

that she had a managerial role in the conspiracy; and (3) she was denied the right to appeal.

DISCUSSION

A. Ineffective Assistance of Counsel

Garcia asserts that her counsel was ineffective because: (1) under the plea agreement counsel advised her to accept, the second count of the indictment was not dropped; (2) counsel never requested and petitioner never received a sentence reduction for her cooperation with the government; and (3) counsel never requested and petitioner never received a sentence reduction for her age or frail health.

Garcia claims the plea agreement was "one sided" because the lesser charge was never dropped. Pet. at 2. She argues that "[i]n a case where defendant takes responsibility and pleads guilty, the lesser charge, in this case count 2[,] should be dropped in good faith by the prosecution and defendant should have plead guilty to only count 1, the conspiracy." The plea agreement required Garcia to plead guilty to both counts, and the court went over the terms of the agreement with Garcia carefully at the change of plea hearing:

COURT: Well, let me go over it with you. First, the plea agreement says that you're going to plead guilty to Counts 1 and 2 of the indictment. In other words, you're going to admit that you conspired with others to distribute heroin and you possessed heroin with the intent to distribute it. . . Do you understand?

DEFENDANT: Yes.

Tr. of Plea, at 38-39. Garcia also explicitly stated she was not forced to enter into the plea agreement. Tr. Plea, at 38. Moreover, because she was sentenced concurrently, Garcia will not serve any additional time for the second count; no additional harm accrues from having plead guilty to the second count.

The gravamen of her complaint is that the plea agreement did not benefit her; she "feels this was a one sided plea agreement." Pet. at 2. Had she gone to trial and been found guilty, the statutory minimum was ten years on count one of the indictment and five years on count two. Tr. of Plea, at 36-37. Garcia was sentenced to 36 months. The benefit of the plea bargain is self-evident. Garcia's counsel was not ineffective with regard to the plea agreement.

Garcia claims her counsel never requested a sentence reduction for her cooperation with the government, nor did she receive such a reduction. This is factually inaccurate. The government filed a motion under § 5k1.1 of the sentencing guidelines for a reduction of Garcia's offense level based on her cooperation with authorities. The court granted that motion.

The government later argued at sentencing, after the

court had granted a reduction in her sentencing calculation for diminished capacity and denied an enhancement for her managerial role, that no further reduction should be granted for her cooperation. Tr. Sentencing, at 168. The court rejected this contention and further reduced the sentence because Garcia provided assisted the government. Tr. Sentencing, at 169 & 172. Garcia's counsel was not ineffective; counsel argued for a reduction based on her cooperation and it was granted.

Garcia claims her counsel erroneously failed to request a reduction in her sentence for her age and frail health. This is incorrect; counsel requested reductions from the court for diminished capacity as well as her frailty and illness. Tr. Sentencing, at 158-164. The court granted both requests; the court reduced the sentencing offense level by two points for diminished capacity and then reduced it by two more points for "a combination of things . . . all her illnesses." Tr. Sentencing, at 164 & 168. Garcia's counsel was not ineffective; counsel requested a reduction for Garcia's physical condition and the court granted the reduction.

B. Lack of Sufficient Evidence for Role Enhancement

Garcia claims the court erred in enhancing her sentence on the basis of her managerial or supervisory role in the

conspiracy because the government failed to produce evidence she had such a role. The government requested a sentence enhancement for her role in the conspiracy, but the request was denied by the court. Specifically, the court stated, "I don't think it's appropriate to add the two points for her being a supervisor." Tr. Sentencing, at 156.

Based on the court's finding that Garcia did not serve in a supervisory role, she became eligible under the sentencing guidelines, § 5C1.2, for an additional offense level reduction. See § 2D1.1(b)(6). The court granted a one point "safety valve" reduction under those sections. Overall, the court reduced the offense level recommended by both the probation office and the government by a total of three points based on its finding that Garcia did not play a managerial role in the conspiracy.

C. Denial of the Right of Appeal

Garcia claims her counsel did not "inform the defendant of the opportunity to file . . . a motion for appeal." She also claims she was never made aware of any post-conviction relief available to her. While her attorney may not have informed her of her right to appeal, the court informed Garcia of that right at her sentencing hearing, as it is required to do under Federal Rule of Criminal Procedure 32(c)(5), Tr. Sentencing, at 173, and Garcia became aware of

and utilized the post-conviction relief available to her, as evidenced by the filing of this petition. Any error that may have occurred was harmless.

CONCLUSION

The petition fails to state a ground for relief under 28 U.S.C. § 2255, and will be denied without an evidentiary hearing.

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

UNITED STATES OF AMERICA : CRIMINAL NO. 98-499-1
 :
 v. :
 :
 MERCEDES GARCIA :
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ORDER

AND NOW this 23rd day of March, 2001, after careful and independent consideration of the petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2255 and the Government's answer, it is **ORDERED** that:

1. The petition filed pursuant to 28 U.S.C. § 2255 is **DENIED WITHOUT AN EVIDENTIARY HEARING.**

2. There is no basis for the issuance of a certificate of appealability.

Norma L. Shapiro, S.J.