

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

DAVID HARRIS :
 :
 v. : CIVIL ACTION
 : NO. 98-1121
 :
 : (Criminal No. 95-507-2)
 UNITED STATES OF AMERICA :

MEMORANDUM ORDER

Petitioner has filed a petition to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 and a subsequent amendment thereto.¹

Petitioner was indicted with three co-defendants for conspiring to distribute cocaine base and for distributing cocaine base within one thousand feet of a playground. Pursuant to a plea agreement, petitioner pled guilty to two conspiracy counts. After a three level reduction for acceptance of responsibility, petitioner had a total offense level of 37. He was in criminal history category V. Because of his prior convictions for possessing cocaine base with intent to distribute, however, he was a "career offender" and was placed in criminal history category VI consistent with U.S.S.G. § 4B1.1. Petitioner's guideline sentencing range was 360 months to life in prison. Pursuant to 21 U.S.C. §841(b), petitioner faced a mandatory term of life imprisonment.

¹ This amendment was captioned "Amended 2255 Motion for Downward Departure" and was separately docketed.

The court granted departure motions filed by the government pursuant to § 5K1.1 and 18 U.S.C. § 3553(e). Petitioner was sentenced to imprisonment for 120 months, to be followed by a term of supervised release.

Petitioner contends that his attorney was ineffective for "failing to argue that the government had not proven that the drugs involved in the case were crack."

The counts to which petitioner pled guilty are replete with references to "crack cocaine." Defendant and his coconspirators discussed selling "crack" in conversations with confidential informants and an undercover agent. After consultation with counsel, petitioner signed a plea agreement with a stipulation that "the cocaine base distributed" as "described in Counts One and Two" (the counts of conviction) was "crack cocaine within the meaning of Note (D) to U.S.S.G. § 2D1.1."

In his plea colloquy, petitioner acknowledged under oath that he had engaged co-defendants to sell "crack cocaine" for him and had supplied them with "crack cocaine" for sale, including the sales to the cooperating informants and undercover agent. The court also specifically asked petitioner "[a]s to the activity charged in Count One and Count Two, did you understand that what it is you were dealing in was crack cocaine?"

Petitioner unequivocally answered "Yes."²

Petitioner's counsel was not professionally deficient or objectively unreasonable in failing to challenge the type of cocaine base involved. The government, of course, is not required to present proof of something to which a defendant has stipulated and admitted under oath.

Petitioner next contends that his prior convictions should not have been used to enhance his sentence under § 851 because they "were not prosecuted by indictment or waiver thereof," relying on U.S. v. Collado, 106 F.3d 1097 (2d Cir. 1997). He also suggests that the prior crimes were not "felonies" and that the government did not timely file a prior felony information.

The government timely filed an information ten months prior to petitioner's entry of a guilty plea. See 21 U.S.C. § 851(a)(1). Petitioner's prior convictions for possession of cocaine base with intent to distribute, punishable by imprisonment for more than one year, were felony convictions. See 21 U.S.C. § 802(13); 35 Pa. C.S.A. §§ 780-113(a)(30) & (f)(1.1).³ The Second Circuit has overruled its decision in

² Indeed, there is no averment in the instant petition that the drugs he bought and conspired to resell were not crack cocaine.

³ Petitioner also had a prior conviction for aggravated assault and reckless endangerment.

Collado after concluding it "was incorrectly decided." See U.S. v. Ortiz, 143 F.3d 728, 729 & n.1 (2d Cir. 1998). It is the instant conviction and not prior convictions which must result from prosecution by indictment or a waiver thereof. Id. at 732; U.S. v. Harden, 37 F.3d 595, 601 (11th Cir. 1994); U.S. v. Trevino-Rodriguez, 994 F.2d 533, 536 (8th Cir. 1993); U.S. v. Adams, 914 F.2d 1404, 1407 (10th Cir.), cert. denied, 498 U.S. 1015 (1990).

Moreover, petitioner's sentence was not enhanced under § 851. Consistent with § 3553(e), petitioner was sentenced "in accordance with the [sentencing] guidelines" under which he faced life imprisonment as a career offender. The requirements of § 851 do not apply to enhancements under the sentencing guidelines for career offender status. See U.S. v. Flores, 5 F.3d 1070, 1081 (7th Cir. 1993), cert. denied, 114 S. Ct. 884 (1994); U.S. v. Whitaker, 938 F.2d 1551, 1552 (2d Cir. 1991), cert. denied, 112 S. Ct. 977 (1992) (citing additional cases holding same). As noted, petitioner in fact received the benefit of a very substantial departure below the otherwise applicable guideline range.

In arguing that his sentence should not have been enhanced under § 851, petitioner states the court erred in determining the drug quantity attributable to him. He does not further elaborate or suggest what quantity should have been

attributed to him. If he is suggesting that an amount necessary to trigger § 841(b)(1)(A)(iii) had not been demonstrated, the short answer is that reports of the DEA Northeast Regional Laboratory document that four undercover purchases alone involved 165.05 grams of substances containing crack cocaine. Although inserted in his § 851 argument, if petitioner means to question the quantity attributed for guidelines purposes, the short answer is that the calculation used in the PSR was conservative based on the evidence, including statements of co-defendants and petitioner's admissions, and was still almost a kilogram more than sufficient to place him at level 38.

Petitioner also contends that his attorney was ineffective when he "failed to inform the court of its independent ability to determine the correct amount of departure." There is no comment to this effect that counsel was reasonably required to make or could have made which in any way would have influenced the sentence in this case. The court was well aware of its authority to determine the extent of any departure once the government's motions were granted and most assuredly exercised its independent judgment in doing so. Petitioner had the benefit of experienced and able counsel who helped to secure a very substantially reduced sentence for him.

Petitioner additionally suggests that the government "breached the terms of the plea agreement" because "the

government stated it would consider filing a post-conviction motion for another departure from the sentencing guidelines based upon assistance that my relative is providing to the DEA." Petitioner's executed plea agreement in fact contains no such term and he stated under oath at his plea that no other undisclosed promises had been made to induce his plea. Indeed, the plea agreement required petitioner to cooperate fully in providing all information regarding drug trafficking and other crimes of which he was aware and to continue to do so "even after the time [he] is sentenced." Petitioner does not identify the person who made the alleged statement, the time and circumstances of the alleged statement, the "relative" in question or the nature and substantiality of his or her purported assistance. In any event, even assuming that Rule 35(b) contemplates subsequent assistance by a relative, a statement that a party will "consider" filing a motion cannot reasonably be viewed as a promise to file one.⁴

On the record presented in this case, petitioner has patently failed to show any basis to set aside his sentence or

⁴ In view of petitioner's criminal history and the significant departure he received, it is virtually inconceivable that the court would further reduce his sentence even if the government had elected to file a Rule 35 motion absent the most extraordinary subsequent post-sentencing assistance attributable to petitioner.

entitlement to a still greater downward departure.⁵

ACCORDINGLY, this day of September, 1998, upon consideration of petitioner's petition to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 and "Amended 2255 Motion for Downward Departure," and a review of the pertinent record herein, **IT IS HEREBY ORDERED** that said petition and said motion are **DENIED** and the above action is **DISMISSED**.

BY THE COURT:

JAY C. WALDMAN, J.

⁵ On this date -- indeed as this memorandum order was being typed -- the court received a request from petitioner to grant him additional time to present further "arguments in support of [his] allegations that his counsel did not render effective assistance." The court has carefully considered petitioner's allegations, including those regarding ineffective assistance of counsel. The court is satisfied that further argument is unnecessary adequately to address these allegations and would not alter the court's analysis or resolution of those allegations as set forth herein in view of the record in this case.