

after a hearing conducted under Rule 11 of the Federal Rules of Criminal Procedure, found Davis's guilty plea knowing, voluntary, and supported by a sufficient factual basis, and it accepted his plea. The Defendant now moves to withdraw his guilty plea, or in the alternative, to have a portion of his guilty plea declared unenforceable as a matter of law.

In a pro se letter motion to the Court dated October 22, 1998, Davis claimed that his guilty plea had been "coerced" by his attorney, and he sought to withdraw the plea. On November 5, 1998, the Government filed a response in opposition. The Court appointed new counsel for Davis and allowed new counsel an extended period of time to file an amended motion. On January 11, 1999, the Defendant filed his Amended Motion. The Government filed a response in opposition on January 27, 1999. The Court now considers the Defendant's Amended Motion.

methamphetamine in violation of 21 U.S.C. secs. 846 and 841(b)(1)(A) (Count 1), attempt to possess phenyl-2-propanone ("P2P"), commonly known as "oil," with intent to manufacture methamphetamine in violation of 21 U.S.C. secs 846 and 841 (b)(1)(A)(Counts 2 and 3), and criminal forfeiture pursuant to 21 U.S.C. secs. 841, 846, and 853 (Count 5). These charges arise from defendant's participation in a conspiracy to purchase chemicals to be used in the illegal manufacture of methamphetamine, a Schedule II non-narcotic controlled substance commonly known as "meth" and "speed."
(Guilty Plea Agreement ¶ A.)

Being an informant of the FBI, Baiocco was not indicted. McCaffrey, like Davis, pled guilty before this Court to all charges against him pursuant to a written plea agreement in which he agreed to cooperate with the Government. On July 31, 1998, Gaeten Polidoro was found guilty by a federal jury of conspiracy to manufacture methamphetamine (Count One), and possession of phenyl-2-propanone ("P2P") with intent to manufacture methamphetamine (Count Two), both in violation of 21 U.S.C. § 846.

II. DISCUSSION

A. The Guilty Plea

1. Standard for Withdrawing Guilty Plea

Rule 32(e) of the Federal Rules of Criminal Procedure states that a district court may allow a defendant to withdraw his guilty plea before he is sentenced "if the defendant shows any fair and just reason." Fed. R. Civ. P. 32(e). The burden of demonstrating a "fair and just" reason falls on the defendant, United States v. Issac, 141 F.3d 477, 485 (3d Cir. 1998), and is substantial, as the Supreme Court has recently reaffirmed, United States v. Hyde, 117 S. Ct. 1630, 1631 (1997) ("After the defendant has sworn in open court that he actually committed the crimes, after he has stated that he is pleading guilty because he is guilty, after the court has found a factual basis for the plea, and after the court has explicitly announced that it accepts the plea, [a defendant cannot] withdraw his guilty plea simply on a lark."). The Advisory Committee, in adding the "fair and just reason" standard to Rule 32(e) in 1983, explained why this cannot be so:

"Given the great care with which pleas are taken under [the] revised Rule 11, there is no reason to view pleas so taken as merely 'tentative,' subject to withdrawal before sentence whenever the government cannot establish prejudice. 'Were withdrawal automatic in every case where the defendant decided to alter his tactics and present his theory of the case to the jury, the guilty plea would become a mere gesture, a temporary and meaningless formality reversible at the defendant's whim. In fact, however, a guilty plea is no such trifle, but a "grave and solemn act," which is "accepted only with care and discernment."'"

Advisory Committee Notes on Fed. R. Crim. P. 32, 18 U.S.C. App., at 794 (quoting United States v. Barker, 514 F.2d 208, 221 (C.A.D.C. 1975) (quoting Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 1468, 25 L.Ed.2d 747 (1970))).

In considering the "circumstances under which withdrawal of a guilty plea before imposition of a sentence should be permitted," the Third Circuit has stated that "motions to withdraw guilty pleas before sentencing should be liberally construed in favor of the accused and should be granted freely." Government of Virgin Islands v. Berry, 631 F.2d 214, 219 (3d Cir. 1980). At the same time, however, the Third Circuit has consistently recognized that a criminal defendant has no absolute right to withdraw a guilty plea and that a district court's determination on a motion under the Rule will be disturbed only if the district court has abused its discretion. See also United States v. Martinez, 785 F.2d 111, 113 (3d Cir. 1986); United States v. Trott, 779 F.2d 912, 915 (3d Cir. 1985); Government of the Virgin Islands v. Berry, 631 F.2d 214, 219-20 (3d Cir. 1980).

The Third Circuit has held that three factors must be considered when a district court evaluates a motion to withdraw a guilty plea under the Rule: (1) whether the defendant asserts his innocence; (2) whether the government would be prejudiced by his withdrawal; and (3) the strength of the defendant's reasons to withdraw the plea. See, e.g., United States v. Jones, 979 F.2d

317, 318 (3d Cir. 1992); United States v. Huff, 873 F.2d 709, 712 (3d Cir. 1989); Government of Virgin Islands v. Berry, 631 F.2d 214, 219-221 (3d Cir. 1980); United States v. Crowley, 529 F.2d 1066, 1071 (3d Cir.), cert. denied, 425 U.S. 995, 96 S.Ct. 2209, 48 L.Ed.2d 820 (1976). If the defendant succeeds in showing a fair and just reason for withdrawing his plea, the burden shifts to the government to show that it would be prejudiced by the withdrawal. However, the Third Circuit's has made clear that "the government is not required to show prejudice when a defendant has shown no sufficient grounds for permitting withdrawal of the plea." Martinez, 785 F.2d at 116. See also United States v. Harris, 44 F.3d 106, 1210-11 (3d Cir. 1995) (citing Martinez).

"A plea is not voluntary or intelligent," and therefore unconstitutional, "if the advice given by defense counsel on which the defendant relied in entering the plea falls below the level of reasonable competence such that the defendant does not receive effective assistance of counsel." United States v. Loughery, 908 F.2d 1014, 1018 (D.C. Cir. 1990). To withdraw a plea on this basis, a defendant must ordinarily satisfy the two-pronged standard of Strickland v. Washington, 466 U.S. 668, 687 (1984), for violations of the Sixth Amendment guarantee. See Hill v. Lockhart, 474 U.S. 52, 57-60 (1985); United States v. Holland, 117 F.3d 589, 594 (D.C. Cir. 1997); United States v. Horne, 987 F.2d 833, 835 (D.C. Cir. 1993).

A defendant must therefore show first, that his counsel's performance "fell below an objective standard of reasonableness" by identifying specific "acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Strickland, 466 U.S. at 687-88. Second, a defendant must demonstrate that the deficiencies in his representation were prejudicial to his defense. Id. at 692. He "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S. at 59, 106 S.Ct. at 370-71.

2. Defendant's Claims

The Defendant claims that his guilty plea must be withdrawn because of the ineffective assistance of counsel, Guy Sciolla ("Sciolla" or "Trial Counsel"). To support this argument, the Defendant essentially makes three allegations: (1) Sciolla never met with him to prepare a defense; (2) Sciolla told him wrong information regarding the range of sentences that he would face; and (3) Defendant did not want to plead guilty, but he was coerced by Sciolla. The Defendant concludes that he was denied the effective assistance of counsel and that he is entitled to an evidentiary hearing. This Court must disagree.

Defendant's claims of ineffective assistance of counsel and coercion of guilty plea goes to the third factor under Jones, e.g. the strength of the defendant's reasons to withdraw the plea. The

Third Circuit has explained that "[a]t a minimum, a motion to withdraw [a guilty plea] should be granted if the plea was not made voluntarily and intelligently." United States v. Nahodil, 36 F.3d 323, 330 (3d Cir. 1994). The Court finds that the Defendant has shown no sufficient grounds for permitting withdrawal of the guilty plea. Davis's reasons for withdrawing his guilty plea are not credible and are contradicted by his own sworn statements. Even if believed, they do not demonstrate that Davis's counsel was ineffective or his plea involuntary and unintelligent. Moreover, Davis never asserts his innocence.

(a) Inadequate Representation

Davis's first argument is that Trial counsel's alleged failure to interview him and to adequately prepare a defense was ineffective assistance of counsel. Davis failed to raise this argument to the Court at the Hearing. When this Court took Davis's guilty plea, the Court questioned the Defendant as to the quality of representation he was receiving from Sciolla:

THE COURT: What do you think of Mr. Sciolla; is he a good lawyer, is he giving you good advice?

DEFENDANT: Yes, your honor.

(Tr. of Hr'g, Jul. 23, 1998, at 19.) Thus, the instant argument is entirely inconsistent with what Davis professed under oath to this Court during the Hearing.

Moreover, the plea agreement that Sciolla negotiated for Davis

was extremely beneficial to him. It contained a number of favorable stipulations, including an agreement to a three point offense level reduction for early acceptance of responsibility and agreements not to seek enhancements for possession of a firearm (potentially two points) or role in the offense (two, three, or four points)--reducing Davis's potential exposure from life imprisonment (level forty-three or above) if convicted at trial, to a recommended range of 188 to 235 months (level thirty-five). The Presentence Investigation Report calculates the total offense level as thirty-seven (235 to 293 months) because it assesses two points for possession of a firearm, disregarding the government's stipulation not to seek the enhancement. Furthermore, the Government agreed to recommend that this sentence run concurrently with, rather than consecutive to, Davis's sentence of forty years in the Turra case, which was imposed for 1995 offenses involving murder and conspiracy to murder.²

Furthermore, it is unreasonable to believe that, but for Trial Counsel's alleged error, Davis would not have pleaded guilty and would have insisted on going to trial. Davis faced the possibility of life imprisonment without parole, and now faces a considerably lesser amount. This result may be favorably compared with the fate of Davis's co-defendant, Gaeten Polidoro, who exercised his right

²Both Davis and Gaeten Polidoro were convicted in United States v. Louis Turra et al., Crim. No. 97-359, of various offenses involving Turra's drug enterprise, including racketeering, drug conspiracy (Polidoro only), and conspiring with Turra to murder Merlino.

to go to trial, was found guilty by a jury after a short deliberation, and now faces a prospective life sentence on top of his life sentence in Turra. As was the case with Polidoro, the evidence against Davis was daunting. Assistant United States Attorney, Abigail R. Simkus, testified that:

If the case had gone to trial the Government would have introduced evidence in the form of testimony by witnesses, consensual audio recordings made by a cooperating witness, surveillance photographs, a video surveillance tape and numerous pieces of physical evidence used during the execution of several search warrants including drug paraphernalia, empty bottles containing chemicals of P2P and methamphetamine and various guns and ammunition.

(Tr. of Hr'g, Jul. 23, 1998, at 20.) In comparison, Sciolla's advocacy appears extremely effective, and Davis's claim of ineffective assistance of counsel is baseless.

(b) Knowingly

Davis's second argument is that he did not knowingly enter his guilty plea because Trial Counsel failed to advise him on the maximum range of sentencing that he faced. Again, Davis failed to raise this argument to the Court at the Hearing. Defendant now contends that Sciolla failed to tell him that the worst possible range of imprisonment that he faced under the guidelines was one-hundred eighty-eight months to two-hundred thirty-five months. Defendant admits that during the colloquy, this Court explained to him that he faced those sentences. (Def.'s Mem. in Support of Am. Mot. at 2, n.2.) The Defendant contends, however, that he "was not

able to fully appreciate the court's explanation." (Id.)

Before accepting the Defendant's plea, the Court questioned Davis thoroughly as to whether he understood the range of sentencing that he faced. The Court engaged the Defendant in the following colloquy:

THE COURT: Okay. The next paragraph right below that I'm going to read and discuss that with you, also. It reads as follows, Paragraph B: "The defendant understands, agrees and has had explained to him by counsel that the maximum sentence he may receive on each of Counts 1, 2 and 3 pursuant to the guilty plea" -- turn the page -- "described in Paragraph A supra is life imprisonment with a mandatory minimum of ten years imprisonment pursuant to 21 U.S.C. Section 841(b), a \$12 million fine, \$4 million per count, a \$150 special assessment, five years supervised release as well as forfeiture pursuant to Count 5 of the indictment."

Being reminded of the statutory maximum, Mr. Davis, do you still wish to enter this plea of guilty?

THE DEFENDANT: Yes, your Honor.

THE COURT: What is your understanding, Mr. Davis. of the sentencing Guidelines and how do they impact on the ultimate sentence that you will receive if I accept your plea of guilty? And if you want to consult with your attorney prior to responding to that question I'll understand.

(Discussion off the record.)

THE DEFENDANT: Yes, your Honor, I understand that the weight that I'm pleading guilty to is bound by the guidelines.

THE COURT: Okay. And what is the range of possible imprisonment that you would be facing under the guidelines if I accept your plea of guilty this afternoon?

And I want this to be the worst case scenario. I see the Government has the book there.

Do you want to take a moment, Mr. Sciolla?

MR. SCIOLLA: Yes, your honor. I believe it's -- it comes in at about 158 months. It's a Level 34 to start with less three.

(Discussion off the record.)

MR. SCIOLLA: I'm sorry, 38 to start with, it's 168 months, the two.

(Discussion off the record.)

MR. SCIOLLA: Judge, at criminal -- if he's a Criminal 2 history category the level is at 38, it would go down to a Level 35 with three off so it would be 188 months to 235 months.

There is a question, he does have one prior conviction which was a recent conviction here in the matter of the United States versus Turra. the question becomes whether or not that counts for more than just one prior conviction and whether or not that would pump the criminal history category from one to two. The Government contends that it would be placing him in the criminal history

Category 2. We might suggest to the Court that it would still keep him in category history of one.

THE COURT: Well, for our purposes at the moment let us discuss with Mr. Davis the worst case scenario. And the worst case scenario would be the criminal history category of two, that would be the 188 to 235 months of incarceration.

MR. SCIOLLA: Correct.

THE COURT: Okay. Now, Mr. Davis, do you understand that the range of imprisonment, the months, the range of 188 to 235 is what you're facing because I do not have the authority to go below the minimum number of months in the guidelines; has that been explained to you? Under normal circumstances I don't have the authority to go below that.

So that the minimum you're facing 188 months of imprisonment. Being reminded of that, sir, do you still wish to enter this plea of guilty?

THE DEFENDANT: Yes, your Honor.

(Tr. of Hr'g, Jul. 23, 1998, at 9-11.)

Moreover, the Court questioned Davis thoroughly as to whether he had any questions regarding the agreement to plead guilty:

THE COURT: Is there anything, sir, that I haven't discussed regarding this agreement or any part of this procedure that you have a question about that you'd like to discuss now, anything at all? Is there anything on your mind, any question you have about

this proceeding or the guilty plea agreement that you would like to discuss; this is your opportunity.

DEFENDANT: No, your honor.

(Id. at 19.) Thus, the Court reaffirms that the Defendant understood and appreciated the range of sentences that he would face.

(c) Voluntariness

Davis's final argument is that he entered his plea of guilty because he was "'pushed' into the decision to plead guilty" by Trial Counsel. Similarly, Davis failed to raise this argument to the Court at the Hearing. When this Court took Davis's guilty plea, the Court questioned Davis thoroughly as to whether he had been coerced or improperly induced to enter a plea of guilty:

THE COURT: At the time you decided to sign this agreement today did anyone say the Court would be easy on you at sentencing if you went along with the program and signed and pled guilty, did anybody make you any sort of promise like that?

DEFENDANT: No, sir.

(Tr. of Hr'g, Jul. 23, 1998, at 14.)

THE COURT: Okay. Did anyone suggest to you that you'd better not go to trial because if you lose the Government's going to be really hard on you because you will have made them work and prove your guilt beyond a reasonable doubt to 12 people ... Did anybody threaten you or coerce you about the Government attorneys?

DEFENDANT: No, your honor.

(Id. at 15.)

Moreover, as previously noted, the Court questioned Davis thoroughly as to whether he had any questions regarding the agreement to plead guilty:

THE COURT: Is there anything, sir, that I haven't discussed regarding this agreement or any part of this procedure that you have a question about that you'd like to discuss now, anything at all? Is there anything on your mind, any question you have about this proceeding or the guilty plea agreement that you would like to discuss; this is your opportunity.

DEFENDANT: No, your honor.

(Id. at 19.) Thus, the Court reaffirms that the Defendant voluntarily pleaded guilty.

Based upon the defendant's own unequivocal responses to the Court when he entered his guilty plea to the offense and his affirmation that he received "good advice" from Sciolla, the Court finds that it is overwhelmingly clear that his plea was voluntary and intelligent. Since the record clearly shows that the defendant had "fully considered the plea bargain," and that the plea was knowing and voluntary, the Court finds that the defendant lacks a valid reason for withdrawing the plea. See e.g., United States v. Trott, 779 F.2d 912, 915 (3d Cir. 1985) (denying motion to dismiss a guilty plea where the record showed that the plea was entered

knowingly and voluntarily).

Furthermore, where, as in the instant case, the defendant's guilty plea is entered knowingly and voluntarily, to succeed on a motion to withdraw the plea, the "defendant must not only reassert his innocence, but give sufficient reasons why contradictory positions were taken before the district court and why permission should be given to withdraw the guilty plea and reclaim the right to trial." United States v. Jones, 979 F.2d at 319. The Court finds that the defendant has not offered sufficient reasons for why he now takes the contradictory position before the Court that his guilty plea was not voluntary and intelligent.

Given that the defendant has not made any colorable showing that there is a "fair and just" reason to withdraw his guilty plea under the third Jones factor, and because the defendant has not asserted his actual innocence under the first Jones factor, the government need not show under the second Jones factor that it would be prejudiced if the defendant was permitted to withdraw his plea. See Martinez, 785 F.2d at 116.

B. The "No Appeal" Provision

1. Defendant's Claim

Davis moves the Court, in the alternative, to enter an order declaring unenforceable the provision in his plea agreement in which he agreed to waive his appellate and Section 2255 rights in United States v. Turra. The provision in his plea agreement that

Davis seeks to declare unenforceable states as follows:

On this date, the defendant will withdraw the Notice of Appeal filed on his behalf in United States v. Turra, et al., E.d. Pa. Crim. No. 97-359, and hereby relinquishes his right to renew his appeal or to file any additional appeals in United States v. Turra, et al., E.D. Pa. Crim. No. 97-359. The defendant further agrees that he will not seek collateral relief under 28 U.S.C. sec. 2255 or Federal Rule of Civil Procedure 60(b) in connection with the judgment imposed on him by the Honorable J. Curtis Joyner in United States v. Turra, et al., E.D. Pa. Crim. No. 97-359.

(Guilty Plea Agreement ¶ F.6.)

2. Analysis

Although the Defendant entered into the plea agreement before this Court, his waiver relinquished his appellate rights not in this case but in the Turra case, which was tried before the Honorable J. Curtis Joyner. Notwithstanding his waiver, Davis appealed his conviction in that case, and his appeal is currently docketed in the Court of Appeals (Docket No. 98-1517). Accordingly, this Court cannot rule on this issue while it is under consideration by the Court of Appeals.

An appropriate Order follows.

