

United States of America
First Circuit Court of Appeals

NO. 19-2140

UNITED STATES OF AMERICA

Appellee,

v.

JOSEPH CROCCO
Defendant/Appellant.

APPEAL FROM NEW HAMPSHIRE DISTRICT COURT

SUPPLEMENTAL BRIEF

June 11, 2021

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ARGUMENT

Under new precedent, Joseph Crocco was unlawfully sentenced as a career offender because in both his case and the new precedent, prior state convictions could have been for hemp, which by the time of federal sentencing, was no longer a controlled substance.

I. Recent Decision in *United States v. Abdulaziz*

As noted before in this appeal, Mr. Crocco was convicted of the instant offense in September 2018, and sentenced in October 2019. A 2011 Virginia conviction for possession of marijuana with intent to distribute was used as a career offender predicate in sentencing Mr. Crocco for the instance offense, because marijuana was considered a “controlled substance offense” under the sentencing guidelines. USSG § 4B1.1(a)(3).

Both parties have briefed and argued this matter, and Mr. Crocco’s appeal is now pending.

On June 2, 2021, this court issued an opinion in *United States v. Abdulaziz*, No. 19-2030, 2021 WL 2217452 (1st Cir. June 2, 2021). In *Abdulaziz*, it was apparent that the predicate offense could have involved hemp, which was unlawful in Massachusetts at the time of the conduct, but lawful there by the time of federal sentencing. This court wrote:

There is ... reason to be wary of a construction of [controlled substance offense] that would require a judge at sentencing to apply an enhancement in consequence of the defendant’s past conduct that itself applies only insofar as that past conduct involves a substance that is “controlled” without regard to whether the conduct in fact involved a

substance that [the law] in effect at the time of that sentencing indicate, is “controlled.”

Abdulaziz, at *7.

Accordingly, this court held that because “hemp was not on the [federal] drug schedules when Abdulaziz was sentenced” on the instant offense due to the 2018 Agriculture Improvement Act, his “2014 Massachusetts conviction was not a conviction of ‘a controlled substance offense’ within the meaning of that term as it was used” in the sentencing guidelines.

II. Changing Virginia Drug Control Statutes

Like in Massachusetts, over the years Virginia's drug statutes have changed – in two ways relevant to this case.

First, Virginia has amended the *qualitative* definition of marijuana.

In 2011, when Mr. Crocco was convicted in Virginia for possession with intent to sell, Virginia's statute broadly defined marijuana as:

any part of a plant of the genus Cannabis, whether growing or not, its seeds or resin; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, its resin, or any extract containing one or more cannabinoids.

VA. CODE ANN. § 18.2-247.D (2004).

In March 2019, the Virginia legislature exempted low-THC cannabis from control: "Marijuana does not include ... a hemp product ... containing a tetrahydrocannabinol concentration of no greater than 0.3 percent." VA. CODE ANN. § 18.2-247.D (2019).

Second, Virginia has amended the *quantity* of marijuana that is subject to control.

In 2011, a person could have been prosecuted for felony possession with intent to sell if the amount possessed was just ½ ounce. VA. CODE ANN. § 18.2-248.1(a) (2006). As of July 2020, the minimum amount constituting felony intent to sell was increased to 1 ounce, with a rebuttable presumption that less than that amount is for personal use. VA. CODE ANN. § 18.2-248.1(a) (2020).

III. Mr. Crocco's Case Is Controlled by *Abdulaziz* Under Federal Law

Abdulaziz controls the outcome in Mr. Crocco's case, and as now-existing precedent, confirms that the error in his sentence was plain error.

Before 2018, the federal drug schedule made possession of hemp a crime. The 2018 Agriculture Improvement Act, however, exempted hemp from prosecution. See *Abdulaziz*, at *20, *27.

Mr. Crocco was sentenced in October 2019, after – as in *Abdulaziz* – federal legislation eliminated hemp from the federal drug schedule.

Thus Mr. Crocco is in the exact same position as the defendant in *Abdulaziz*, and therefore that case controls.

Although this issue was not before raised in this case, not addressing it on direct appeal means that Mr. Crocco will likely file a motion to vacate his sentence pursuant to 28 U.S.C. § 2255. Given the *Abdulaziz* precedent, his sentence will likely be vacated. Such procedure will result in judicial inefficiency, and prolongation of the error in Mr. Crocco's sentence. Accordingly, this court should address this matter on direct appeal, under plain error review.

The error is plain because it is (1) apparent that an error occurred, which is (2) now "clear [and] obvious," and which (3) not only affects Mr. Crocco's substantial rights to a lawful sentence, but also (4) affects the fairness and integrity of judicial proceedings. *United States v. Pabon*, 819 F.3d 26, 34 (1st Cir. 2016).

Abdulaziz is squarely controlling of Mr. Crocco's case, and thus this court should vacate Mr. Crocco's sentence, and remand for re-sentencing.

IV. Mr. Crocco's Case Is Controlled by *Abdulaziz* Under State Law Regarding the Definition of Marijuana

In *Abdulaziz*, this court assumed that the federal definitions of marijuana and hemp controlled because the government did not raise that issue until a post-argument letter. *Abdulaziz* at *3, n.2; see FED. R. APP. P. 28(j).

Moreover, there may be disagreement among circuits regarding whether the sentencing court, in determining whether a prior conviction is a “controlled substance offense,” should focus on the federal drug schedules, or defer to state definitions. Regardless of any disagreement, the Fourth Circuit “look[s] to *either* the federal or state law of conviction” to define “controlled substance offense” under the sentencing guidelines. *United States v. Ward*, 972 F.3d 364, 374 (4th Cir. 2020) (emphasis in original); accord *United States v. Abdulaziz*, No. 19-2030, 2021 WL 2217452, at *9 (1st Cir. June 2, 2021) (citing reference to Kansas law in *Mellouli v. Lynch*, 575 U.S. 798 (2015)).

Mr. Crocco's Virginia conviction could have been for hemp, because in 2011 when he was convicted for possession with intent to sell, Virginia's statute included hemp in its definition of marijuana. In March 2019, however, before Mr. Crocco's October 2019 sentencing, Virginia excluded hemp from its definition of marijuana.

Accordingly, even if there is deference to the Virginia definition, like in *Abdulaziz*, hemp was not a controlled substance under the state law at the time of Mr. Crocco's federal sentencing.

This court should thus vacate Mr. Crocco's sentence and remand for re-sentencing.

V. Mr. Crocco's Case Is Informed by *Abdulaziz* Under State Law Regarding Quantity

As noted in earlier argument, under Virginia law at the time of conviction, Mr. Crocco could have been convicted with just ½ ounce of marijuana, but as of July 2020, felony conviction in Virginia of possession with intent to sell requires possession of more than 1 ounce with a rebuttable presumption that less than that amount is for personal use.

While the record is silent on the quantity Mr. Crocco possessed in 2011, under the categorical approach, the court must assume the least quantity. *Abdulaziz* at *2.

Thus, the principle announced in *Abdulaziz* – that a sentence should not be enhanced for an offense that was later decriminalized – applies to Mr. Crocco, and his sentence should therefore be vacated.

CONCLUSION

What this court was wary of in *Abdulaziz* happened to Mr. Crocco – he was sentenced with regard to a conviction for conduct that is no longer a crime.

Whether this court looks to federal or state law, or whether it looks to the definition of marijuana or to quantity, Mr. Crocco's case is controlled by the recent decision in *United States v. Abdulaziz*, No. 19-2030, 2021 WL 2217452 (1st Cir. June 2, 2021).

Accordingly, this court should vacate Mr. Crocco's sentence and remand for re-sentencing.

Respectfully submitted,

Joseph Crocco
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Dated: June 11, 2021

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CERTIFICATIONS

I hereby certify that on June 11, 2021, I will forward via the ECF/PACER system an electronic version of this brief to the United States Court of Appeals for the First Circuit, and by the same method to the office of the United States Attorney.

I hereby certify that this brief complies with the type-volume limitations contained in F.R.A.P. 32(a), and that it contains no more than 1,250 words, exclusive of those portions which are exempted.

Dated: June 11, 2021

Joshua L. Gordon, Esq.

ADDENDUM

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