

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	Criminal Action No. 5:11cr00015
v.)	
)	By: Michael F. Urbanski
LUIS PABLO VASQUEZ,)	United States District Judge
)	
Defendant.)	

MEMORANDUM OPINION

Before the court is defendant's **First Motion to Quash (Dkt. # 43)**, filed on August 8, 2011. The court held a hearing on defendant's motion on September 1, 2011. In his motion, defendant seeks to quash the government's Information of Notice of Intention to Rely Upon Previous Conviction (Dkt. # 23), filed on May 20, 2011, by which the government seeks a sentencing enhancement against defendant based on defendant's 2007 criminal conviction in the United States District Court for the Northern District of West Virginia.

I

In the Indictment filed on May 12, 2011 (Dkt. # 15), defendant is charged in Count One with knowingly and intentionally conspiring and agreeing to distribute fifty grams or more of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A) and in Count Three with knowingly and intentionally distributing five grams or more of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B). The government filed the Information

pursuant to 21 U.S.C. § 851 seeking a sentencing enhancement against defendant based on his prior criminal conviction in the Northern District of West Virginia.¹

On September 21, 2007, defendant pled guilty to Count Two of an indictment filed in the Northern District of West Virginia, in which defendant was charged with unlawfully, knowingly, and intentionally conspiring “to obtain a machine gun in exchange for the distribution of cocaine hydrochloride” in violation of 18 U.S.C. § 924(o).² Defendant was subsequently sentenced to thirty months in prison on December 12, 2007. The government now seeks to enhance defendant’s sentence for his current charges under Counts One and Three of the Indictment by relying on this prior conviction. If this sentencing enhancement is granted, the mandatory minimum sentences to be imposed on defendant, if convicted, will be increased from ten years to twenty years as to Count One and from five years to ten years as to Count Three. See 21 U.S.C. §§ 841(b)(1)(A) and (b)(1)(B).

Defendant denies the allegations in the government’s Information and argues that his 2007 conviction under § 924(o) is not the type of prior conviction that entitles the government to a sentencing enhancement for his current charges in this court. See 21 U.S.C. § 851(c). The issue before the court is whether defendant’s 2007 conviction in the Northern District of West

¹ 21 U.S.C. § 851 provides as follows:

No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court . . . stating in writing the previous convictions to be relied upon.

21 U.S.C. § 851(a)(1).

² Defendant’s prior conviction was in criminal action 3:07-00048 before the Honorable John Preston Bailey in the Northern District of West Virginia. The court has reviewed the relevant documentation from that matter, including the indictment, the original judgment, the amended judgment (issued to correct a clerical error in the original judgment), the plea agreement, and the transcript from defendant’s guilty plea hearing before that court. See Dkt. # 59, Exhibits 1, 2, 4, and 5; Dkt. # 76, United States v. Luis Pablo Vasquez, No. 3:07cr048, Guilty Plea Hearing Transcript (N.D. W.Va. Sept. 21, 2007).

Virginia under § 924(o) is the type of prior felony drug offense that entitles the government to a sentencing enhancement in the instant matter.

II

Under §§ 841(b)(1)(A) and (b)(1)(B), a person convicted of a violation of § 841(a)(1) involving fifty grams or more of methamphetamine or five grams or more of methamphetamine is subject to a mandatory minimum sentence of ten years or five years, respectively. However, if a person “commits such a violation after a prior conviction for a felony drug offense has become final,” then the mandatory minimum sentences under the statute are increased from ten years to twenty years and from five years to ten years, respectively. See §§ 841(b)(1)(A) and (b)(1)(B). The term “felony drug offense” is defined in 21 U.S.C. § 802(44) as “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.*” § 802(44) (emphasis added). Therefore, whether defendant is subject to a sentencing enhancement for his current charges under Counts One and Three of the Indictment depends on whether his 2007 conviction under § 924(o) is a “felony drug offense” as defined in § 802(44).

In order to qualify as a “felony drug offense” under § 802(44), § 924(o) must be (1) a “law of the United States” that (2) “prohibits or restricts conduct relating to narcotic drugs” and that (3) is punishable by “imprisonment for more than one year.” Id. Section 924(o) provides as follows:

A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.

18 U.S.C. § 924(o). This provision specifically incorporates 18 U.S.C. § 924(c), which states:

[A]ny person who, during and in relation to any *crime of violence or drug trafficking crime* (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--(i) be sentenced to a term of imprisonment of not less than 5 years[.]

18 U.S.C. § 924(c)(1)(A) (emphasis added). Thus, § 924(o) makes it unlawful for any person to conspire to use, carry, or possess a firearm, including a machine gun, in furtherance of a crime of violence or drug trafficking crime. See §§ 924(c)(1)(A) and 924(o).

Criminal conduct proscribed in § 924(o) easily meets two of the three requirements for a “felony drug offense” under § 802(44). First, it is clear that § 924(o) is a law of the United States. Second, a violation of § 924(o) is punishable by “imprisonment for more than one year.”

The final definitional requirement requires § 924(o) to be a law that “prohibits or restricts conduct relating to narcotic drugs.” § 802(44). If § 924(o) is a law that prohibits or restricts such conduct, then it is a “felony drug offense” under § 802(44), upon which defendant’s mandatory minimum sentences in this case may be enhanced pursuant to §§ 841(b)(1)(A) and (b)(1)(B).

The court has found no cases directly addressing whether § 924(o) is a law that “prohibits or restricts conduct relating to narcotic drugs” in order to qualify as a “felony drug offense” under § 802(44). However, there is case law interpreting whether § 924(c) is a “felony drug offense” under § 802(44). Because § 924(o) specifically incorporates § 924(c), these cases are relevant to interpreting the relationship between § 924(o) and § 802(44) for purposes of the government’s request for a sentencing enhancement.

In United States v. Nelson, the Fourth Circuit Court of Appeals addressed whether a conviction under § 924(c)(1) constitutes a “felony drug offense” as defined in § 802(44). In that

case, James Nelson was charged with violations of 21 U.S.C. § 841, and the government sought a sentencing enhancement based on his prior conviction under § 924(c)(1). United States v. Nelson, 484 F.3d 257, 259 (4th Cir. 2007). Some years earlier, in 1998, Nelson had been charged with possession of crack cocaine with the intent to distribute in violation of § 841(a)(1) and possession of a firearm “during and in relation to a drug trafficking crime” in violation of § 924(c)(1). Id. He pled guilty to the § 924(c)(1) charge in 1999 pursuant to a plea agreement, the government dismissed the charge under § 841(a)(1), and Nelson “was sentenced to sixty months’ imprisonment on the § 924(c)(1) count.” Id. Based on this prior conviction under § 924(c)(1), the government sought a sentencing enhancement pursuant to § 851 for Nelson’s current charges under § 841, and the district court agreed and found that Nelson’s prior “conviction for carrying a firearm during and in relation to a drug trafficking crime fell squarely within § 802(44)’s unambiguous definition of ‘felony drug offense.’” Id. Nelson appealed, and the Fourth Circuit upheld the district court’s finding that Nelson’s prior conviction under § 924(c)(1) constituted a “felony drug offense” under § 802(44). Id. at 260-61.

In order to convict Nelson of a violation of § 924(c)(1), the Fourth Circuit stated the government had to prove that ““(1) the defendant used or carried a firearm, and (2) the defendant did so during and in relation to a drug trafficking offense or crime of violence.”” Id. at 260 (quoting United States v. Mitchell, 104 F.3d 649, 652 (4th Cir. 1997)). Thus, by pleading guilty to a violation of § 924(c)(1), “Nelson admitted that he not only possessed a firearm, but also did so during and in relation to the offense of possession of crack with the intent to distribute,” the charge that was dismissed by the government following Nelson’s guilty plea. Nelson, 484 F.3d at 261. The Fourth Circuit found that, based on the facts of the case, § 924(c)(1) fit within the definition of “felony drug offense” under § 802(44), reasoning as follows:

Where, as here, a defendant has pled guilty to a § 924(c)(1) offense involving the possession of a firearm during and in relation to a drug trafficking crime, the § 924(c)(1) offense unquestionably “prohibits or restricts conduct relating to narcotic drugs.” Section 924(c)(1), in the context of this case, prohibited Nelson from possessing crack with the intent to distribute while simultaneously carrying a firearm. His conduct was not criminal under § 924(c)(1) until he (1) committed the offense of possession of crack with the intent to distribute and (2) carried the firearm during and in relation to that offense. Because his conduct was not criminal under § 924(c)(1) without his possession of crack with the intent to distribute, his March 1999 § 924(c)(1) conviction was an offense that prohibited or restricted conduct relating to narcotic drugs under § 802(44).

Id. The court referenced the 1998 indictment and other relevant documentation from Nelson’s prior conviction, explaining further:³

To be sure, if Nelson had only been convicted of carrying a firearm during and in relation to a crime of violence or violating § 924(c)(1) generically (in the sense that neither the parties nor the district court could discern whether Nelson carried the firearm during and in relation to a crime of violence or carried it during and in relation to a drug trafficking crime), a different result might be required. However, the September 1998 indictment referred specifically to the crime of possession of crack with intent to distribute. Because Nelson admitted, by virtue of the September 1998 indictment and his subsequent guilty plea, that he carried a firearm during and in relation to his possession of crack with the intent to distribute, his March 1999 § 924(c)(1) conviction meets the “relat[ed] to” requirement of § 802(44).

Id.

Before concluding, the court addressed Nelson’s suggestion that “Congress never intended § 924(c)(1) to restrict or prohibit conduct related to controlled substances” because § 924(c)(1) is “contained in Chapter 44 (‘Firearms’) of Title 18 (‘Crimes and Criminal Procedure’) as opposed to Part D (‘Offenses and Penalties’) of Title 21 (‘Food and Drugs’).” Id. at 262. The Fourth Circuit explained that “Title 18 and Title 21 work together, not separately, to prohibit conduct related to controlled substances,” and “there are instances in Title 18 where

³ The United States Supreme Court has instructed that when reviewing prior convictions in the context of sentencing enhancement provisions, courts should look to the statutory definition as well as “the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information.” Shepard v. United States, 544 U.S. 13, 16 and 26 (2005).

Congress understandably sought to penalize conduct that went beyond conduct solely related to firearms.” Id. The court also declined to apply the rule of lenity to the interpretation of “felony drug offense” under § 802(44) because there is no “grievous ambiguity or uncertainty” regarding its meaning. Id. at 263 (quoting Muscarello v. United States, 524 U.S. 125, 139 (1998)). Having found that Nelson’s prior conviction under § 924(c)(1) qualified as a “felony drug offense” under § 802(44), the court affirmed the enhanced sentence imposed by the district court.⁴ Nelson, 484 F.3d at 263.

The Nelson opinion makes it clear that determining whether a prior criminal conviction qualifies as a “felony drug offense” under § 802(44) for purposes of sentencing enhancement requires consideration of the language of the statute along with defendant’s relevant conduct during the commission of the offense at issue, as memorialized in the indictment, plea agreement, factual basis, and transcript from the guilty plea hearing.

A case before Judge Jones in this court further illustrates this point. In United States v. Gardner, Demetrius Tyrone Gardner was found guilty of “conspiring to distribute or to possess with intent to distribute fifty or more grams of crack cocaine” in violation of § 841. 534 F. Supp. 2d 655, 656 (W.D. Va. 2008). The government sought a sentencing enhancement under § 841(b)(1)(A) based upon Gardner’s prior state conviction for “felony possession with intent to distribute an imitation controlled substance.” Id. at 657. In 1999, Gardner “sold imitation cocaine to a confidential informant in a controlled buy” and later pled guilty to the charge pursuant to a plea agreement. Id. The issue before the court was whether this prior conviction qualified as a “felony drug offense” pursuant to § 802(44) in order to subject Gardner to a

⁴ Other federal circuit courts of appeals have followed the analysis in Nelson to conclude that a prior conviction under § 924(c) is an offense that “prohibits or restricts conduct relating to narcotic drugs,” thus qualifying it as a “felony drug offense” under § 802(44) that subjects the defendant to a sentencing enhancement for their current offense. See United States v. Faison, 393 F. App’x 754, 760 (2d Cir. Sept. 14, 2010); United States v. Rains, 615 F.3d 589 (5th Cir. 2010).

sentencing enhancement for his current conviction under § 841. Id. at 659. The court found that it did not. Id.

Judge Jones compared the facts surrounding Gardner’s prior conviction to other cases, including Nelson, discussing prior felony drug offenses for sentencing enhancement purposes that “did not involve possession or distribution of an actual controlled substance” and found that Gardner’s case differed “in one important aspect: The defendant’s conviction for possession with intent to distribute an imitation controlled substance did not require the Commonwealth to prove any nexus between the defendant and an actual controlled substance.” Id. at 659-60. In other cases, the government had to prove, or the defendant had to admit, to conduct with a direct nexus to an actual controlled substance, like “possessing a firearm while possessing crack with the intent to distribute it,”⁵ possession of “drug paraphernalia with the knowledge that it would be used . . . [with] a controlled dangerous substance, controlled substance analog, or toxic chemical,”⁶ knowingly attempting “to possess one of a list of actual controlled substances,”⁷ or using a “communications facility to commit a drug offense”⁸ Id. at 660 (internal quotations omitted). In contrast, the court did not find that “the sentencing enhancement statute, whose purpose is to punish recidivist drug offenders, was written broadly enough to reach those crimes that do not require proof of any connection to a controlled substance.” Id. at 661.

After applying the principles laid out in Nelson and Gardner and reviewing the indictment, plea agreement, and transcript from the guilty plea hearing in the Northern District of West Virginia, it is clear that defendant’s prior conviction pursuant to § 924(o) is a “felony drug offense” under § 802(44) that entitles the government to a sentencing enhancement in this case.

⁵ See Nelson, 484 F.3d 257 (4th Cir 2007).

⁶ See United States v. Wheeler, 1998 WL 416704 (4th Cir. July 22, 1998).

⁷ See United States v. Brown, 500 F.3d 48 (1st Cir. 2007).

⁸ See United States v. Mankins, 135 F.3d 946 (5th Cir. 1998).

Count Two of the indictment from the Northern District of West Virginia, the count to which defendant pled guilty before that court, is entitled “Conspiracy to Barter A Firearm for Drugs,” and it specifically charges defendant with unlawfully, knowingly, and intentionally conspiring “to obtain a machine gun in exchange for the distribution of cocaine hydrochloride” in violation of 18 U.S.C. § 924(o). Dkt. # 59, Exhibit 1, United States v. Luis Pablo Vasquez, No. 3:07cr048, Indictment (N.D. W. Va. May 16, 2007). Moreover, the plea agreement between defendant and the government in the Northern District of West Virginia states that defendant “will plead guilty to Count 2 Conspiracy to obtain a machinegun in exchange for cocaine, in violation of Title 18, United States Code, Section 924(o)” Dkt. # 59, Exhibit 4, United States v. Luis Pablo Vasquez, No. 3:07cr048, Plea Agreement (N.D. W.Va. Sept 21, 2007). Finally, the transcript from defendant’s guilty plea hearing in the Northern District of West Virginia confirms this nexus between defendant’s conduct and an actual controlled substance.

During defendant’s guilty plea hearing, defendant was asked about the allegations in Count Two of the indictment and the provisions of his plea agreement with the government, as both are described above, and defendant responded affirmatively that these documents were correct, that he had reviewed them, and that he understood them. Dkt. # 76, at 10-12, United States v. Luis Pablo Vasquez, No. 3:07cr048, Guilty Plea Hearing Transcript (N.D. W.Va. Sept. 21, 2007). Defendant then affirmed that he understood the elements of the offense that the government would be required to prove at trial, which the court stated as follows: “That you unlawfully, knowingly, and intentionally agreed with each other to obtain a firearm in exchange for a controlled substance; that the agreement involved the defendant using or bartering a firearm; and that the defendant did so *during and in relation to a drug trafficking offense.*” Id. at 12 (emphasis added). Next, the government presented a summary of its evidence in order to

prove the allegations in the indictment, which consisted of testimony by a federal agent regarding the controlled purchase of cocaine in exchange for a machine gun with defendant and his co-conspirators. Id. at 17-21. The guilty plea hearing then concluded with defendant pleading guilty to “conspiracy to obtain a machine gun in exchange for cocaine,” of his own free will, and because he was in fact guilty of the crime charged. Id. at 21-23.

Based on this documentation of defendant’s prior conviction in the Northern District of West Virginia and the conduct to which he admitted while pleading guilty before that court, it is clear that defendant’s prior conviction pursuant to § 924(o) was for conspiracy to commit a “drug trafficking crime” under § 924(c). Pursuant to the holding in Nelson, the court finds that defendant’s prior conviction under § 924(o) qualifies as a “felony drug offense” under § 802(44) because defendant’s prior conduct was not criminal without its nexus to a controlled substance, which means defendant violated a law that “prohibits or restricts conduct relating to narcotic drugs.” 21 U.S.C. § 802(44). Thus, the government is entitled to rely on this prior conviction to seek a sentencing enhancement in this case pursuant to § 841. See 21 U.S.C. §§ 841(b)(1)(A) and (b)(1)(B).

III

Accordingly, **IT IS ORDERED** that defendant’s **First Motion to Quash (Dkt. # 43)** is **DENIED**. The Clerk is directed to send a copy of this Memorandum Opinion and accompanying Order to defendant and all counsel of record.

Entered: October 17, 2011

/s/ Michael F. Urbanski

Michael F. Urbanski
United States District Judge