UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CRIMINAL MINUTES - GENERAL

Case No.	CR-13-0388-RGK-2	Date	January 15, 2016

Present: The Honorable	R. Gary Klausner, United States District Judge
Interpreter	N/A

S. Williams, Not Present	Not Reported	Julian Andre, Not Present
Deputy Clerk	*Court Reporter/Recorder*	*Assistant U.S. Attorney*

U.S.A. v. Defendant(s):	Present	Cust.	Bond	Attorneys for Defendants:	Present	App.	Ret.
Edward Nolan Norwood	N	X		David McLane, CJA Panel	N	X	

Proceedings: **Minute Order re: Defendant's Motions to Dismiss Information (DE 99,119)**

I. INTRODUCTION

Edward Norwood ("Norwood") has been indicted on two counts: (1) conspiracy to distribute, and possess with intent to distribute, cocaine base in the form of crack cocaine, in violation of 21 U.S.C. § 846; and (2) distribution of cocaine base in the form of crack cocaine, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(B)(iii) (the "Indictment").

Norwood moves to dismiss the Information alleging he sustained a prior felony conviction. (Docket No. 99.) Norwood asserts that this conviction is no longer a felony conviction, as this conviction was reduced to a misdemeanor pursuant to California's Proposition 47/Penal Code § 1170.18. (Mem. Supp. Mot. Dismiss Info. ("Def.'s Mem.") 1, Docket No. 99.) The Government has filed an Opposition. (Opp'n, Docket No. 104.) Norwood has replied. (Reply, Docket No. 107.)

For the following reasons, the Court **DISMISSES** the September 6, 2013 Information filed pursuant to 21 U.S.C. § 851 (the "Information").

II. FACTUAL & PROCEDURAL BACKGROUND

The Indictment was filed against Norwood on May 30, 2013. On September 6, 2013 the Government filed the Information alleging that Norwood committed the offenses charged in the Indictment after having been finally convicted of a felony drug offense. (Docket No. 20.) The Information charges Norwood with having been finally convicted of a felony drug offense on or about February 14, 2007 in Superior Court of the State of California, LA County, case number BA311513. (Id.) The offense is possession under California Health & Safety Code section 11350. The charge was for possession of "approximately 7 grams of crack cocaine in 2006." (McLane Reply Decl. Support Mot. Change Venue ¶ 2, Docket No. 108-1.)

On July 28, 2015 the Superior Court of the State of California, Los Angeles County ("Superior Court") held a "Proposition 47 Application Hearing." (Def.'s Mem. Ex. B-1, Docket No. 99-2.) The Superior Court found that Norwood was eligible and suitable to have his conviction reduced to a misdemeanor pursuant to California's Proposition 47. (Id.) Consequently, the Superior Court ordered the charging count to be reduced to a misdemeanor. (Id.) Specifically, the Superior Court ordered that the information filed November 27, 2006 in case No. BA311513 be "deemed amended" and ordered that the charging count "shall proceed as a misdemeanor."

The present motion followed.

A. California Health & Safety Code section 11350 amended by Voter Enacted Proposition 47

When Norwood was convicted in Superior Court on February 14, 2007, California Health & Safety Code section 11350(a) provided that possession of a controlled substance "shall be punished by imprisonment in the state prison"—a felony. Today, possession of a controlled substance is punishable only "by imprisonment in a county jail for not more than one year" unless the person convicted of possession also has one or more prior serious and/or violent felony convictions or is a person required to register under the Sex Offender Registration Act. Neither of these exceptions apply to Norwood.

This more lenient sentencing structure has been in effect since the day after California voters passed Proposition 47 on November 4, 2014 with 59.6% of the vote. Proposition 47, codified at Cal. Penal Code § 1170.18 et seq.

B. Proposition 47, California Penal Code section 1170.18 et seq., provides for redesignation of felonies as misdemeanors

Along with the new sentencing structure, Proposition 47 provided re-sentencing provisions. Any person who had previously been convicted, whether by trial or plea, of a felony under California Health & Safety Code section 11350 who would under the terms of Proposition 47 have been guilty only of a misdemeanor could petition the trial court for resentencing. Cal. Penal Code § 1170.18(a).

Finally, and most relevantly to this case:

> "A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors."

Cal. Penal Code § 1170.18(f). The process for redesignation is nearly automatic. The trial court must designate the felony offense as a misdemeanor if it satisfies the conditions of section 1170.18(f). Cal. Penal Code § 1170.18(g).

Proposition 47 goes on to specify that any recalled felony conviction "shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm." Cal. Penal Code § 1170.18(k). Proposition 47 section 15

states the act "shall be broadly construed to accomplish its purposes," and section 18 states the act "shall be liberally construed to effectuate its purposes." Text of Proposed Laws 74, available at http://vig.cdn.sos.ca.gov/2014/general/pdf/text-of-proposed-laws1.pdf.

Norwood applied to Superior Court for redesignation, and such application was acted upon, in favor of Norwood, on July 28, 2015. (Def.'s Mem. Ex. B-1, Docket No. 99-2.)

III. JUDICIAL STANDARD

A. Construction of 21 U.S.C. section 841 is a mixed question of Federal Law and State Law

Construction of certain terms of 21 U.S.C. section 841 is a matter of federal law. Specifically, the meanings of the terms "final" and "conviction" are questions of federal law.

United States v. Norbury, 492 F.3d 1012 (9th Cir. 2007), resolved that the term "conviction" in section 841 is a question of federal law. Id. at 1015. Norbury further held that "expunged" or "dismissed" state convictions still qualify as prior convictions under section 841 if the expungement or dismissal did not alter the legality of the conviction. Id. The Norbury court reasoned that the "legality of a conviction does not depend upon the mechanics of state post-conviction procedures, but rather involves the conviction's underlying lawfulness." Id. The Norbury court cited actual innocence and trial error as examples affecting a conviction's legality. Id.

United States v. Suarez, 682 F.3d 1214 (9th Cir. 2012), similarly resolved that the term "final" in section 841 is a question of federal law. Id. at 1220. However, it is a mixed question of federal and state law because the Ninth Circuit's finality standard turns on whether "the time for taking a direct appeal from the prior state conviction expires or has expired." Id. The Suarez court considered whether a guilty plea entered to felony drug possession, a plea which never resulted in the entry of judgment of guilt, was "final" for purposes of section 841. Id. at 1219. The Suarez court concluded that because the defendant's charges were dismissed before judgment was entered against him (due to deferred entry of judgment under California Penal Code §1000) and because the defendant's guilty plea was not appealable, it was not a "final" conviction under section 841. The Ninth Circuit consequently reversed the district court's imposition of a twenty-year mandatory minimum sentence, vacated the sentence, and remanded for resentencing.

Unlike "final" and "conviction," the term "felony drug offense," as it is used in this case, is defined with explicit reference to state law: "The term 'felony drug offense' means an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." 21 U.S.C. § 802(44). The Ninth Circuit has said that determining whether a prior conviction qualifies as a "felony drug offense" requires the court to look "only to the fact of the conviction and the statutory definition of the prior offense." U.S. v. Hollis, 490 F.3d 1149, 1157 (9th Cir. 2007), abrogated on other grounds by DePierre v. United States, _ U.S. _, 131 S. Ct. 2225 (2011).

IV. DISCUSSION

Under 21 U.S.C. section 841(b)(1)(B)(iii), a person who commits a violation of this section "after a prior conviction for a felony drug offense has become final" shall be sentenced to a term of not less than 10 years.

At the heart of the matter, Norwood argues that his conviction in BA311513 is no longer a "felony drug offense" because the Superior Court's order amended the charge in BA311513 and ordered that the conviction is now a misdemeanor.

The Government argues that Norwood's conviction in BA311513 was, at the time Norwood committed the present offense, a "prior conviction . . . that has become final." Further, because his conviction was a felony drug offense as the phrase is defined in section 802(44) at the time Norwood is alleged to have committed the present offense, the conviction alleged in the information remains a "conviction for a felony drug offense" that "has become final."

This dispute presents a pure question of law for the Court to resolve.

A. This case is resolved by the definition of "felony drug offense" rather than "final" or "conviction"

The present case is resolved on grounds similar to those stated in United States v. Summey, EDCR 08-0181 (C.D. Cal. Sept. 30, 2015) (Docket No. 75) motion for reconsideration filed No. 76 (Nov. 17, 2015).[1]

In Summey, Judge Phillips held that a California Superior Court's redesignation of a prior state court conviction in a petitioner's case from a felony to a misdemeanor under Proposition 47 was consequential in determining whether the defendant had a prior conviction for a felony drug offense under section 841. Id. at *8-9. The Summey court found that the sentence originally imposed in the petitioner's federal case was imposed in violation of the laws of United States, was in excess of the maximum sentence authorized by law, or was otherwise subject to collateral attack because the prior conviction used to enhance petitioner's sentence could no longer be considered a conviction for a "felony drug offense." Id. at *11.

This Court (and now the Summey Court on the motion for reconsideration) has the benefit of more focused briefing on the merits of this argument rather than the procedural propriety of a section 2255 petitioner's motion. Nevertheless, the same conclusion is warranted. In this case, the Information should be dismissed.

All a court must do in reviewing whether a prior conviction applies is look "only to the fact of the conviction and the statutory definition of the prior offense." Hollis, 490 F.3d at 1157. Both parties agree that there has been a conviction. Both parties agree on the statutory definition at the time of sentencing and the statutory definition today. The parties disagree strongly about which statutory definition to use, but Proposition

[1] The memorandum supporting the motion for reconsideration filed in Summey presents the same arguments as the Government's Opposition to Motion to Dismiss information filed in this case. It also cites no additional precedent save for cases laying out the standard for a motion for reconsideration.

47 provides the answer.

> "Any felony conviction that is recalled and resentenced under subdivision (b) or **designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes**, except that such resentencing shall not permit that person to own . . . any firearm or prevent his or her conviction under [certain control of deadly weapons statutes.]"

Cal. Penal Code § 1170.18(k) (emphasis added). Here, Proposition 47 has retroactively redesignated the drug conviction and, "for all purposes," Norwood's conviction in BA311513 is a misdemeanor. Norwood is no longer convicted of a "felony drug offense," as alleged in the Information, nor was he ever in terms of Proposition 47.

B. The Government's arguments in response fall short

The Government raises a few arguments in response to Summey. These arguments are made in the Opposition in this case, but are structured more clearly in the Government's motion for reconsideration in Summey. ("Mot. Reconsideration" available at United States v. Summey, EDCR 08-0181 (C.D. Cal. Sept. 30, 2015) (Docket No. 76).)

1. *The literal language suggesting a strict adherence to timing in determining whether to apply sentencing enhancements under 21 U.S.C. § 841 cannot alone decide the case*

First, the Government argues, the plain language of section 841 makes no exception for a latter change in the status of a defendant's prior conviction. (Opp'n 10. See also Mot. Reconsideration 1 ("under the plain language of 21 U.S.C. § 841, the relevant time at which felony status is determined is, at the latest, the date when the defendant committed the federal offense.") The Government would peg the date that the sentencing enhancement attaches as the date the present offense is committed on the sole grounds that the present offense occurred "**after** a prior conviction for a felony drug offense has become final." 21 U.S.C. § 841 (emphasis added). This argument is a red herring.

So far as the Government's construction of the text puts undue importance on the temporal aspects of the statute's language, the Government's construction in this instance is unwarranted. Such a construction of the statute would undermine the acknowledged exceptions to section 841 recited in Norbury and is contrary to some of the reasoning employed in Dickerson v. New Banner Institute, Inc., 460 U.S. 103 (1983) and Lewis v. United States, 445 U.S. 55 (1980). To be specific, the Government's construction of the plain text incorrectly suggests that even if a final conviction is vacated for reasons of the conviction's legality or the defendant's actual innocence—exceptions acknowledged in Norbury—it *could* still be used as a prior conviction based on when the federal crime is committed and when the predicate conviction is finally vacated. This would be contrary to the Norbury court's reading of Dickerson.

In Dickerson, the Supreme Court determined that Iowa's expunction provisions did not nullify a petitioner's conviction for purposes of a federal gun control statute. 460 U.S. at 114. The Dickerson Court noted that there could, however, be exceptions if the expunction modified the legality of the previous conviction or signified that the defendant was innocent of the crime. Id. at 115.

The Supreme Court explicitly stated that in the context of reading recidivist statutes, the plain language

does not necessarily control. In Lewis, the Court determined that even if a convict's conviction was subject to collateral attack, the conviction could remain a predicate felony for purposes of federal gun control laws. 445 U.S. 55. Nevertheless, in dicta, the Court analyzed and ultimately constrained the sweeping language of the federal law: "One might argue, of course, that the language is so sweeping that it includes in its proscription even a person whose predicate conviction in the interim had been finally reversed on appeal and thus no longer was outstanding. . . . though we have no need to pursue that extreme argument in this case, we reject it." Id. at 61 n. 5. Three years later, the Court formalized this dicta as an "obvious exception to the literal language of the statute." Dickerson, 460 U.S. at 115.

The reasoning applied to these federal statutes, though made in the context of gun control rather than section 841 sentence enhancements, is equally valid in this context. Norbury, 492 F.3d at 1015. If an exception to the literal language can be made for certain vacated convictions, the Court should be able to at least reach the merits of whether a similar exception applies in the present case of a conviction redesignated as a misdemeanor.

Finally, the Government also cites McNeill v. United States, _ U.S. _, 131 S. Ct. 2218 (2011), for the proposition that the proper time to look at whether the state court conviction is a felony is at the time of the original state court conviction. In this Armed Career Criminal Act (ACCA) case, an unanimous Supreme Court held that under the proper construction of ACCA, the time to look to see whether "an offense under State law" is a "serious drug offense" is to look at the offense at the time of the defendant's conviction for this predicate offense. Id. at 2221-22.[2] Nevertheless, the Supreme Court left as an open question whether federal courts should consider the effect of state action where "a State subsequently lowers the maximum penalty applicable to an offense and makes that reduction available to defendants previously convicted and sentenced for that offense." Id. at 2224 n. 1. Norwood's motion addresses the precise issue that the Supreme Court anticipated.

2. *Redesignation under Proposition 47 is broader than, and different in kind from, an expungement or a dismissal.*

Dickerson and Norbury reason:

> An expunged or dismissed state conviction qualifies as a prior conviction if the expungement or dismissal does not alter the legality of the conviction or does not represent that the defendant was actually innocent of the crime.

Norbury, 492 F.3d at 1015, citing Dickerson, 460 U.S. 103 (1983). Here, the government argues that Proposition 47 did not alter the legality of the conviction or represent that the defendant was actually innocent of the crime.

But a Proposition 47 redesignation is not an expungement or dismissal of a state conviction – it is instead a *redesignation* of a state conviction. This is not a mere distinction without a difference.

Expungements and dismissals are outcomes of states' general post-conviction procedures that "vary

[2] ACCA is constructed somewhat differently than section 841, and specifically says: "In the case of a person who . . . has three previous convictions by any court . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be . . . imprisoned not less than fifteen years . . . ." 18 U.S.C. § 924(e)(1).

widely from State to State." Dickerson, 460 U.S. at 120.[3] In contrast, the redesignation provisions in Proposition 47 are part of a voter-enacted proposition that also lowered the maximum sentence that can be imposed for the conduct charged in Norwood's prior state court conviction. To clarify: while expungements or certain dismissals may not indicate that the State has changed its perception of the wrongfulness of conduct, in contrast, Proposition 47 (1) reduced the maximum sentence, (2) provided a resentencing remedy, and (3) provided a redesignation remedy. Proposition 47 therefore reflects the position that California voters do not believe possession of controlled substances under section 11350 should have ever been treated as conduct worthy of a felony.[4] California voters were also willing to ante up to this position, by allowing even convicted felons (now misdemeanants) currently serving sentences to have their sentences reduced.

Because Proposition 47 reduced the consequences for engaging in prohibited behavior for new offenders, persons currently serving a sentence for that behavior, and for persons who have already completed their sentences, Proposition 47 significantly differs from laws cited in other cases addressing analogous issues. The Government chiefly cites U.S. v. McGlory, 968 F.2d 309 (3d Cir. 1992). In McGlory, the Third Circuit considered whether conduct that could no longer be charged as a felony under Pennsylvania state law could still be the basis of a predicate felony drug offense for purposes of section 841 if the defendant was properly charged and convicted under the prior law. 968 F.2d 348-51. The McGlory court concluded that such a conviction, even if the same conduct would not make defendant guilty of a felony at the time of his federal drug crime, could still qualify as a predicate drug offense. Id. at 351.

But as Judge Phillips recognized in Summey, dicta in McGlory recognized that a retroactive provision "strikingly similar to Cal. Penal Code § 1170.18" could have provided the result the defendant in McGlory desired. Summey at 10. See also McGlory, 968 F.2d at 351 n. 33. However, the retroactive provision had previously been found unconstitutional under Pennsylvania law. Id. citing Commonwealth v. Sutley, 474 Pa. 256 (1977). Therefore, there was no "wholesale reduction of prior . . . offenses from felony to misdemeanor status." McGlory, 968 F.2d at 351 citing U.S. v. Tobin, 408 F. Supp. 760, 762 (W.D. Pa. 1976). Here, in contrast, Proposition 47 through its resentencing and redesignation provisions, demonstrates an intent to reduce prior offenses under section 11350 for any qualifying prior offender.

Finally, the Government cites language in McNeill that "it cannot be correct that subsequent changes in state law can erase an earlier conviction for ACCA purposes." _ U.S. _, 131 S. Ct. 2223. (Opp'n 12. See also Mot. Reconsideration 7.) However, the remainder of the paragraph from which the Government quotes highlights that affirmative actions such as expungement or dismissal do "erase" certain violent felony convictions under ACCA—erasure is completely possible depending on the applicable federal and state laws.

Here, Proposition 47 accomplishes two objectives simultaneously. Proposition 47 provides a change in state law *and* affords to a former felon such as Norwood a process to have his felony conviction redesignated a misdemeanor. This makes Proposition 47 meaningfully different from general state post-conviction procedures

[3] Two cases that the Government cites in opposition, U.S. v. Yepez, 704 F.3d 1087 (9th Cir. 2012) (*en banc*) and U.S. v. Salazar-Mojica, 634 F.3d 1070 (9th Cir. 2011), address instances of varying "post-conviction procedures." California Penal Code section 17(b), provides a California superior court with discretion to designate "wobbler" offenses as misdemeanors. Here, there is no discretion, based on the mandatory language of California Penal Code section 1170.18(g).

[4] Additionally, possession is not a felony under federal law unless the defendant has certain drug-related prior convictions. 21 U.S.C. § 844.

and demonstrates an intent to reduce the consequences for conduct Norwood was convicted of in 2007.

3. *The extent of Proposition 47's retroactivity is unsettled and currently before the California Supreme Court*

The Government argues—even if there is an exception recognized in McGlory and left open by implication in McNeill for laws that retroactively reduce sentences—that Proposition 47 is not such a law because Proposition 47 is not retroactive. The Government cites People v. Feyrer, 48 Cal. 4th 426 (2010), and People v. Perez, 190 Cal. Rptr. 3d 738 (2015), pet. for review granted Nov. 18, 2015, 2015 WL 7294332, for this proposition.

People v. Feyrer was decided in 2010, before Proposition 47 was enacted. People v. Feyrer interpreted California Penal Code section 17(b)(3) which provides: "(3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor." The Feyrer court determined that if a sentence is not initially imposed (i.e., the court suspends pronouncement of a sentence), the offense is not a misdemeanor until the court declares it to be one—and it is not a misdemeanor retroactively.[5] 48 Cal. 4th at 439.

People v. Park, 56 Cal. 4th 782 (2013), is instructive. In Park, the California Supreme Court clarified that although language in Feyrer and People v. Banks, 53 Cal. 2d 370 (1959), suggested that felonies remained felonies up until they were reclassified as misdemeanors, once the felony is indeed reclassified as a misdemeanor, it becomes a misdemeanor even for backward looking laws such as California's Three Strikes Law. Park, 56 Cal. 4th at 802-03.

Final state court interpretation of the retroactivity of Proposition 47 is not yet definitively determined. Norwood cites People v. Buycks, 241 Cal. App. 4th 519, 194 Cal. Rptr. 3d 33 (2015), for the position that a redesignated misdemeanor is treated liberally as a misdemeanor even for determining whether sentences can be enhanced based on conduct committed while the redesignated misdemeanor was still a felony. The California Supreme Court recently granted petition for review of the two California Court of Appeals cases cited by the Government (Perez and People v. Eandi, 239 Cal. App. 4th 801, 190 Cal. Rptr. 3d 923 (2015)) for the opposite proposition.

[5] Arguably, even this is a very minor point in Feyrer irrelevant to the present case. Feyrer's holding and result was to affirm an earlier ruling of the California Court of Appeals. The Court of Appeals had previously held that the sentencing court retained discretion to reduce a charge to a misdemeanor until the court imposes a sentence, notwithstanding defendant's admission to conduct that would restrict a sentencing court's discretion. 48 Cal. 4th 440-45.

V. CONCLUSION

For the foregoing reasons, the Court **DISMISSES** the September 6, 2013 Information filed pursuant to 21 U.S.C. § 851 (the "Information").

IT IS SO ORDERED.

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