

MAY 22 2008

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARCOS DIEGO-BARRERA,

Defendant - Appellant.

No. 05-50541

D.C. No. CR-05-00037-LAB

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Larry A. Burns, District Judge, Presiding

Submitted May 5, 2006**
Pasadena, California

Before: D.W. NELSON, HAWKINS, and PAEZ, Circuit Judges.

In 2005, Marcos Diego-Barrera pled guilty to illegal re-entry. At his sentencing hearing, the government sought enhancements based on two prior

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

convictions. Previously, Diego-Barrera had pled guilty to “Possession or purchase for sale of designated controlled substances,” in violation of Cal. Health & Safety Code § 11351, and “Transportation, sale, giving away, etc., of designated controlled substances,” in violation of Cal. Health & Safety Code § 11352. Diego-Barrera objected to the imposition of a sentence enhancement. He argued that the government failed to provide clear and unequivocal evidence that these prior convictions constituted aggravated felonies. The district court rejected this argument and imposed a seventy-eight month sentence.

On May 9, 2006, we issued a memorandum disposition affirming the enhanced sentence. *United States v. Diego-Barrera*, No. 05-50541, 2006 WL 1236689 (9th Cir. May 9, 2006). We applied the modified categorical approach to examine the nature of these convictions. *Id.* at *1. We held that the record in the district court was insufficient to establish, by clear and unequivocal evidence, that the prior convictions had been based on all of the elements of a qualifying predicate offense. *Id.* However, we took judicial notice of charging documents not presented to the district court. *Id.* The government’s appellate brief included the Information Summary from the 1991 proceedings, charging appellant with “unlawfully possess[ing] for sale a controlled substance containing heroin.” We determined that this evidence, considered with the abstract of judgment,

established that appellant had been charged with a “drug trafficking offense.” *Diego-Barrera*, 2006 WL at *1. On this basis, we affirmed the upward modification of Diego-Barrera’s sentence for illegal re-entry after deportation. *Id.*

On June 21, 2006, Diego-Barrera filed a Petition for Rehearing and a Petition for Rehearing En Banc. We issued an order holding these petitions in abeyance pending the en banc resolution of *United States v. Vidal*, 426 F.3d 1011 (9th Cir. 2006), *rev’d en banc*, 504 F.3d 1074 (9th Cir. 2007). After *Vidal* was decided, we granted Diego-Barrera’s Petition for Rehearing and withdrew our previous memorandum disposition. The new disposition again applied the modified categorical approach, but found that the record did not confirm that the plea necessarily rested on facts identifying Diego-Barrera’s prior conviction as a drug trafficking offense. *United States v. Diego-Barrera*, No. 05-50541, 2008 WL 80156, *2 (9th Cir. Jan. 7, 2008). Accordingly, we vacated and remanded for resentencing. *Id.*

On February 20, 2008, the United States filed a Petition for Rehearing. The government points out that during the time that this case was held in abeyance pending *Vidal*, other panels of this court had uniformly concluded that a conviction under Cal. Health & Safety Code § 11351 was categorically a “drug trafficking offense” within USSG § 2L1.2(b)(1)(A)(i). *See, e.g., United States v. Gutierrez-*

Cruz, No. 05-50870, 2008 WL 205513 (9th Cir. Jan. 24, 2008) (unpublished); *United States v. Borguez-Borbon*, No. 06-50011, 2007 WL 654230 (9th Cir. Mar. 1, 2007) (unpublished). Those cases relied in large part on this court’s decision in *United States v. Morales-Perez*, 467 F.3d 1219 (9th Cir. 2006), holding that a conviction under Cal. Health & Safety Code § 11351.5 categorically qualifies as a drug trafficking offense. Both § 11351.5 and § 11351 criminalize the same conduct – possession for sale or purchase for sale of a controlled substance.

We are not persuaded by Diego-Barrera’s argument that *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Cir. 2007), compels a different result. *Ruiz-Vidal* relied upon the fact that the “plain language of the statute” at issue, 8 U.S.C. § 1227(a)(2)(B)(i), “requires the government to prove that the substance underlying an alien’s state law conviction for possession is one that is covered by Section 102 of the [Controlled Substances Act].” *Ruiz-Vidal*, 473 F.3d at 1076. The sentencing guideline at issue here does not have the same requirement. *See* USSG § 2L1.2(b)(1)(A)(i). Whether § 11351 criminalizes the possession or purchase for sale substances not listed in the federal drug tables thus has no bearing on our determination that a conviction under § 11351 categorically qualifies as a drug trafficking offense under USSG § 2L1.2(b)(1)(A)(i).

Consistent with the dispositions cited above, we now find that Diego-Barrera's prior conviction was categorically a drug trafficking offense under USSG § 2L1.2(b)(1)(A)(i). Our memorandum disposition filed on January 7, 2008, is hereby vacated, and the district court's imposition of a seventy-eight month sentence is affirmed.

VACATED and AFFIRMED.