

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL ACTION
: NO. 99-421-01
vs. :
: CIVIL ACTION
BLAND PADGETT : NO. 05-1349

MEMORANDUM

ROBERT F. KELLY, Sr. J.

MARCH 23, 2007

PROCEDURAL BACKGROUND

Bland Padgett filed a *pro se* motion to vacate, set aside or correct sentence pursuant to Title 28, United States Code § 2255, on May 18, 2006.¹ This petition seeks relief from a guilty plea and sentence.

The records reveal that Padgett was indicted on July 28, 1999 for eight drug trafficking counts. He was charged in Counts 1, 3, 5 and 7, with distribution of crack cocaine. He was charged in Counts 2, 4, 6 and 8 with distribution of those same amounts of crack cocaine within 1000 feet of a school. The amounts alleged in these counts were: in Count 2, one-half (0.5) gram on October 24, 1995; in Count 4, 4.3 grams on November 21, 1995; in Count 6, 13.5 grams on December 5, 1995; and in Count 8, 53.2 grams on December 13, 1995. Padgett remained a fugitive until his arrest on February 27, 2002.

Padgett faced the following statutory maximum and mandatory minimum sentences: Count 2, distribution of “crack” cocaine base within 1000 feet of a school, 40 years

¹The petition is dated May 2, 2006, and is date stamped as filed on May 18, 2006. Padgett attempted to file a previous petition dated November 25, 2005 but did not comply with the standards for filing and the petition was dismissed by this Court in an Order dated April 5, 2006.

imprisonment, a \$2 million fine, a mandatory minimum 3 years of supervised release up to lifetime supervised release, and a \$100 special assessment; Count 4, distribution of “crack” cocaine base within 1000 feet of a school, 40 years imprisonment, a \$2 million fine, a mandatory minimum 3 years of supervised release up to lifetime supervised release and \$100 special assessment; Count 6, distribution of 5 grams or more of “crack” cocaine base within 1000 feet of a school, 80 years imprisonment with a 5 year mandatory minimum term of imprisonment, a mandatory minimum 4 years of supervised release up to lifetime supervised release, a \$4 million fine, and a \$100 special assessment; and Count 8, distribution of 50 grams or more of “crack” cocaine base within 1000 feet of a school, life imprisonment with a 10 year mandatory minimum term of imprisonment, a mandatory minimum 5 years of supervised release up to lifetime supervised release, an \$8 million fine, and a \$100 special assessment.

Because Padgett had a prior state felony conviction, on October 8, 1996, for sale and possession of a controlled substance, for which he received a sentence of 1 to 2 years imprisonment, his minimum mandatory sentences could have been doubled, under 21 U.S.C. § 851: in Count 6, from 5 years to 10 years; and in Count 8, from 10 years to 20 years imprisonment.

On September 9, 2002, Padgett pled guilty to Counts 2, 4, 6, and 8 of the indictment, each of which charged him with distributing “crack” cocaine, in violation of Title 21, United States Code, Section 841(a)(1), arising from the defendant’s distribution of 71.5 grams of “crack” cocaine in Philadelphia.

Padgett and the United States entered into a written plea agreement in which they agreed that Padgett would agree to plead guilty to Counts 2, 4, 6, and 8 of the indictment, each of

which count charged Padgett with having distributed “crack” cocaine base within 1000 feet of a school, in Philadelphia. Padgett stipulated that the total amount of “crack” cocaine distributed by the defendant was 71.5 grams. The government agreed to dismiss corresponding distribution Counts 1, 3, 5, and 7 after sentencing. As part of Padgett’s written guilty plea agreement, Padgett expressly waived his right to appeal, and his right to file a petition for post-conviction relief under 28 U.S.C. § 2255.

A Pre-Sentence Investigative (PSI) Report was prepared. Padgett’s sentencing guidelines range was determined to be 135 to 168 months imprisonment. There was a 10 years minimum mandatory term of imprisonment, a ten year minimum mandatory term of supervised release, and a mandatory \$400 special assessment.

On March 13, 2003, Padgett was sentenced on Counts 2, 4, 6 and 8, to 135 months in prison, ten years on supervised release, and a \$400 mandatory special assessment. Upon the government’s motion, the Court dismissed Counts 1, 3, 5 and 7.

FACTUAL BACKGROUND

As admitted by Bland Padgett at his guilty plea hearing, Padgett sold crack cocaine to undercover Philadelphia Police Office Jim Corbett on the four occasions charged in the indictment. Specifically, on October 25, 1995, Padgett sold him 18 packets of “crack” cocaine base, which was 57% pure, with a total weight of 0.5 grams. At that same time, an informant purchased from Padgett 12 packets of crack, also 57% pure, with a net weight of 0.5 grams.

On November 20, 1995, Officer Corbett paged Padgett. A telephone call was later placed to Padgett, which conversation was recorded and transcribed. They agreed to meet the next day in order to do a drug transaction.

On November 21, 1995, Padgett sold Officer Corbett 90 packets of crack, 58% pure, with a net weight of 4.3 grams for \$400. That purchase occurred on the 600 block of McKean Street, in South Philadelphia. The transaction was videotaped and audiotaped.

On December 4, 1995, Padgett and Officer Corbett spoke via telephone. They agreed to meet the next day in order to do a drug transaction. That call was recorded.

On December 5, 1995, Padgett sold Officer Corbett a large chunk of crack, 74% pure, with a net weight of 13.5 grams. The purchase was supposed to be for a full ounce, with \$1000 in official funds having been tendered to Padgett. This purchase occurred on the 800 block of Snyder Street, in South Philadelphia. That transaction was videotaped and audiotaped.

On December 6, 1995, Padgett and Officer Corbett spoke via telephone. They made plans to meet the next day in order to do a drug transaction for one-half ounce of crack, which Padgett owed Officer Corbett from the previous day's sale. The call was recorded. On December 7, 1995, another recorded conversation occurred, in which they agreed to meet in order to consummate the one-half ounce transaction.

On December 13, 1995, Padgett sold Officer Corbett 80 small packets of crack, 49% pure, with a net weight of 51.1 grams, and an additional baggie containing large chunks, weighing 2.1 grams of crack that was 57% pure, all in exchange for \$2,000. The purchase occurred on the 800 block of Snyder Street, in South Philadelphia. That transaction was videotaped and audiotaped.

All of the aforementioned drug transactions occurred within 1000 feet of two schools in South Philadelphia, specifically: Bok Technical High School, a public secondary school located at 1901 South 9th Street (8th & Mifflin Streets); and Saint Maria Goretti High

School, a private secondary school located at 1736 South 10th Street (10th & Moore Streets).

Petitioner alleged in his original motion one ground for relief: “despite being explicitly requested to file a notice of appeal, my attorney failed to so file.” After the Government filed its response to the petition, Petitioner filed a reply in which he adds “Padgett contends that his attorney told him that he would receive the 120 month sentence and that this would be the low end of the guidelines.” Defendant’s reply at p.2.

WAIVER OF APPEAL OR COLLATERAL ATTACK

Under the Plea Agreement the Defendant signed, he expressly waived, “all rights to appeal or collaterally attack the defendant’s conviction, sentencing, or any other matter related to this prosecution.”

The only exception to the waiver was if the Government appealed from the sentence, then the Defendant had the right to file a direct appeal of his sentence. N.T. 4. If the Government does not appeal then notwithstanding the waiver the Defendant may file a direct appeal if the sentence exceeds the statutory maximum or the sentencing judge erroneously departs upward from the otherwise applicable sentencing guideline range. In addition to the signed waiver these provisions were reviewed in open court as can be seen from the following colloquy. N.T. 13.²

“Mr. Troyer: As to that, let me deal with that in more -- with more specificity since that issue has arisen.

The Defendant is agreeing to voluntarily and expressly waive rights to appeal or to collaterally attack his conviction or sentence or any other

²Earlier in the plea colloquy at n.t. 7, not realizing that there was a signed Plea Agreement containing a waiver of appeal and collateral attack provisions, I advised the Defendant as to the usual appeal rights. The above quoted material corrects that situation further emphasizing the waiver provisions in his Plea Agreement.

matter relating to this prosecution, both under his statutory right to appeal or under 28, USC, Section 2255. Notwithstanding that waiver provision, if the Government appeals from the sentence, then the defendant is free to file a direct appeal of his sentence as well.

If the Government does not appeal, then even notwithstanding the waiver, the defendant may file a direct appeal but may raise only claims that either, one, the defendant's sentence exceeds the statutory maximum; or, two, the Sentencing Judge erroneously departed upward from the otherwise applicable Sentencing Guideline range. So he would still maintain that exception to his appeal waiver.

If the defendant does appeal pursuant to this paragraph, then no issue may be presented by the defendant on appeal other than those described in this paragraph. In other words, he would not then be able to litigate other issues that he had otherwise waived as to the appeal.

Finally, of course, the defendant acknowledges that he's satisfied with his legal representation. And, lastly, of course, the defense and the Government agree that this plea agreement contains all of the plea - - the promises and agreements between the parties and that there are no other agreements but for those set forth in this written plea agreement.

BY THE COURT:

Q. Okay. Mr. Padgett, do you understand that ordinarily you would have the appeal rights that I had outlined for you originally, and in addition to that, you would also have the right to bring later proceedings such as a collateral attack by filing a habeas corpus motion in this court to vacate, set aside or correct a sentence.

Do you understand that?

A. Yes.

Q. This plea agreement as outlined by the Government greatly limits your right to appeal and prevents you from using later proceedings such as collateral attack and habeas corpus to challenge your convictions - - your conviction, your sentence or any other matter, and, therefore, you're limited to those appeal rights which have been reserved in that agreement

and have been outlined by the Assistant United States Attorney. Do you understand that?

A. Yes.

Q. Okay. Mr. Padgett, do you think that any other promises have been made to you in order to enter this plea.

A. No, no promises.

Q. No? Okay. It's important because if they aren't put in this agreement or if they're not mentioned here in open court, you will not be able to enforce them later. Do you understand?

A. Yes.

Q. Okay.

THE COURT: Mr. McMahon, is that the agreement as you understand?

MR. McMAHON: That is the agreement as I understand and we have signed as such."

As the record indicates, neither exception to the waiver of appeal rights ever came about. The Government did not appeal and the Court sentenced the Defendant at the low end of the guideline range. The Defendant's waiver was knowing and voluntary. He may not file a direct appeal under these circumstances. Therefore, Petitioner's complaint based upon a claim that he asked his attorney to appeal, but he refused to do so has no validity because Petitioner's appeal rights had been knowingly, intelligently and voluntarily waived.

ALLEGATION THAT DEFENSE COUNSEL TOLD
PETITIONER THAT HE WOULD RECEIVE A
SENTENCE OF 120 MONTHS

After seeing the Government's response to his original 2255 motion, Padgett added a second contention in his reply. He contends that his attorney told him that he would receive a

120 month sentence and that this would be the low end of the guidelines.

It is highly unlikely that defense counsel ever made such a statement, but assuming for the sake of argument that he did, this would not deprive the defendant of effective assistance of counsel under the facts of this case. The guilty plea agreement entered into and signed by the defendant stated at ¶ 11:

“It is agreed that: the parties’ guilty plea agreement contains no additional promises, agreements or understandings other than those set forth in this written guilty plea agreement, and that no additional promises, agreements or understandings will be entered into unless in writing and signed by all parties.”

In addition to the written statements signed by the Petitioner at the plea of guilty colloquy the following took place “and, lastly, of course, the defense and the Government agree that this plea agreement contains all of the plea - - the promises and agreements between the parties and that there are no other agreements but for those set forth in this written plea agreement.” N.T. pgs. 13-14. And further in the colloquy:

BY THE COURT:

Q Okay. Mr. Padgett, do you think that any other promises have been made to you in order to enter this pleas?

A No, no promises.

Q No? Okay. It’s important because if they aren’t put in this agreement or if they’re not mentioned here in open court, you will not be able to enforce them later. Do you understand?

A Yes.

Q Okay.

N.T. pgs. 14-15.

Further on in the colloquy:

BY THE COURT

Q All right. Do you have any questions of me as to this proceeding that you're going through right now?

A No.

N.T. p. 18.

The written plea agreement at ¶ 6 outlined the maximum possible sentence the defendant could receive for the Counts that he entered pleas of guilty to. This was followed by ¶ 7 which stated:

“The defendant may not withdraw his plea because the Court declines to follow any recommendation, motion or stipulation by the parties to this agreement. No one has promised or guaranteed to the defendant what sentence the Court will impose.”

The allegation that defense counsel made a statement to the defendant that he would receive a sentence of 120 months flies in the teeth of what was said in the written plea agreement and the in-Court colloquy. See the recent case of U.S. v. Shedrick, 2007 WL 601993 (C.A. 3 (Pa.)) where the Court stated:

“this case falls squarely within well established precedent: defense counsel's conjectures to his client about sentencing are irrelevant where the written plea agreement and the in-court guilty plea colloquy clearly establish the defendant's maximum potential exposure and the sentencing court's discretion. Shedrick's written, signed agreement stated that (1) he faced a maximum potential sentence of ten years' incarceration; (2) the parties were free to argue any other sentencing issues (explicitly including departures); (3) the District Court retained ultimate discretion over the sentence; and (4) there were no other agreements or promises regarding Shedrick's potential sentence.”

Based upon the foregoing we enter the following Order.

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|--------------------------|---|-----------------|
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| BLAND PADGETT | : | NO. 05-1349 |

ORDER

AND NOW, this 23rd day of March, 2007, after consideration of the Petition for Writ of Habeas Corpus, the Government's response thereto and Petitioner's reply, it is **ORDERED** that the Petition for Writ of Habeas Corpus is **DENIED WITH PREJUDICE**. There is no probable cause to issue a certificate of appealability.

BY THE COURT:

/s/ Robert F. Kelly _____
ROBERT F. KELLY
SENIOR JUDGE