violating the CSA. But this logic ignores the fact that nothing in § 994(h) prohibits the Commission from recommending an enhanced sentence for a state-law controlled-substance offense. In other words, the statutory language requires the Commission to provide a career-offender enhancement for violations involving drugs prohibited by the CSA, but it does not strip the Commission of its authority to include drug offenses that are not violations of the CSA as predicate crimes for a career-offender enhancement.

And on its face, Defendant's position conflicts with established circuit authority. In the context of § 4B1.2(b), we have held that § 994(h) "does not represent an exclusive list of crimes for which enhancement under the career offender guidelines may be imposed and does not, by mandating enhancement for certain

crimes, preclude the Commission from enhancing others if it is within the Commission's grant of discretion to do so." United States v. Chavez, 660 F.3d 1215, 1227 (10th Cir. 2011) (internal quotation marks omitted) (quoting United States v. Allen, 24 F.3d 1180, 1186 (10th Cir. 1994)). Under § 994(a), Congress gave the Sentencing Commission broad discretion in drafting the Guidelines and the authority to determine what constitutes a "controlled substance offense" for the purpose of enhancing a career offender's sentence. Id.; see 28 U.S.C. § 994(a)(1) (granting the commission authority to "promulgate . . . guidelines . . . for use . . . in determining the sentence to be imposed in a criminal case"). See also United States v. Mendoza-Figueroa, 65 F.3d 691, 694 (8th Cir. 1995) (Section 994(h) "does not define the *only* crimes for which the Commission may specify a sentence at or near the maximum; it merely declares that the enumerated crimes must be so treated."); United States v. Jackson, 60 F.3d 128, 132 (2d Cir. 1995) ("Even if § 994(h) were the sole authority relied upon for Ch. 4, Pt. B, however, we do not interpret the statute and its legislative history as imposing an exclusive list of offenses that would subject a defendant to a career offender sentence."); United States v. Damerville, 27 F.3d 254, 257 (7th Cir. 1994) ("Section 994(h) does not define the only crimes that require the application of the career offender provisions, but rather it declares that those recidivists convicted of the enumerated crimes must receive a sentence at or near the maximum."); United States v. Smith, 54 F.3d 690, 693 (11th Cir. 1995) (holding the Commission acted within its authority under § 994(a) in considering offenses not listed in § 994(h) to be "controlled substance offenses" for determining career-

offender status). Accordingly, Congress gave the Commission discretion to include state-law controlled-substance offenses, involving substances not found in the CSA, within the definition of "controlled substance offense" under § 4B1.2(b).

Besides conflicting with our precedent, Defendant's position diverges from the Commission's understanding of its mandate under § 994(h). The 1987 version of § 4B1.2(2)[6] defined "controlled substance offense" to include the § 994(h) offenses plus "similar offenses." U.S.S.G. § 4B1.2(2) (1987) ("The term 'controlled substance offense' as used in this provision means an offense identified in 21 U.S.C. §§ 841, 952(a), 955, 955a, 959; §§ 405B and 416 of the Controlled Substance Act as amended in 1986, and similar offenses."). Application Note 2 to the 1987 version shows "similar offenses" meant "substantially equivalent state offenses." Thus, the 1987 version of § 4B1.2(2) reflects that the Commission understood § 994(h)'s mandate to require it to promulgate Guidelines enhancing the sentences of defendants convicted of offenses enumerated in § 994(h) at a minimum—not a maximum.

And in 1989, the Commission "clarified" § 4B1.2(2) by removing the "similar offenses" catchall and deleting the Application Note explaining that "similar offenses" meant "substantially equivalent state offenses." U.S.S.G. § 4B1.2(2) (1989). Because the 1989 amendment's purpose "was to clarify the definitions of crime of violence and controlled substance offense," Thomas, 939 F.3d at 1129

[6] The 1987 and 1989 versions of § 4B1.2 include a numbered, rather than lettered, list of definitions. U.S. Sent'g Guidelines Manual § 4B1.2 (U.S. Sent'g Comm'n 1987); U.S. Sent'g Guidelines Manual § 4B1.2 (U.S. Sent'g Comm'n 1989).

(citation omitted), rather than make substantive changes, the Commission either never intended to limit "controlled substance offense[s]" under § 4B1.2 to "substantially equivalent state offenses" or simply thought its definition was clearer without that language. We need not speculate, however, because § 994(h) does not represent an exclusive list of crimes for which the Guidelines may impose an enhanced sentence. And the Commission acted within its discretion when it included state-law controlled-substance offenses, involving substances not found on the CSA, within the definition of "controlled substance offense" under § 4B1.2(b).

Finally, Defendant argues that a plain-meaning interpretation of "controlled substance offense" under § 4B1.2(b) leads to absurd results and undermines national uniformity in sentencing. Under Defendant's position, a state conviction only "qualif[ies] as a predicate offense under § 2K2.1(a) if the state conviction aligns with, or is a 'categorical match' with, federal law's definition of a controlled substance." Townsend, 897 F.3d at 72. By Defendant's logic, his Oklahoma conviction would not constitute a predicate "controlled substance offense" because, post Mathis, state-drug offenses listing multiple controlled substances as means rather than elements are indivisible. See Mathis v. United States, 136 S. Ct. 2243, 2253 (2016) ("For these reasons, the court below erred in applying the modified categorical approach to determine the means by which Mathis committed his prior crimes."). State statutes that criminalize substances not listed on the CSA are categorically broader than federal offenses. So, if those statutes are also indivisible, they would be beyond § 4B1.2(b)'s purview and fail to qualify for an enhancement

under § 2K2.1, no matter the controlled substance at issue. Here, we have said that Okla. Stat. tit. 63 § 2-401 is indivisible by drug because the statute sets forth alternative means that violate it, rather than alternative elements. Cantu, 964 F.3d at 930, 934. Thus, under Defendant's view, the government could not prevail even if it established that Defendant's Oklahoma conviction involved a CSA-listed controlled substance. Townsend, 897 F.3d at 73 ("In other words, a state statute that punishes conduct not criminalized by federal law cannot affect the Guidelines calculation."). But disregarding *any* conviction under a state's categorically broader, indivisible drug-offense statute in determining whether to enhance a defendant's sentence arguably undermines national uniformity in sentencing more than considering *all* state-law convictions under indivisible or divisible statutes, though some convictions might involve non-CSA-listed substances. And, national uniformity aside, ignoring prior state-felony convictions in sentencing determinations, whether or not they involve non-CSA-listed substances, flouts Congress's intent that the Guidelines prescribe an enhanced sentence for defendants with "a history of two or more prior Federal, State, or local felony convictions for offenses committed on different occasions." 28 U.S.C. § 994(i)(1); Henderson, 11 F.4th at 717. For these reasons, Defendant's state conviction is a "controlled substance offense" under § 4B1.2(b).

AFFIRMED.