

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

RICARDO MCCLEARY :  
 :  
 v. : CIVIL ACTION NO. 97-2890  
 :  
 : (Criminal No. 91-321-09)  
 UNITED STATES OF AMERICA :

MEMORANDUM ORDER

Presently before the court is petitioner's Petition to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 and the amendment thereto filed on June 5, 1998.

Petitioner pleaded guilty pursuant to a plea agreement to conspiring to distribute and to possess with intent to distribute cocaine in violation of 21 U.S.C. § 846.<sup>1</sup> In the plea agreement he executed, petitioner stipulated it was foreseeable to him that more than 50 kilograms of cocaine would be distributed during the time he was a conspirator and that his base offense level under the Guidelines was 36. Based on an amount of 55 kilograms and with a three level reduction for acceptance of responsibility, petitioner's offense level was 33. His sentencing range was 135 to 168 months of imprisonment.

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<sup>1</sup> Petitioner was charged with eighteen co-defendants and five unindicted co-conspirators with participating in a substantial drug distribution operation headed by Julian Dumas, Jr. from Los Angeles and wholesaling cocaine in Philadelphia largely through Charles Porter.

Petitioner was sentenced to 135 months of imprisonment, to be followed by a term of supervised release.<sup>2</sup>

Petitioner contends that the court failed to make an adequate finding regarding the amount of drugs attributable to him and should not have attributed 55 kilograms. Petitioner contends that his lawyer was ineffective in not objecting to the drug quantity attributed to him in the PSR and by the court.

Effective assistance of counsel means adequate representation by an attorney of reasonable competence. Government of the Virgin Islands v. Zepp, 748 F.2d 125, 131 (3d Cir. 1984). To show ineffective assistance of counsel, it must appear that a defendant was prejudiced by the performance of counsel which was deficient and unreasonable under prevailing professional standards. Strickland v. Washington, 466 U.S. 668, 686-88 (1984); Government of the Virgin Islands v. Forte, 865 F.2d 59, 62 (3d Cir.1989). Counsel's conduct must have so undermined the proper functioning of the adversarial process that the result of the pertinent proceedings cannot be accepted as reliable, fair and just. Lockhart v. Fretwell, 506 U.S. 364, 369 (1993); Strickland, 466 U.S. at 686; U.S. v. Nino, 878 F.2d 101, 103 (3d Cir.1989).

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<sup>2</sup> The government agreed to dismiss two other counts against petitioner, one involving his purchase for distribution of five additional kilograms of cocaine, and to refrain from charging him with unlawful flight to avoid prosecution.

During his plea colloquy, petitioner stated under oath that he agreed to let co-conspirator Charles Porter whom he knew to be a "major drug dealer" store six suitcases containing 55 kilograms of cocaine in petitioner's apartment, assisted Mr. Porter in unpacking the cocaine and took two kilograms of cocaine to sell when Mr. Porter returned to retrieve the drugs. When asked at his plea hearing if he understood that the cocaine stored at and retrieved from his apartment would be sold or distributed to others, petitioner answered "[o]h definitely."

The PSR properly attributed the 55 kilograms to petitioner. It was clear from petitioner's own sworn statements that he agreed to provide a secure place to store these drugs for Mr. Porter while reasonably foreseeing and indeed knowing that they would be retrieved for distribution. The court reasonably found that petitioner "effectively and knowingly facilitated Mr. Porter's ability to distribute 55 kilograms of cocaine." Petitioner's counsel clearly was not ineffective for failing to object to the attribution of this amount to his client in the PSR and by the court.

Petitioner's analogy to a defendant who agrees to assist a principal conspirator with the distribution of only a portion of the drugs he has imported is unavailing. Mr. Porter sold or possessed for distribution over 300 kilograms of cocaine. Petitioner agreed to assist Mr. Porter in possessing for

distribution 55 kilograms. Only that amount was attributed to petitioner.

Petitioner apparently misapprehends the court's reference at sentencing proceedings to the fact petitioner did not personally physically distribute 53 of the 55 kilograms. The statement clearly does not suggest that this amount was unattributable to petitioner. Rather, it was a factor the court stated it would consider "in deciding where within the guideline range to sentence him." As noted, the court sentenced petitioner at the bottom of the applicable range.

Petitioner also asserts that the government withheld information from him which should have been disclosed pursuant to Brady v. Maryland, 373 U.S. 83 (1963). Petitioner describes this information as:

significant allegations of wrong doings involving the FBI group of agents who were involved in the investigation and prosecution of this case and that no disclosure of this information was made to the defense, even though the government stated that these agents would be witnesses at trial against petitioner. The government failed to disclose that these agents were under investigation for stealing money in this drug investigation.

Petitioner's support for this assertion consists of news articles which show that one FBI agent was under investigation in 1994 for the suspected theft from an FBI safe of \$25,400 of the \$222,472 seized from Mr. Porter at the time of his arrest in 1990. That agent was never charged, according to the news accounts submitted by petitioner, because of a "lack of

evidence." There is no showing that the agent was under investigation at the time of petitioner's plea and sentencing. Moreover, that agent was not one of the 27 government witnesses at the trial of those co-conspirators who did not plead guilty, and there is no showing that he had any first-hand knowledge of the occurrence underlying petitioner's conviction.

Petitioner's statement that comments by the prosecutor at pages 6, 7 and 11 of the sentencing transcript reveal that the testimony of "these" agents would have been presented is untrue. Nowhere in the entire transcripts of petitioner's sentencing or plea proceedings does the prosecutor ever state that the suspected agent had any pertinent testimony to give. As the plea proceedings and trial of petitioner's co-conspirators make clear, the evidence which the government would have presented against petitioner was the testimony of Mr. Porter, corroborating drug business records kept by Mr. Porter and the testimony of two cooperating drug couriers who brought the six suitcases of cocaine from Los Angeles to Philadelphia.

The information about the suspected agent is not remotely material to petitioner's sentencing.<sup>3</sup>

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<sup>3</sup> Petitioner seeks a reduced sentence in his petition. He has not asked to withdraw his plea and proceed to trial on all counts in which he was charged and the court will not assume he wishes to do so, thereby risking the three offense level reduction for acceptance of responsibility and increasing his sentencing exposure by up to 100 months.

Petitioner also contends that his counsel was ineffective in not informing him of a letter from the prosecutor extending an "offer" to file a departure motion in exchange for substantial cooperation. A reading of the actual letter makes clear that no such offer was extended. Rather, the government agreed to recommend a sentence in "the middle of the guideline range" and noted as a general matter that it does not agree to sentences below an applicable guideline range except in cases of substantial cooperation. The prosecutor made clear that she was interested in no such arrangement for petitioner, stating "we will not reward him for being a fugitive by negotiating a sentence beneath the appropriate guideline range."

Moreover, there is absolutely no showing that at the time petitioner's plea agreement was negotiated he was in a position to provide any meaningful, let alone substantial, cooperation. Petitioner was a fugitive for two years, and indeed attempted to flee when finally apprehended by FBI agents. By the time petitioner was arraigned, the government had an abundance of cooperating co-conspirators and all but one of petitioner's co-defendants, another fugitive, had already been convicted and sentenced.

Nevertheless, petitioner's sentence will be vacated and reimposed for the purpose of permitting him to appeal his sentence if he wishes to do so. Petitioner avers his attorney

did not advise him of the right to appeal the sentence and it appears that he was not formally so advised on the record.

The government suggests in the circumstances that the court "vacate petitioner's sentence, reimpose the same sentence and authorize him to appeal his sentence nunc pro tunc." In the absence of any demonstrated basis for a different sentence and given the public resources which generally must be expended to effect the physical transfer and supervision of an inmate, the government's suggestion is practical. See U.S. v. Rodriguez, 1998 WL 372278, \*1 (E.D. Pa. May 15, 1998) (Gawthrop, J.) (no "practical purpose served" in physically bringing petitioner from Puerto Rico "simply to go through the pro forma procedural minuet of resentencing"); U.S. v. Sanchez, 1998 WL 195727, \*4 (E.D. Pa. Mar. 31, 1998) (Ludwig, J.) (vacating and reimposing same sentence by order to permit appeal nunc pro tunc). Nevertheless, as petitioner has asked physically to appear and is currently incarcerated in nearby Ft. Dix, the court will schedule a resentencing proceeding.

**ACCORDINGLY**, this                    day of August, 1998, upon consideration of petitioner's Petition to Vacate, Set Aside or Correct Sentence and the amendment thereto, **IT IS HEREBY ORDERED** that said Petition is **GRANTED** in part in that petitioner's sentence will be vacated by an order entered at the appropriate

criminal number, said Petition is otherwise **DENIED** and all claims presented having been resolved the above civil case is **CLOSED**.

**BY THE COURT:**

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**JAY C. WALDMAN, J.**