

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

UNITED STATES OF AMERICA : CIVIL ACTION
 :
 v. : No. 00-623
 :
 GUSTAVO MEDINA : (Criminal No. 97-190-1)

MEMORANDUM

Ludwig, J.

July 30, 2001

Petitioner Gustavo Medina, pro se, moves to vacate, set aside or correct his sentence, 28 U.S.C. § 2255.¹

On July 21, 1997, petitioner pleaded guilty to one count of conspiracy to distribute cocaine, 18 U.S.C. § 846. On November 9, 1998, he was sentenced to 135 months custody and five years supervised release. On appeal the sentence was affirmed.² United States v. Medina, 203 F.3d 818, No. 98-2094, slip op. (3d Cir. Nov. 23, 1999). He now challenges the sentence on three grounds: 1) the procedure under which the plea was taken contravened Federal Rule of Criminal Procedure 11; 2) the plea he entered was “not guilty”; and 3) ineffective assistance of counsel.

¹ A pro se petitioner’s § 2255 claims should be liberally construed, United States v. Miller, 197 F.3d 644, 645 (3d Cir. 1999).

² On appeal, petitioner argued that the following rulings made at sentencing were erroneous: 1) the “safety valve” provision, U.S.S.G. §§ 5C1.2, 2D1.1(b)(6), did not apply; 2) the government’s refusal to file a § 5K1.1 motion was not bad faith; 3) 50 kilograms of cocaine were attributable to him; 4) reduction for mitigating role, U.S.S.G. § 3B1.2, was not warranted; 5) willingness to consent to deportation at conclusion of sentencing did not justify departure; 6) reduction under U.S.S.G. § 2X1.1 did not apply; 7) he was not forced into the conspiracy, U.S.S.G. § 5K2.12; and 8) the conditions in a non-federal institution did not justify a departure, § 5K2.0. United States v. Medina, 203 F.3d 818, No. 98-2094, slip op. (3d Cir. Nov. 23, 1999).

The plea and the sentencing were before the Honorable Marjorie O. Rendell, then of this court.

1. Federal Rule of Criminal Procedure 11 and Entry of the Plea³

Petitioner maintains that the district court deviated from the requirements of Rule 11 by: (1) impermissibly delegating its responsibilities to the prosecutor and courtroom deputy, who did not advise him of the essential elements of a conspiracy, the identity of his co-conspirators, or the correct maximum term or effect of supervised release; and (2) injecting a waiver of rights that were not part of the Rule 11 requirements or the plea agreement. He also asserts that at the end of the colloquy, he pleaded “not guilty” and that, therefore, he was not sentenced on a guilty plea.⁴

³ The purpose of Rule 11 is to ensure that the plea is voluntary, is not induced by threats or promises, and that a defendant possesses an understanding of the law in relation to the facts. See, e.g., McCarthy v. United States, 394 U.S. 459, 466, 89 S. Ct. 1166, 1170-1171, 22 L. Ed. 2d 418 (1969).

⁴ According to the transcript of the plea colloquy, when asked how he pleaded, petitioner, through an interpreter, said “not guilty.” The transcript:

THE COURT: All right. I’ll make findings on the record. I find that the defendant, Gustavo Medina is competent to enter into an informed plea.

I find that his plea is a knowing and voluntary plea and not the result of force or threats or promises apart from the plea agreement discussed on the record.

I find that there is a factual basis for Mr. Medina’s plea of guilty. I find that Mr. Medina does understand the charges, his legal rights, the maximum penalties and the mandatory, minimum penalties.

I find to [sic], that Mr. Medina is waiving his right to a trial if I accept his guilty plea. I ask my Courtroom Deputy to take the plea.

COURTROOM DEPUTY: Gustavo Medina, you previously pleaded not guilty to Criminal Indictment Number 97-190, charging you with conspiracy in distributing five or more kilograms of cocaine in violation of Title 21 United States Code Section 846.

“To be entitled to habeas corpus relief under section 2255, [petitioner] must show that the Rule 11 error amounted to ‘a fundamental defect which inherently result[ed] in a complete miscarriage of justice or an omission inconsistent with the rudimentary demands of fair procedure.’” United States v. Cleary, 46 F.3d 307, 310-11 (3d Cir. 1994) (quoting United States v. Deluca, 889 F.2d 503, 506 (3d Cir. 1989)). Therefore, “[n]ot only must [petitioner] demonstrate an error of constitutional magnitude, but he also must show that he was prejudiced by that error, *i.e.*, that he did not understand the consequences of his plea or that, if he had been properly advised about the effect of [his sentence], he would not have

As to Count 1 of this indictment, how do you plead now, guilty or not guilty?

THE DEFENDANT: Not guilty.

COURTROOM DEPUTY: Thank you.

THE COURT: All right. This plea is accepted and defendant, Gustavo Medina is hereby adjudged guilty of the offense charged.

7/21/97 tr. at 21-22.

On June 20, 2001, an evidentiary hearing was held regarding petitioner’s assertion that the record did not contain a plea of guilty. Present at the hearing were petitioner, his former criminal counsel, the interpreter at the change of plea hearing, the assistant United States attorney, appointed stand-by counsel, and an interpreter for petitioner. Petitioner’s position was that, prior to the colloquy, his lawyer had not properly advised him of the charges or potential sentence and, therefore, he eventually decided to plead not guilty. 6/20/01 tr. at 14. Petitioner attributed the delay in raising the issue, in short, to his attorney’s neglect. Id. at 10.

The audiotope of the plea hearing was played three times. Petitioner’s former interpreter testified that she said “*now*, guilty.” Id. at 26-30 (emphasis added). According to petitioner’s former counsel, “[t]here was absolutely no doubt in my mind whatsoever, nor in the Court’s, nor anybody else in that courtroom. He pled guilty.” Id. at 37. The assistant United States attorney said that she heard the interpreter say “N-O-W guilty.” Id. at 30. Petitioner disputed that he said “now” in Spanish. Id. at 31. Consistent with the credible testimony and listening carefully to the audiotope, however, it was found that petitioner pleaded guilty and it was so stated at that time. Id. at 30. It may be worth noting the question asked of defendant was, “How do you plead *now*, guilty or not guilty?” 7/21/97 tr. at 22 (emphasis added).

pled guilty.” Cleary, 46 F.3d at 311.

A. Rule 11(c)(1)

Petitioner argues that the court erred because under Rule 11(c)(1) “the indictment, the plea agreement, and plea colloquy did not apprise the Petitioner [of] the identity of a co-conspirator, the meaning of conspiracy, [or] the correct maximum supervised release” Pet. at 15. Under Rule 11(c), “[b]efore accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands . . . the nature of the charge to which the plea is offered” Fed. R. Crim. P. 11(c)(1). “[M]ost courts look to the totality of the circumstances to determine whether a defendant was informed of the nature of the charges against him, considering factors such as the complexity of the charge, the age, intelligence, and education of the defendant, and whether the defendant was represented by counsel.” United States v. Cefaratti, 221 F.3d 502, 508 (3d Cir. 2000). A challenge to Rule 11(c) may be rejected “where the record plainly shows that the defendant understood the nature of the charges despite a flawed inquiry by the court.” Id. (quoting United States v. Maher, 108 F.3d 1513, 1521 (2d Cir. 1997)).

The record shows that the nature of the charge was adequately delineated.⁵ The

⁵ Contrary to petitioner’s argument, a prosecutor may explain the charges in the indictment without violating Rule 11. See, e.g., United States v. Mosley, 173 F.3d 1318, 1326 n.9 (11th Cir. 1999) (guilty plea may be upheld where “district judge asked the prosecutor to inform the defendant of a core principle of Rule 11”); United States v. Smith, 60 F.3d 595, 597 (9th Cir. 1995) (prosecutor may state nature of the charges); United States v. Sanchez, 650 F.2d 745, 748 (5th Cir. 1981) (Rule 11 does not require the judge to be the “sole orator” in a proceeding, but only that she personally involve herself in the inquiry).

prosecutor said that petitioner, having learned of a conspiracy to distribute between 300 and 550 kilograms of cocaine, agreed to distribute portions of it in New York City. 7/21/97 tr. at 6-7. In response to the court's inquiry, petitioner stated that he heard the prosecutor, and that he fully understood and discussed with his counsel the indictment.⁶ Id. at 7-8. The

⁶ THE COURT: All right. I'm going to be asking the United States Attorney, to talk about certain things, and I want you to listen, Mr. Medina, because I may ask you after she speaks, whether you understood what she said, whether you agree with it, whether you disagree with it, all right?

THE DEFENDANT: Okay.

THE COURT: All right. Ms. Eve, would you please tell us about the indictment indicating the charges, the penalties and the elements of the offense charged?

MS. EVE: Yes, your Honor.

By way of indictment, Mr. Medina, was charged with conspiracy to dipute [sic] five or more kilograms of cocaine in violation of 21 U.S.C. Section 846.

The elements are a violation of 21 U.S.C. Section 846 are, the conspiracy described in the indictment was wilfully formed and was existing at or about the time alleged and that the accused was willfully a member of the conspiracy.

The indictment states that the defendant and a co – the defendant introduced a confidential informant to a co-conspirator. The reason for the introduction is that the co-conspirator indicated to Mr. Medina that he had an individual who was interested in purchasing a[n] aircraft.

Following that –

THE COURT: All right. I don't need the factual basis for the plea. All right.

MS. EVE: I'm sorry, your Honor, I was describing the indictment.

THE COURT: Okay. Go ahead.

MS. EVE: Afterwards Mr. Medina learned of a conspiracy to distribute approximately 300 to 550 kilograms of cocaine, and Mr. Medina became involved in that conspiracy when he indicated that he wish [sic] to obtain a quantity of that cocaine and to distribute that in New York City along as well as – in addition to obtaining customers for part of the cocaine that was to receive by the informant.

The plea agreement states the defendant is agreeing to plead guilty to the conspiracy. . . .

THE COURT: All right. What are the penalties for violation of 21 U.S.C. Section 846?

MS. EVE: Your Honor, the maximum penalty is life in prison. There is a

indictment contained the essential elements of a conspiracy;⁷ that a co-conspirator was unidentified is inconsequential.⁸ See, e.g., United States v. Davis, 679 F.2d 845, 851 (11th Cir. 1982) (“The existence of the conspiracy agreement rather than the identity of those who agree is the essential element to prove conspiracy.”).

As to petitioner’s assertion that “the agreement element of conspiracy” was not adequately explained to him, pet. at 15, our Court of Appeals recently considered, and

ten year mandatory, minimum term of imprisonment, a mandatory, minimum of five years of supervised release up to a lifetime of supervised release, a \$4 million fine, and a \$100 special assessment.

THE COURT: All right. Mr. Medina, did you hear what Ms. Eve just said?

THE DEFENDANT: Yes.

THE COURT: Have you received a copy of the indictment pending against you?

THE DEFENDANT: Yes. Yes, your Honor.

THE COURT: All right. Have you gone over it with your counsel and interpreter?

THE DEFENDANT: Yes, your Honor.

THE COURT: All right. Have you fully discussed the charges with your counsel in this case?

THE DEFENDANT: Yes, your Honor.

THE COURT: And you feel you understand the charges against you in this case?

THE DEFENDANT: Yes, your Honor.

7/21/97 tr. at 6-8.

⁷ The indictment alleged that he “did knowingly and intentionally conspire, combine, confederate and agree with others known and unknown to the grand jury to distribute more than 5 kilograms of a mixture or substances containing a detectible amount of cocaine[.]”

⁸ Petitioner relies on United States v. Andrades, 169 F.3d 131, 135-36 (2d Cir. 1999) for the position that, to sustain a conspiracy conviction, a co-conspirator must be identified. Pet. at 20. That decision, however, held that the government must establish an agreement among individuals who are neither government agents nor confidential informants. Here, petitioner pleaded guilty to having conspired with a “large cocaine distributor,” who was later named at the plea colloquy as Alfred Fuentes. Andrades, therefore, is inapplicable.

rejected, a similar argument in United States v. Cefaratti, 221 F.3d 502 (3d Cir. 2000). There a district court's failure to specifically state elements of the offense in a plea colloquy was held to be a harmless variance under Rule 11(c)(1) because the indictment contained the essential elements of the offense, and the reasonably sophisticated defendant admitted to having reviewed it with his counsel. Id. at 508-09. Similarly, in this case, given petitioner's reasonable sophistication,⁹ his review of the indictment with his attorney, and the extensive inquiry at the plea hearing, if a deviation from Rule 11 occurred, it was harmless. See Fed. R. Crim. P. 11(h) ("Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.")¹⁰

B. Rule 11(e)

Petitioner also asserts that the court participated in the plea agreement in violation

⁹ At the time of the plea colloquy, petitioner was 48 years old, and had been in the United States for seven years. He stated that he studied at a university for 16 years, did additional course work in human relations and with micro-computers, and was working as an auditor at a bank. 7/21/97 tr. at 4.

¹⁰ According to petitioner, the prosecutor erroneously stated that there was a mandatory-minimum "of five years of supervised release up to a lifetime of supervised release," which was incorrect under U.S.S.G. § 5D1.2. 7/21/97 tr. at 7. Nevertheless, he was also instructed that there was up to a lifetime of imprisonment, which far exceeded the punishment actually imposed. Therefore, the error in stating the maximum supervised release term was inconsequential. See Andrades, 169 F.3d at 134 (2d Cir. 1999) (harmless error "where a district court misinforms defendant of the potential term of incarceration and the actual sentence he receives is less than that stated during the plea allocution"); United States v. Fuentes-Mendoza, 56 F.3d 1113, 1114-16 (9th Cir. 1995) (same); United States v. Raineri, 42 F.3d 36, 42 (1st Cir. 1994) (upholding guilty plea even though there was misinformation given to defendant because it did not lead him to "expect a lesser penalty than he actually received"); United States v. Good, 25 F.3d 218 (4th Cir. 1994) (same).

of Rule 11(e)(1).¹¹ Specifically, he maintains, the court modified the agreement by requiring him to waive rights in the plea colloquy that were not part of the plea agreement or required by Rule 11.¹² His argument is without merit.

“The Rule 11(e)(1) prohibition ‘simply commands that the judge not participate in, and remove him or herself from, any discussion of a plea agreement that has not yet been agreed to by the parties in open court.’” United States v. Bierd, 217 F.3d 15, 19 (1st Cir. 2000) (quoting United States v. Bruce, 976 F.2d 552, 556 (9th Cir. 1992)). “The primary

¹¹ Under Rule 11(e)(1), the government and the defendant may engage in negotiations to reach a plea agreement, but “[t]he court shall not participate in any such discussions.” Fed. R. Crim. P. 11(e)(1).

¹² Petitioner cites the following exchange:

THE COURT: All right. Now, you give up certain rights when you do plead guilty, the rights to challenge the indictment, and that was referred to by Ms. Eve, the right to challenge, how the Government may have obtained evidence against you.

Whether they used an informant or whether they conducted searches or wire taps or surveillance. And how the grand jury was composed, all of the things that the Government may have done in obtaining the evidence against you and arresting you in the indictment being handed down by the grand jury. Everything the Government may have done up until now, you’ll be waiving your right to be [sic] complain about that if you plead guilty.

Do you understand that?

THE DEFENDANT: Yes, your Honor.

* * *

THE COURT: All right. And after you please [sic] guilty, the only thing that you can appeal would be the sentence that I impose on you. And you can never come into any Court at any time in the future and say that as to these charges, you were not guilty or that your rights were violated.

All right. Do you understand that?

THE DEFENDANT: Yes, your Honor.

7/21/97 tr. at 9, 11.

philosophy behind it is that “[j]udicial involvement in plea negotiations inevitably carries with it the high and unacceptable risk of coercing a defendant to accept the proposed agreement and plead guilty.” Id. Here, the statements made by the court, to inform petitioner of those rights he was waiving by pleading guilty, simply did not create the type of pressure or coercion contemplated by Rule 11(e).

C. Rule 11(f)

As regards the plea colloquy, petitioner further argues that the government did not establish a sufficient factual basis for the acceptance of the plea, thereby violating Rule 11(f). Rule 11(f): “Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment . . . without making such inquiry as shall satisfy it that there is a factual basis for the plea.” Fed. R. Crim. P. 11(f). “The court may make that inquiry by looking to the defendant’s own admissions, the government’s proffer of evidence, the presentence report, or ‘whatever means is appropriate in a specific case – so long as the factual basis is put on the record.’” Cefaratti, 221 F.3d at 509 (quoting United States v. Smith, 160 F.3d 117, 121 (2d Cir. 1998)).

According to unchallenged facts stated by the prosecutor, petitioner introduced a confidential informant to his co-conspirator, Alfred Fuentes, relative to the sale of an airplane. Subsequently, upon finding out that they also made a drug deal, petitioner demanded payment from the informant for having introduced him to Fuentes. Petitioner traveled from New York to Philadelphia on a few occasions to meet with the informant and an undercover agent. During the meetings, he agreed to arrange for the sale of 50 kilograms of the 300 to 500 kilograms of cocaine that the informant was to receive from

Fuentes. 7/21/97 tr. at 18-19.

During the plea colloquy, petitioner acknowledged that the facts were correct with two exceptions. First, he disagreed that a total of 62 kilograms were attributable to him.¹³ Secondly, as stated by his attorney, “when [petitioner] introduced Mr. Fuentes in Venezuela, with the confidential informant, to buy the airplane, or airplanes, he was not aware at that time that it was a drug transaction.” 7/21/97 tr. at 19-20. Petitioner now asserts that there was not a sufficient factual basis to establish conspiracy.

“To prove a conspiracy, the government must establish a unity of purpose between the alleged conspirators, an intent to achieve a common goal, and an agreement to work together toward that goal.” United States v. Gibbs, 190 F.3d 188, 197 (3d Cir. 1999). “The government need not prove that each defendant knew all of the conspiracy’s details, goals, or other participants.” Id. Here, as the plea colloquy makes clear, petitioner acted as intermediary between the purchasers and importers of the 50 kilograms of cocaine, thereby taking “a step in achieving the conspiracy’s common goal of distributing cocaine for profit.” Id. (quoting United States v. Theodoropoulos, 866 F.2d 587, 593 (3d Cir. 1989)). Moreover, in response to the court’s inquiry, petitioner admitted his knowing involvement in the conspiracy. The plea, therefore, was supported by a sufficient factual basis.

¹³ The government had stated that petitioner “indicated his desire to take 12 kilograms of cocaine for himself out of the 300 to 500 kilograms that the informant was to receive from Mr. Fuentes . . . [and] that he would find customers for another 50 kilograms of cocaine.” 7/21/97 tr. at 18-19.

2. Ineffective Assistance of Counsel

Petitioner asserts that his trial counsel was ineffective by: 1) not moving to dismiss the indictment; and 2) advising him to plead guilty prior to investigating and adequately assessing the merits of his case.

To succeed on an ineffective assistance claim, petitioner must show “(1) that counsel’s representation fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different.” United States v. Nino, 878 F.2d 101, 103 (3d Cir.1989) (citing Strickland v. Washington, 466 U.S. 668, 687-96, 104 S. Ct. 2052, 2064-69, 80 L. Ed.2d 674 (1984)). Prejudice in the context of a guilty plea means “a reasonable probability that, but for counsel’s errors, [petitioner] would have proceeded to trial instead of pleading guilty.” United States v. Nahodil, 36 F.3d 323, 326 (3d Cir. 1994) (citing Hill v. Lockhart, 474 U.S. 52, 56-59, 106 S. Ct. 366, 369-70, 88 L. Ed. 2d 203 (1985)). “It is therefore only the rare claim of ineffective assistance of counsel that should succeed under the properly deferential standard to be applied in scrutinizing counsel's performance.” United States v. Gray, 878 F.2d 702, 711 (3d Cir. 1989).

According to petitioner, the indictment was deficient because it did not contain the signature of the grand jury foreperson or the identity of a co-conspirator. However, the indictment was signed by the foreperson, see Indictment, May 1, 1997. And, a “defendant may be indicted and convicted despite the names of his co-conspirators remaining unknown, as long as the government presents evidence to establish an agreement between two or more persons, a prerequisite to obtaining a conspiracy conviction.” United States v. Rey, 923 F.2d 1217, 1222 (6th Cir. 1991); see Rogers v. United States, 340 U.S. 367, 375,

71 S. Ct. 438, 443, 95 L. Ed. 344 (1951) (“at least two persons are required to constitute a conspiracy, but the identity of the other members of the conspiracy is not needed, inasmuch as one person can be convicted on conspiring with persons whose names are unknown”).¹⁴

Petitioner also argues that his counsel was ineffective for advising him to plead guilty without an “adequate investigation of the law in relation to the facts.” Pet. at 39. In particular, he maintains, counsel should have recognized and advised him that the indictment did not contain “the identity of a co-conspirator and elements of conspiracy under Section 846, Title 21, United States Code.” *Id.* at 42-43. Given the totality of the representation in this case, these are meritless arguments.

Accordingly, petitioner’s motion to vacate, alter or amend sentence must be denied.¹⁵
28 U.S.C. § 2255.

An order accompanies this memorandum.

Edmund V. Ludwig, J.

¹⁴ Petitioner’s argument that counsel was ineffective for not moving to dismiss the indictment based on outrageous government conduct is also without merit. Pet. at 37. “The defense of outrageous government conduct examines whether a defendant’s due process rights have been violated because the government created the crime for the sole purpose of obtaining a conviction.” United States v. Pitt, 193 F.3d 751, 759-60 (3d Cir. 1999). Petitioner has not shown that the government’s conduct was “shocking, outrageous, and clearly intolerable.” United States v. Nolan-Cooper, 155 F.3d 221, 230-31 (3d Cir. 1998).

¹⁵ Insofar as petitioner argues that his sentence is illegal under Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 2363-64, 147 L. Ed. 2d 435 (2000), following the majority of courts that have declined to apply the rule retroactively to cases on collateral review, his claim for relief will not be granted on that basis. See, e.g., United States v. Moss, 252 F.3d 993, 1001 (8th Cir. 2001); United States v. Gibbs, 125 F. Supp. 2d 700, 707 n.10 (E.D. Pa. 2000) (listing cases).

