IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JOE RAMON SANTILLAN, Defendant.	No. 17-CR-3052-LRR **ORDER**

I. INTRODUCTION

The matters before the court are Defendant Joe Ramon Santillan's "Motion to Dismiss Count 3" ("Motion to Dismiss") (docket no. 14) and "Motion to Strike and/or Set Aside Government's Section 851 Notice" ("Motion to Strike") (docket no. 17).

II. RELEVANT PROCEDURAL HISTORY

On November 30, 2017, a grand jury returned a four-count Indictment (docket no. 2) charging Defendant with: (1) conspiracy to distribute a controlled substance, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 846 and 851; (2) possession with intent to distribute a controlled substance, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 851; (3) possession of a firearm by a prohibited person, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2); and (4) possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A). *See* Indictment at 1-4. On February 5, 2018, Defendant filed the Motion to Dismiss. On February 10, 2018, Defendant filed the Motion to Strike. On February 12, 2018, the government filed the Resistance to the Motion to Dismiss (docket no. 18) and the Resistance to the Motion to Strike (docket no. 19). On February 18, 2018, Defendant filed the Reply to the Resistance to the Motion to Strike (docket no. 20). The matters are fully submitted and ready for decision.

III. ANALYSIS

A. Motion to Dismiss

In the Motion to Dismiss, Defendant contends that Count 3 of the Indictment, charging him with being a prohibited person in possession of a firearm, fails as a matter of law. *See* Motion at 1. The Indictment charges that Defendant is prohibited from possessing a firearm due to his prior felony conviction. *See* Indictment at 3. Defendant contends that he cannot be convicted of the offense of being a prohibited person in possession of a firearm because the predicate felony, "possession of marijuana for sale, . . . was subsequently 'redesignated' to a misdemeanor." Motion at 1. The government argues that "post-conviction reclassification of [D]efendant's state of California prior felony drug conviction to a misdemeanor does not affect th[e] conviction's felony status for purposes of federal law pursuant to 18 U.S.C. § 922(g)." Resistance to Motion to Dismiss at 1.

1. Standard of review

Federal Rule of Criminal Procedure 12(b) authorizes pretrial motions to present "any defense, objection, or request that the court can determine without a trial on the merits." Fed. R. Crim. P. 12(b)(1). "A motion is capable of pretrial determination 'if trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity' of the motion." *United States v. Turner*, 842 F.3d 602, 604-05 (8th Cir. 2016) (quoting *United States v. Covington*, 395 U.S. 57, 60 (1969)). "[T]o be valid, an indictment must allege that the defendant performed acts which, if proven, constitute the violation of law for which he is charged. If the acts alleged in the indictment do not constitute a violation of the law, the indictment is properly dismissed." *United States v. Polychron*, 841 F.2d 833, 834 (8th Cir. 1988).

2. Prior conviction

Title 18 U.S.C. § 922(g)(1) provides, in relevant part, that "[i]t shall be unlawful

for any person who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year" to possess a firearm. "The term 'crime punishable by imprisonment for a term exceeding one year' does not include . . . any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less." 18 U.S.C. § 921(a)(20)(B). "What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held." 18 U.S.C. § 921(a)(20). "Whether a particular conviction qualifies as a predicate felony for the purpose of § 922(g) is a question of law for the district court." *United States v. Thomas*, 615 F.3d 895, 899 (8th Cir. 2010).

The Indictment states, in relevant part, that Defendant had "previously . . . been convicted of a crime punishable by imprisonment for a term exceeding one year, namely: possession of marijuana for sale, in the Superior Court for Lancaster County, California, on or about February 19, 2008." Indictment at 3. On February 19, 2008, Defendant was convicted of the felony of possession of marijuana for sale, in violation of California Health and Safety Code § 11359. *See* Exhibit 1 (docket no. 18-2) at 8. Defendant was sentenced to a sixteen-month term of incarceration. *Id.*

On November 8, 2016, the California electorate passed Proposition 64. *See* 2016 Cal. Legis. Serv. Prop. 64. Proposition 64 amended § 11359 "to provide, generally, that '[e]very person [eighteen] years of age or over who possesses marijuana for sale shall be punished by imprisonment in a county jail for a period of not more than six months," thus reducing the offense to a misdemeanor. *People v. Rascon*, 216 Cal.Rptr.3d 385, 388 (Cal. Ct. App. 2017) (first alteration in original). Proposition 64 also added Health and Safety Code § 11361.8, which provides that,

> [a] person who has completed his or her sentence for a conviction under [§ 11359] . . . who would have been guilty of a lesser offense under the Control Regulate and Tax Adult

> Use of Marijuana Act had that 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 conviction . . . redesignated as a misdemeanor . . . .

Cal. Health & Safety Code § 11361.8(e). "Once the applicant satisfies the criteria in subdivision (e), the court shall redesignate the conviction as a misdemeanor . . . ." *Id.* § 11361.8(f). "Any felony conviction that is . . . designated as a misdemeanor . . . under subdivision (f) shall be considered a misdemeanor . . . for all purposes." *Id.* § 11361.8(h). In sum, Proposition 64 reduced the maximum term of imprisonment for a § 11359 offense and provided a procedure for persons who had previously discharged their sentence to have their felony conviction redesignated as a misdemeanor.

On December 26, 2017, the Superior Court of California, County of Los Angeles granted Defendant's petition for redesignation of his felony conviction to a misdemeanor pursuant to Health and Safety Code § 11361.8(f). *See* Exhibit 1 at 12. Defendant contends that this redesignation prevents his prior conviction from qualifying as a predicate felony offense under 18 U.S.C. § 922(g). However, the Indictment charges Defendant with possession of multiple firearms "[f]rom about February[] 2017 through November 9, 2017." Indictment at 3. It is undisputed that Defendant's prior felony conviction was not redesignated to a misdemeanor until after the alleged possession.

Further, although Proposition 64 was put into effect on November 9, 2016, it was not automatically retroactive for individuals who were previously convicted of the felony, as evidenced by the application procedure for reclassification of convictions. That Defendant might have, but had not yet, reclassified his conviction at the time he possessed the firearm does change his alleged status as a prohibited person. *See Lewis v. United States*, 445 U.S. 55, 67 (1980) ("[A] convicted felon may challenge the validity of a prior conviction, or otherwise remove his disability, before obtaining a firearm."); *United States v. Kind*, 194 F.3d 900, 906-07 (8th Cir. 1999) ("There is no evidence that [the

defendant's] right to possess firearms was restored under Minnesota law at the time he purchased the shotgun."); *see also United States v. Padilla*, 387 F.3d 1087, 1091 (9th Cir. 2004) ("[T]he only relevant circumstance for present purposes is [the defendant's] status as a convicted felon at the time he possessed a firearm."). Therefore, assuming without deciding that Proposition 64 restored Defendant's right to possess a firearm after his conviction was redesignated, it is beyond dispute that such was not the case at the time of the possession alleged in the Indictment.

Defendant's contention that "[i]t is . . . of no importance that the Indictment alleges a date of possession of firearms that was prior to the 'redesignation' of [D]efendant's purported felony conviction" because "[§] 921(a)(20) does not limit the exception in any temporal way" is without merit and is unsupported by the case he cites. Brief in Support of Motion to Dismiss (docket no. 14-1) at 4; *see also United States v. Burleson*, 815 F.3d 170, 172 (4th Cir. 2016) (concluding that "if a felon has had his civil rights restored, then his prior felony conviction may no longer serve as a predicate for a violation of § 922(g)" and stating that this exclusion was critical in the present case because the defendant's "civil rights were fully restored by operation of state law in 1993, almost two decades before the 2012 arrest that led to his federal felon-in-possession charge under § 922(g)").

Accordingly, the court shall deny the Motion to Dismiss.

B. Motion to Strike

In the Motion to Strike, Defendant argues that the court should strike "the government's 21 U.S.C. [§] 851 notice alleged in the Indictment" because "[t]he [§] 851 predicate is not a drug felony" as the "alleged predicate offense has been redesignated as a misdemeanor by California State law." Brief in Support of Motion to Strike (docket no. 17-1) at 1. The government contends that "post-conviction reclassification of [D]efendant's state of California prior felony drug conviction to a misdemeanor does not affect this conviction's status with respect to [a] potential federal sentenc[ing] enhancement

and notice thereof" pursuant to 18 U.S.C. §§ 841 and 851. Resistance to Motion to Strike at 1.

"For purposes of applying the mandatory sentencing enhancements of § 841(b)(1), the term 'felony drug offense' 'is defined exclusively by § 802(44).'" *United States v. Hawkins*, 548 F.3d 1143, 1150 (8th Cir. 2008) (quoting *Burgess v. United States*, 553 U.S. 124, 126 (2008)). "The term 'felony drug offense' is broadly defined to include, in relevant part, offenses punishable by imprisonment for more than one year under any federal or state law." *Id.* (quotations omitted).

At the time of Defendant's conviction for the underlying offense, a violation of California Health and Safety Code § 11359 was punishable by a term of imprisonment of sixteen months, or two or three years. *See* Exhibit 1 at 11; Cal. Penal Code § 1170(h)(1). After passage of Proposition 64, the maximum sentence for a violation of § 11359 was "imprisonment . . . for a period of not more than six months." Cal. Health & Safety Code § 11359(b). Therefore, at the time of Defendant's conviction, § 11359 qualified as a "felony drug offense" for purposes of 18 U.S.C. § 841. Defendant asserts that because the offense is now punishable by not more than six months, his prior offense does not qualify as a "felony drug offense." Brief in Support of Motion to Strike at 1-3. The court does not find that this change in the status of Defendant's conviction is relevant for purposes of § 841(b)(1)(A).

"'[T]he question posed by § 841(b)(1)(A) is whether the defendant was previously convicted, not the particulars of how state law later might have' permitted relief from the defendant's state conviction." *United States v. Diaz*, 838 F.3d 968, 973-74 (9th Cir. 2016) (quoting *United States v. Dyke*, 718 F.3d 1282, 1293 (10th Cir. 2013)). "In other words, a state making a change to a state conviction, after it has become final, 'does not alter the historical fact of the prior state conviction' becoming final—which is what § 841 requires." *Id.* at 974 (alteration omitted) (quoting *Dyke*, 718 F.3d at 1292). "Even where a state has

fully eradicated a predicate state conviction by dismissing it or expunging it—a more drastic change than merely reclassifying it as a misdemeanor—'as a matter of plain statutory meaning there is no question' the defendant committed his crime 'after a prior state felony conviction' has become final." *Id.* (alterations and emphasis omitted) (quoting *Dyke*, 718 F.3d at 1292).

The court is persuaded by the Ninth Circuit Court of Appeals decision in *Diaz*. In *Diaz*, the court addressed the impact of California's Proposition 47, which similarly offered "post-conviction relief by reclassifying certain past felony convictions as misdemeanors." 838 F.3d at 975. The Ninth Circuit examined § 841 and determined that California's reclassification of past felony convictions "does not undermine a prior conviction's felony-status for purposes of § 841." *Id.* The Ninth Circuit concluded that, "California's later actions cannot change the fact that [the defendant] committed his federal offense 'after two or more convictions for a felony drug offense [had] become final.'" *Id.* (second alteration in original). Importantly, the court reached this conclusion despite the inclusion of language that the felony that was redesignated as a misdemeanor "shall be considered a misdemeanor for all purposes." *Id.* at 972.

The court finds that for purposes of §§ 841 and 851 the definition of "felony drug offense" refers to the offense as it was punishable at the time of Defendant's conviction, regardless of subsequent changes to the sentencing scheme. *See United States v. Williams*, 616 F.3d 760, 766 n.3 (8th Cir. 2010) (concluding that, where the defendant contended that his prior offense "was not a 'felony' for purposes of the [§ 841(b)(1)(A)] enhancement," the critical fact was that the defendant "pled guilty to [an] Illinois offense, the punishment for which me[t] the definition of 'felony' under federal law" even if "the Illinois court later changed its notation, or even if it had expunged [the defendant's] record altogether"); *United States v. Burdock*, 355 F. App'x 81, 83 (8th Cir. 2009) (concluding that the district court erred in enhancing the defendant's offense based "on the current

version of the [state] statute" which provided for a maximum sentence of two years, when the defendant was actually convicted and sentenced under a prior version of the statute, which provided for a maximum sentence of one year); *see also United States v. McCaney*, 177 F. App'x 704, 709-10 (9th Cir. 2006) (concluding that there was not "any support for reading § 802's definition of felony drug offense as referring to how the offense is presently punishable, as opposed to the maximum punishment which could be imposed at the time of conviction" and explaining that "[s]uch a reading would produce anomalous results in situations . . . where an offense formerly punishable only as a misdemeanor under the statute were subsequently made a felony"). At the time of Defendant's conviction, his offense was punishable by a term of imprisonment greater than one year. Therefore, it qualifies as a prior "felony drug offense."

Accordingly, the court shall deny the Motion to Strike.

IV. CONCLUSION

In light of the foregoing, the Motion to Dismiss (docket no. 14) and the Motion to Strike (docket no. 17) are **DENIED**.

IT IS SO ORDERED.

DATED this 10th day of March, 2018.

LINDA R. READE, JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA