

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

RICARDO RODRIQUEZ-AMADOR,)
)
 Petitioner,)
) Criminal Action No. 95-072-SLR
 v.) Civil Action No. 98-550-SLR
)
UNITED STATES OF AMERICA,)
)
 Respondent.)

Ricardo Rodriguez-Amador, Three Rivers, Texas. Petitioner,
pro se.

Colm F. Connolly, United States Attorney and Paulette K. Nash,
Assistant United States Attorney, United States Attorney's
Office, Wilmington, Delaware. Counsel for Respondent.

MEMORANDUM OPINION

Dated: September 17, 2001
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

Petitioner Ricardo Rodriquez-Amador is an inmate at the Federal Correctional Institution in Three Rivers, Texas. Currently before the court is petitioner's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. (D.I. 42) For the reasons stated, the court shall deny petitioner's motion.

II. BACKGROUND

On September 26, 1995, a federal grand jury indicted petitioner on one count of reentering the United States after a felony conviction and deportation in violation of 8 U.S.C. § 1326(a) and (b)(2). (D.I. 1) On January 13, 1997, petitioner pled guilty to the indictment pursuant to a memorandum of plea agreement (the "Plea Agreement"). (D.I. 28)

A. The Plea

Pursuant to the Plea Agreement, the government agreed to: (1) not challenge a three point reduction in the offense level for petitioner's affirmative acceptance of responsibility; and (2) file a substantial assistance motion pursuant to U.S.S.G. § 5K1.1 recommending a reduction "not greater than one year from the minimum of the Sentencing Guideline range established by the Court." (D.I. 28 at ¶¶ 3, 6) Petitioner agreed to: (1) plead guilty to the indictment; (2) pay the special

assessment; (3) cooperate with authorities in other investigations; and (4) waive administrative deportation proceedings following any incarceration. (Id. at ¶¶ 1-2, 4-5) The Plea Agreement also provided that it "supersedes all prior promises, representations, and statements of the undersigned parties" and that Count One of the indictment "carries a maximum penalty of ten years imprisonment." (Id. at ¶¶ 1, 6)

At petitioner's plea hearing, the court summarized the Plea Agreement and confirmed that petitioner understood it through the following exchange, conducted with the assistance of an interpreter:

THE COURT: Having taken some time doing this, this appears to be all the promises and representations and agreements that are contained in this written plea agreement; is that correct?

THE DEFENDANT: Yes. Everything is okay. Everything is okay.

THE COURT: Has anyone promised you anything that is not contained in the plea agreement?

THE DEFENDANT: No.

THE COURT: Has anyone threatened or coerced you to enter this plea agreement?

THE DEFENDANT: I've talked to my lawyer and he has been giving me advice I need.

(D.I. 44 at 9-10)

After informing the court that the Plea Agreement did not address petitioner's cooperation with the government, the

court again asked petitioner whether he had been forced or coerced into entering the Plea Agreement. Petitioner responded, "Nobody has forced me." (Id. at 10)

Petitioner further answered affirmatively that: (1) he received a copy of the indictment and reviewed it with his lawyer; (2) he was "fully satisfied with the advice and counsel and representation given [by his] lawyer, Mr. O'Malley;" and (3) no one threatened or coerced him into the Plea Agreement. (Id. at 4-5, 10) Petitioner also stated that "Everything is in order. My lawyer has explained it to me, and he has helped me a great deal." (Id. at 9)

The court then explained to petitioner that ten years imprisonment was the maximum penalty for his crime, that the Sentencing Guidelines applied to his case, and that the court could impose a sentence more or less severe than that recommended by the Sentencing Guidelines. (Id. at 10-11) The court also advised petitioner that he had the right to: (1) enter a plea of not guilty; (2) have a trial by jury; (3) be represented by counsel; (4) see, hear, examine, and compel the attendance of witnesses; and (5) testify on his own behalf. (Id. at 12) Petitioner acknowledged that he was forfeiting these rights by entering a plea of guilty. (Id.)

The plea colloquy continued with the following exchange between the court and petitioner:

THE COURT: Do you understand that if the sentence that the court imposes is more severe than you expected, you will still be bound by your plea, you'll have¹ the right to withdraw it?

THE DEFENDANT: I know.

THE COURT: You also understand that if the court does not accept the sentencing recommendation by the government in your plea agreement, that you will still be bound by your plea and you will not have the right to withdraw it?

THE DEFENDANT: Yes.

(D.I. 44 at 11-12)

The court then explained the elements of the charge brought against petitioner, and petitioner described why each element of the crime was met. (Id. at 13-14) Next, the government described the evidence that it would present should the case go to trial. (Id. at 14-15) Finally, the court asked petitioner whether he strongly disagreed with any of the government's factual representations. Petitioner responded, "No, that's fine." (Id. at 15)

¹The transcript contains a typographical error here. The court informed petitioner, consistent with the court's practice and script from the court's bench book, that he would **not** have the right to withdraw his plea if the court imposed a sentence more severe than he expected.

The court accepted petitioner's guilty plea, specifically noting that "the defendant is fully competent and capable of entering an informed plea and that his plea of guilty is a knowing and voluntary plea supported by an independent basis in fact containing each of the elements of the offense."

(Id.) The court then scheduled a sentencing date. (Id. at 16)

B. The Sentence

On or about February 18, 1997, the government filed a substantial assistance motion pursuant to 28 U.S.C. § 994(n) and U.S.S.G. § 5K1.1, requesting that the court depart from the Sentencing Guidelines. (D.I. 31) On April 3, 1997, the court granted the government's motion, denied petitioner's motion for further departure,² and sentenced petitioner to sixty-five months of imprisonment to be followed by three years of supervised release.³ The court also ordered petitioner to pay a \$50.00 special assessment. (D.I. 34) At

²Pursuant to the Plea Agreement, petitioner agreed to be deported without administrative proceedings upon the completion of any incarceration. Petitioner argued that he should be granted an additional downward departure for his concession to deportability. (D.I. 32, 38)

³The sentence imposed by the court was below the otherwise applicable ten-year maximum penalty of 8 U.S.C. § 1326(b)(1) and below the otherwise applicable Sentencing Guidelines' range of seventy-seven to ninety-six months imprisonment.

the sentencing hearing, petitioner stated that he was "extremely sorry for what he did" and that he "made a mistake." (D.I. 38 at 16)

C. The Appeal

On April 15, 1997, petitioner filed an untimely notice of appeal, which the Third Circuit dismissed for lack of jurisdiction. (D.I. 35, 40) The Third Circuit further held that even if petitioner's appeal was timely, the court lacked jurisdiction to review a district court's discretionary decision not to depart from the Sentencing Guidelines. (Id.)

III. DISCUSSION

In the instant motion, petitioner argues that: (1) the government failed to fulfill the obligations of the Plea Agreement because petitioner did not receive a further downward departure for his consent to deportation; (2) his counsel coerced him into pleading guilty; (3) the court erroneously consolidated prior convictions when calculating his sentence; (4) the court failed to advise petitioner that he had no right to withdraw his plea under Fed. R. Crim. P. 11(e)(2); (5) petitioner was denied effective assistance of counsel at his sentencing; and (6) the court should grant a further downward departure for his accomplishments and behavior since being incarcerated. (D.I. 42 at 3-4)

A. Government's Obligations Under the Plea Agreement

The court finds no basis for petitioner's claim that the government failed to fulfill its obligations under the Plea Agreement. The face of the Plea Agreement did not obligate the government to seek a further downward reduction other than the twelve month reduction for substantial assistance, which was requested by the government and granted by the court. Moreover, petitioner stated at his plea hearing that, with the exception of the details of his cooperative efforts, no promises were omitted from the Plea Agreement, and he was not forced into entering the Plea Agreement.

To the extent that petitioner is claiming that the court erred by not granting the further downward departure for his deportation agreement, that claim may not now be relitigated under 28 U.S.C. § 2255. Although the Third Circuit dismissed petitioner's appeal as untimely, it nevertheless addressed this issue on direct appeal. Thus, a subsequent review by this court is not required. See Withrow v. Williams, 507 U.S. 680, 721 (1993) ("If the claim was raised and rejected on direct review, the habeas court will not readjudicate it absent countervailing equitable considerations.").

B. Coercion Into Pleading Guilty

Petitioner contends that his attorney coerced him into a guilty plea by informing petitioner that he would not receive a career offender enhancement if he pled guilty. (D.I. 42 at 5)

This claim is also without merit. First, petitioner did not receive a career offender enhancement. Thus, to the extent that his counsel represented that he would not receive such an enhancement, counsel was correct. Second, petitioner has not demonstrated evidence of any misunderstanding regarding his sentence. When accepting petitioner's plea, the court made a specific finding on the record that petitioner's plea was voluntary. Petitioner has not presented the court with any reason to doubt his credibility at the plea hearing.

C. Calculation of Sentencing Guidelines

Petitioner contends that the court erroneously calculated his sentence by failing to "consolidate" or "relate" his prior convictions that arose under "the same criminal information under the same docket number." (D.I. 42 at 6) This claim fails because claims of error under the Sentencing Guidelines are not cognizable under Section 2255. See Graziano v. United States, 83 F.3d 587, 589-90 (2d Cir. 1996).

D. Court's Failure to Advise Petitioner That He Had No Right to Withdraw His Guilty Plea

Petitioner alleges that the district court failed "to advise him that he had no right to withdraw his guilty plea, if the District Court did not accept the Prosecutor's sentence recommendation." By granting the government's substantial assistance motion, the court did accept the government's sentencing recommendation. Thus, petitioner fails to state a claim on this issue.

E. Ineffective Assistance of Counsel

Petitioner's ineffective assistance of counsel claim is nearly identical to his claim of coercion into a guilty plea. Petitioner alleges that his counsel told him that he would receive a three point downward departure for consenting to deportation without an administrative hearing. (D.I. 42 at 10) At sentencing, petitioner's counsel argued for such a departure, but the court denied it.⁴ (D.I. 32, 38) Petitioner claims that he would not have entered a plea of guilty "had he known the true nature of his attorney's interest." (D.I. 42 at 10)

The Sixth Amendment provides that an accused has the right to the assistance of counsel in all criminal proceedings, including the right to effective assistance of counsel. See Strickland v. Washington, 466 U.S. 668, 686

⁴Counsel actually only argued for a two point departure.

(1984). The right to effective assistance of counsel exists to protect an accused's fundamental right to a fair trial. See id. at 684; Nix v. Whiteside, 475 U.S. 157, 175 (1986); United States v. Cronic, 466 U.S. 648, 653 (1984). To prevail on a claim of ineffective assistance of counsel, petitioner must show that: (1) his counsel's performance fell below an objective standard of reasonableness; and (2) there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. See Strickland, 466 U.S. at 686; Burger v. Kemp, 483 U.S. 776, 788-89 (1987); Darden v. Wainwright, 477 U.S. 168, 184 (1986); Kimmelman v. Morrison, 477 U.S. 365, 375 (1986). In determining whether counsel's actions were reasonable, the court must give considerable deference to the attorney:

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland, 466 U.S. at 688-89 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)).

Petitioner is required to illustrate not only the derelictions of his counsel, but also that "there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different." Sistrunk v. Vaughn, 96 F.3d 666, 670 (3d Cir. 1996) (citing Strickland, 466 U.S. at 668). When evaluating counsel's performance, a court should not "focus[] solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable." Lockhart v. Fretwell, 506 U.S. 364, 369 (1993). The effect of counsel's deficient performance must be evaluated in light of the totality of the evidence. See Strickland, 466 U.S. at 696 ("[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.").

Petitioner's claim that he was misadvised by his counsel as to the possible length of his imprisonment is belied by the record. When a defendant considers the government's offer of a plea agreement, his attorney is required to attempt to learn all of the pertinent facts of the case and provide good-faith

advice about the sentencing consequences of a guilty plea.

See McMann v. Richardson, 397 U.S. 759, 769- 71 (1970).

"Waiving trial[, however,] entails the inherent risk that the good faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what the court's judgment might be." United States v. Broce, 488 U.S. 563, 572 (1989). As the Supreme Court stated in Blackledge v. Allison, 431 U.S. 63 (1977):

[T]he representations of the defendant, his lawyer, and the prosecutor at such a hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible.

Id. at 73-74. Consequently, the general rule is that where an adequate guilty plea hearing has been conducted, an erroneous prediction or assurance by defense counsel regarding the likely sentence does not constitute grounds for invalidating a guilty plea on grounds of ineffective assistance of counsel. See Masciola v. United States, 469 F.2d 1057, 1059 (3d Cir. 1972); Brown v. United States, 75 F. Supp.2d 345, 355 (D.N.J. 1999). This rule has been reinforced by the implementation of the Sentencing Guidelines and the detailed procedures required when conducting the Rule 11 colloquy at plea hearings. See,

e.g., United States v. Stephens, 906 F.2d 251, 253 (6th Cir. 1990); United States v. Sweeney, 878 F.2d 68, 70 (2d Cir. 1989). The Rule 11 colloquy, during which the defendant is informed of the maximum possible sentence and fines for the offense to which he intends to plead guilty, eliminates any prejudice that might arguably attach to counsel's erroneous sentencing prediction. See United States v. Martinez, 169 F.3d 1049, 1053 (7th Cir. 1999); Gonzalez v. United States, 33 F.3d 1047, 1051-53 (9th Cir. 1994); Doganieri v. United States, 914 F.2d 165, 168 (9th Cir. 1990); Brown, 75 F. Supp.2d at 355-56.

During the plea colloquy, the court unequivocally informed petitioner that ten years imprisonment was the statutory maximum with respect to count one of the indictment. (D.I. 44 at 5) Petitioner acknowledged under oath that he understood such and at no point during the plea hearing (or sentencing) indicated that he had been advised otherwise by counsel. (Id. at 6) Moreover, the Plea Agreement explicitly indicates that count one of the indictment "carries a maximum penalty of ten years imprisonment," and does not provide that petitioner would receive a downward departure for consenting to deportation. (D.I. 28 at 1) The court asked petitioner whether the Plea Agreement contained all the promises and

representations and agreements made to him, and he responded affirmatively. (D.I. 44 at 9-10) Under these circumstances, even if the court accepts petitioner's contention, his claim that counsel's assistance was constitutionally infirm is untenable. Therefore, petitioner's claim of ineffective assistance of counsel is without merit.

IV. CONCLUSION

For the reasons stated, petitioner's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 is denied. Because resentencing is not warranted, the court need not consider petitioner's educational development while incarcerated. An appropriate order shall issue.

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 Petitioner,)
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O R D E R

At Wilmington this 17th day of September, 2001,
consistent with the memorandum opinion issued this same day;

IT IS ORDERED that:

1. Petitioner Ricardo Rodriguez-Amador's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (D.I. 42) is denied.

2. For the reasons stated above, petitioner has failed to make a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and a certificate of appealability is not warranted. See United States v. Eyer, 113 F.3d 470 (3d Cir. 1997); 3rd Cir. Local Appellate Rule 22.2 (1998).

United States District Judge