

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

UNITED STATES of AMERICA : CRIMINAL
 :
 v. :
 :
 ANDREW PADILLA : NO. 95-174-1

MEMORANDUM and ORDER

Norma L. Shapiro, J.

January 26, 1998

By Memorandum and Order dated September 12, 1997, the court denied defendant Andrew Padilla's ("Padilla") motion to vacate, set aside or correct sentence under 28 U.S.C. § 2255. Padilla filed a notice of appeal, and the Court of Appeals remanded "for the sole purpose of either issuing a certificate of appealability or stating reasons why a certificate of appealability should not issue." For the reasons stated below, a certificate of appealability will be denied.

Padilla was indicted in April, 1995 with co-defendants on four drug violations: 1) conspiring to distribute more than 500 grams of cocaine, in violation of 21 U.S.C. § 846(a)(1); 2) possession with intent to distribute and aiding and abetting possession with intent to distribute more than 500 grams of mixture containing cocaine, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2; 3) knowing and intentional possession with intent to distribute a mixture containing a detectable amount of marijuana, in violation of 21 U.S.C. § 841(a)(1); 4) possession of a firearm in violation of 18 U.S.C. § 924(c); and 5)

forfeiture of property used in the commission of drug offenses, in violation of 21 U.S.C. § 853(a)(1), (2) and (p).

Padilla plead guilty to Counts I, II and V on June 27, 1995. The court sentenced Padilla on September 19, 1996. Padilla's Offense Level of 29 and Criminal History Category of II resulted in an imprisonment range of 97-121 months under the Sentencing Guidelines (the "Guidelines"). The government, pursuant to Padilla's plea agreement, moved for a downward departure under Guidelines § 5K1.1 because of Padilla's assistance in the investigation and prosecution of other individuals. The court granted the government's motion; Padilla was sentenced to 48 months imprisonment on Counts I and II, running concurrently, a fine of \$5,000 and a special assessment of \$100.

Padilla sought habeas relief under 28 U.S.C. § 2255 for alleged ineffective assistance of counsel. Padilla argued counsel was ineffective for failing to object and seek an evidentiary hearing at the time of sentencing based on the court's reliance on his knowing association with a co-defendant who possessed a firearm at the time of their arrest. The Guideline calculation included a two point enhancement for a weapon attributed to defendant.

At his Rule 11 guilty plea colloquy in June, 1995, Padilla admitted he knew his co-defendant possessed a firearm at the time of arrest. At the sentencing hearing in June, 1996, Padilla's

counsel, arguing Padilla had no knowledge his co-defendant had a firearm, objected to the two point weapon enhancement. The court offered to allow Padilla to discuss the matter with counsel and withdraw his guilty plea if he had mistakenly admitted knowledge of the firearm. Padilla withdrew counsel's objection and instead proceeded with sentencing. Padilla's counsel was not ineffective because Padilla himself did not wish to pursue that objection. Padilla suffered no injury because the court made a downward departure and imposed a sentence of only 50% of the minimum otherwise required under the Guidelines.

The court could consider Padilla's admitted knowledge of his co-defendant's possession of a firearm, even though Padilla was neither convicted nor sentenced for knowingly possessing a firearm. Padilla had previously admitted under oath that he knew his co-defendant possessed a firearm, so there was no need for an evidentiary hearing on the matter at sentencing; the court did not err in declining to hold a hearing.

Had the court not made a two point weapon enhancement under the Guidelines, the Offense Level would have been lower and the court would have made a smaller downward departure after granting the government's § 5K1.1 motion. The alleged ineffective assistance of counsel did not warrant relief under § 2255.

"A certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a

constitutional right." 28 U.S.C. § 2253(c)(2).¹ Because Padilla's claim was without merit, he did not make the required "substantial showing" of constitutional violation. A certificate of appealability will be denied.

An appropriate Order follows.

¹ The remand from the Court of Appeals also directs the court to consider whether a certificate of appealability should be issued under Federal Rule of Appellate Procedure 22(b) (establishing requirement for certificate of appealability in habeas petitions involving state court process) and Local Appellate Rule 22.2 (dealing with habeas petitions in death penalty cases). Neither rule is applicable to Padilla, a federal prisoner not sentenced to death.

