

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA,)
)
v.) Criminal No. 98-16-B
)
)
ENRIQUE REYES-CABRERA,)
)
)
Defendant)

RECOMMENDED DECISION ON
PETITIONER’S MOTION TO VACATE, SET ASIDE,
OR CORRECT SENTENCE UNDER 28 U.S.C. §2255

On October 5, 1998, Petitioner pled guilty to four counts involving federal cocaine offenses in violation of 21 U.S.C. § 841. On February 4, 1999, United States District Judge Morton Brody sentenced Petitioner to one hundred and eighty-eight months in jail. Petitioner now files this motion to vacate sentence pursuant to 28 U.S.C. § 2255 claiming that his plea was secured in violation of his constitutional rights.

A court should dismiss a § 2255 motion without an evidentiary hearing if “(1) the motion is inadequate on its face, or (2) the movant’s allegations, even if true, do not entitle him to relief, or (3) the movant’s allegations need not be accepted as true because they state conclusions instead of facts, contradict the

record, or are inherently incredible.” *David v. United States*, 134 F.3d 470, 477 (1st Cir. 1998). For reasons stated below I am satisfied that Petitioner’s allegations need not be accepted as true because they contradict the record in this case. I therefore recommend that the motion be dismissed without an evidentiary hearing.

Factual Background

On May 12, 1998 a grand jury returned a four count indictment against Petitioner. Count One charged that Reyes-Cabrera conspired with Maria Diaz-Cuevas to possess cocaine with the intent to distribute, in violation of 21 U.S.C. § 846. Counts Two and Three alleged that the same two individuals distributed cocaine on April 10 and 17, 1998, in violation of 21 U.S.C. §§ 841 (a)(1) and (b)(1)(C). Count Four charged that the two possessed cocaine on April 30, 1998, again in violation of the § 841. Petitioner pled guilty to all counts on October 5, 1998. On February 4, 1999, the Court sentenced him to 188 months in prison, to be followed by six years of supervised release. Petitioner took no direct appeal.

At the time of the Rule 11 proceeding, the record reflects that the plea agreement provided that the government and the Petitioner had agreed that the amount of cocaine involved in this transaction was in excess of 400 grams, but

less than 500 grams. (T. p. 10)¹. Prior to the sentencing hearing the government and the Petitioner both objected to information in the presentence report which calculated the weight of the cocaine to be 510 grams (PSI ¶ 7). The Court acknowledged those objections and verified that the parties would withdraw the objections if the Court determined the weight of the cocaine to be less than 500 grams as agreed in the Plea Agreement. (S. p. 2).

The Court sentenced the Petitioner based upon the lesser amount. The base offense level for 510 grams of cocaine would have been 26. (PSI ¶¶ 11, 13). At the sentencing hearing the Court indicated that the base offense level used to calculate the sentence was 24. (S. p. 3). However, Reyes-Cabrera's prior criminal record made him a career offender under U.S.S.G. §4B1.1 because he was 18 years old or older at the time he committed the instant offense, the offense was a controlled substance offense, and he had previously been convicted of two such offenses (PSI ¶ 21). The applicable guideline range for imprisonment was 188 to 235 months. (S. p. 4). Following the recommendation of both the government and Petitioner's attorney, the Court imposed a sentence of 188 months on each of

¹As noted in the Government's Response, references to the plea proceeding and the sentencing hearing appear at (T.) and (S.) respectively. The presentence report is referred to as (PSI).

the counts, to be served concurrently. (S. p. 17). The Court also imposed a term of supervised release of six years on each count. (S. p. 18).

Petitioner filed the instant Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 on December 13, 1999. On January 3, 2000, transcripts of both the Rule 11 proceeding and the sentencing hearing were filed with this Court. On January 18, 2000, the Government filed its response to the § 2255 motion and the Petitioner filed his reply on January 31, 2000. On February 14, 2000, the Petitioner filed a motion for extension of time to file his memorandum in reply to the Government's opposition.

The Petitioner has raised four separate grounds in his motion. Under Ground one he alleges that the Court violated Rule 11 (c), Fed. R. Crim. P., by failing to inform the Petitioner of a statutory minimum sentence during the Rule 11 proceeding, and then subsequently imposing a ten year minimum mandatory sentence. Ground two asserts that the sentencing court was without jurisdiction to impose a six year period of supervised release. Petitioner's third ground is based upon an alleged violation of the plea agreement with the Government involving the weight of the scheduled drug which would be used for sentencing purposes. Ground four alleges that his two prior convictions, which formed the basis of a sentencing enhancement in this case, were improper and unconstitutional.

Discussion

A. Imposition of Ten Year Minimum Mandatory Sentence

Petitioner states in his motion that the Court imposed a ten year minimum mandatory sentence upon him without any prior warning. The record reveals, however, that the ten-year minimum sentence did not apply to Reyes-Cabrera and the Court did not impose it. Rather, the Court imposed a sentence at the low end of the sentencing range as calculated under the federal Sentencing Guidelines. (S. p. 15). By pleading guilty to the charges in the indictment the Petitioner subjected himself to potential incarceration of up to 30 years. There is absolutely no indication anywhere in the record that the Court deviated from the plea agreement and imposed a ten year minimum mandatory sentence. While the 188 month sentence is in excess of ten years, the sentence resulted from the application of the Sentencing Guidelines in the manner most favorable to the Petitioner and it was not the result of the operation of any ten year minimum mandatory sentence.

B. Jurisdiction to Impose Six Years of Supervised Release

Petitioner next complains that the Court did not have jurisdiction to impose a supervised release term of six years. There is nothing in the record to support this conclusory assertion and clearly the relevant statute provides for a six year period of supervised release. 21 U.S.C. § 841 (b)(1)(C). At the Rule 11 proceeding the Petitioner was advised that his sentence would include six years of supervised release. (T. p. 6). Furthermore, the written plea agreement provided that the Petitioner would serve *at least* four years of supervised release following any period of incarceration. Thus the Court clearly had jurisdiction to impose the six year supervised release component of the sentence pursuant to the repeat offenders provision of 21 U.S.C. § 841 (b)(1)(C). The Government filed the necessary notice of its intention to rely upon the Petitioner's prior convictions for sentencing purposes. *Suveges v. United States*, 7 F.3d 6, 10 (1st Cir. 1993) ([t]he filing of such an informational notice is jurisdictional). The Petitioner had notice of the applicability of the six year term of supervised release and the Court had jurisdiction to impose that term of supervised release.

C. Breach of the Plea Agreement

Petitioner argues that the Government breached the plea agreement. The plea agreement called for the sentence to be computed under the guidelines based upon a cocaine weight of less than 500 grams. Although the PSI certainly calculated the Guideline sentencing range based upon 510 grams of cocaine, the Court at the sentencing hearing rejected that calculation and made its own calculation in accordance with the parties' agreement. The Court calculated a Guideline sentencing range of 188 to 235 months based upon an amount of cocaine that was less than 500 grams. The record contradicts Reyes-Cabrera's assertion that the government breached the agreement. When the record so clearly contradicts Petitioner's assertion, the Petitioner is not entitled to an evidentiary hearing. *See, David*, 134 F.3d at 477 (1st Cir. 1998); *Dziurgot v. Luther*, 897 F.2d 1222, 1225 (1st Cir. 1990).

D. Collateral Attack on Predicate Convictions

Petitioner's fourth ground involves an assertion that his two prior felony drug convictions in the Southern and Eastern Districts of New York were obtained in violation of constitutional due process, and as the result of the ineffective assistance of counsel. However, this Court is not the proper forum in which to test the constitutional validity of those convictions. The predicate, enhancing

convictions must be vacated in the courts that imposed them before the challenge may proceed in the court that imposed the enhanced sentence based upon them. *See, e.g. United States v. Allen*, 24 F.3d 1180, 1187 (10th Cir. 1994). Thus any challenge to those convictions should proceed first in the U.S. District Courts in New York. Those convictions cannot be collaterally attacked in this Court.

Petitioner further alleges that he did not raise these grounds earlier because he was rendered ineffective assistance of counsel at trial. To the extent the motion attempts to raise ineffective assistance claims, there are no facts developed in support of that allegation nor is there any claim that a different result would have obtained had counsel proceeded in a different fashion. Under the familiar two-prong analysis set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), made applicable to guilty pleas in *Hill v. Lockhart*, 474 U.S. 52, 57 (1985), there is absolutely no basis upon which to find that a claim of ineffective assistance of counsel could be sustained.

E. Petitioner's Motion to Extend Time to File Reply

By motion filed February 14, 2000, the Petitioner has asked for a ninety day extension to reply to the Government's Response to his Motion. This request misses the mark for at least two reasons. First, the movant has already filed a pleading on January 31, 2000, which he styled "Petitioner's Reply to Gov't

Opposition to Motion to Vacate Sentence”. Second, and perhaps more importantly, nothing in the relevant Rules Governing Section 2255 Proceedings gives a movant the automatic right to file a responsive pleading in any event.

Conclusion

For the reasons stated herein the Petitioner’s Motion to Extend Time to File Reply is **DENIED**. (Docket No. 33). I recommend that the Petitioner’s Motion to Vacate be **DISMISSED** without an evidentiary hearing.

Notice

A party may file objections to those specified portions of this report or proposed findings or recommended decision for which de novo review by the district court is sought, together with a supporting memorandum, within ten days after being served with a copy hereof. A responsive memorandum shall be filed within ten days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court’s order.

Margaret J. Kravchuk
U.S. Magistrate Judge

Dated this 16th day of February, 2000