

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

AMADO LOPEZ, )  
 )  
 Movant )  
 v. ) Crim. No. 99-79-P-C  
 ) Civil No. 03-267-P-C  
 UNITED STATES OF AMERICA, )  
 )  
 Respondent )

**RECOMMENDED DECISION ON 28 U.S.C. § 2255 MOTION**

Amado Lopez has filed a 28 U.S.C. § 2255 (Docket No. 1), seeking re-sentencing on his guilty plea conviction for conspiracy to possess with intent to distribute cocaine and cocaine base. Two counts of Lopez’s motion pertain to the imposition of five years of supervised release on top of Lopez’s twenty-year prison term. In Lopez’s remaining count he asserts that his sentencing range should have been lower than the 240-month cap agreed to by Lopez and the United States if his acceptance of responsibility adjustment is to be given any effect. Per the reasons stated below, I recommend the Court **DENY** Lopez the relief he seeks.

***Discussion***

***Background***

Lopez’s Presentence Investigation Report (PSI) explained that a Maine law enforcement investigation disclosed the involvement of seventeen co-conspirators and Lopez in a network that, during 1999, regularly supplied crack cocaine obtained in Connecticut to conspirators in the area of Bath and Brunswick, Maine. (PSI at 3.) In August 1999, Lopez moved to Maine. (*Id.* at 3.) Together with his cousin Orlando Santana, Lopez traveled to Connecticut several times a week to bring back four ounces of

cocaine that was reconstituted into crack cocaine and later sold to others. (Id. at 4.) The group also obtained cocaine in Massachusetts and New York. (Id. at 4.) During one transaction, James Dall gave Lopez a .32 caliber handgun in exchange for crack cocaine. (Id. at 4.) In late 1999, Kirk Owen gave Lopez a shotgun to protect an apartment used as a drug distribution center. (Id.) On December 7, 1999, agents intercepted Santana and two others when they arrived at a Brunswick hotel where Lopez had rented a room. (Id. at 5.) During a struggle with agents, Santana was killed. (Id.) Agents then arrested Lopez and two others in the hotel room. (Id.) Santana's bag contained 450 grams of cocaine. (Id.) Inside the room were 34 grams of marijuana and another .8 grams of cocaine. (Id.)

On October 3, 2000, Lopez appeared with his attorney before the Court to plead guilty to one count of his indictment.<sup>1</sup> At the outset of the colloquy, the Court told Lopez that if he did not understand what was being said or wished to consult with counsel, he should say so. (R. 11 Tr. at 4-5.) Lopez indicated that he was being treated for depression but his condition did not interfere with his ability to understand the proceedings. (Id. at 5-7.) Asked whether he was pleading guilty because he was guilty and for no other reason, Lopez responded: "I have another reason. ... The Apprendi case." (Id. 8.) See Apprendi v. New Jersey, 530 U.S. 466 (2000). Defense counsel interjected:

Judge, let me tell you what I have told him about the Apprendi case. What I have told him about the Apprendi case is that it is my belief that the weight in the indictment is presently – the Apprendi can only allow a sentence of up to 20 years, the statutory sentence, and I also told him, as I told you back in chambers over the past few weeks or so, and [the

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<sup>1</sup> There was an agreement that the plea was conditional as Lopez reserved the right to appeal the denial of a motion to suppress.

prosecutor] has been telling us he is going to cure this indictment by way of another superseding indictment by alleging drug quantity.

(Id. at 8-9). The Court observed that obtaining another superseding indictment would increase Lopez's maximum sentence exposure. (Id. at 9.) Defense counsel added, "My client is coming before the Court to plead guilty, to admit he is guilty but also from a strategic standpoint I have advised him that it is in his best interest rather than letting the government go back to Grand Jury and presenting an indictment that could have a higher statutory maximum sentence." (Id. at 9.) Once again the Court asked Lopez directly whether the only reasons he was pleading guilty was because he was in fact guilty and because of the desire to limit his sentencing exposure. (Id. at 9-10.) Lopez indicated that this was the case. (Id.)

The Court ascertained that Lopez had discussed the charges with his attorney and understood the elements and nature of the offense. (Id. at 10). Lopez further indicated that his attorney had also explained to Lopez the penalties he faced and that he was satisfied with counsel's advice. (Id. at 11.) The court then described the rights Lopez surrendered by pleading guilty and assured that Lopez understood these rights and intended to waive them. (Id. at 11-14.)

When the court asked if Lopez continued to want to plead guilty, Lopez asked if he could pose a question. (Id. at 14-15.) Lopez then said: "That document Appendi, I never got to see, or understand that." (Id. at 15.) The court responded, "I suggest you need not be worried about it, that you are protected from any escalation of the range of sentencing that I will explain to you under the arrangement that you and [your attorney] have made, and [the prosecutor]." (Id.)

Lopez then asked if he would be permitted to withdraw his guilty plea if he received a sentence greater than twenty years and the prosecutor replied that, by deciding not to return to the grand jury for a superseding indictment, the United States had limited Lopez's sentence exposure to twenty years. (Id. at 15.) The Court also offered that, if for any reason it decided that a sentence of more than twenty years was required, Lopez would be allowed to withdraw his guilty plea. (Id.) "So therefore," Lopez asked, "you can still give me over 20 years." (Id.) The court answered:

I could theoretically. What [the prosecutor] has just said is that that is not going to happen. The government is agreeing by not going back to the Grand Jury and consenting to your conditional guilty plea, it is limiting itself, the government is, to a sentence of not more than twenty years. And I can tell you that I will not impose a sentence of more than 20 years without affording you an opportunity, in any event, to withdraw your guilty plea and go to trial.

(Id. at 16.) Lopez said he understood and his attorney continued to recommend that the guilty plea be accepted. (Id.)

Lopez said he had received a copy of the superseding indictment and understood the charge and his attorney seconded this representation. (Id. at 16-17.) The Court told Lopez that he was charged with a conspiracy to possess with intent to distribute cocaine and cocaine base and then explained:

Do you understand that if you are convicted of that offense, subject to the limitations imposed by the agreement that you have made with the government in respect to sentence, you would be exposed under the statute to imprisonment for a term of minimum of 10 years, maximum of life and a fine not to exceed 4 million dollars or any combination of the two, plus a period of supervised release of at least 5 years and an additional period of imprisonment of not more than 5 years if supervised release should be [violated]?

(Id. at 17.) Lopez said he understood. (Id.) The court then explained that, although the statute provided for a maximum of life, “that is not going to happen here unless you have an opportunity to withdraw your plea.” (Id.) Lopez said he understood. (Id. at 17-18.) A prosecution version of the offense was marked as an exhibit. (Id. GX 1.) Lopez and his attorney each affirmed that they had read it and discussed the prosecution version and indicated that Lopez had two objections to it. (Id. at 18-19.) One pertained to the amount of Cocaine involved in the conspiracy and the other was to the use of the phrase cocaine base. (Id. at 19-20.) Both attorneys agreed that drug quantity related to sentencing, not guilt. (Id. at 20.) Otherwise, Lopez’s attorney said that, based on his review of the discovery, he was satisfied that the United States could produce the evidence described. (Id. at 21-22.) The court found that there was a factual basis for the guilty plea. (Id. at 22.)

The Court explained that sentencing rested in the court’s exclusive authority although it would be governed by the United States Sentencing Guidelines. (Id. at 22-23.) Lopez indicated that he had conferred with his attorney vis-à-vis the guidelines as they might apply to Lopez and that his attorney had explained the application and that Lopez had understood that explanation. (Id.) The Court indicated that no portion of the term of imprisonment imposed could be served on parole and that if the sentence, to be determined based on the PSI, was more severe than Lopez expected that he would still be bound by the plea of guilty, save for the right to appeal the motion to suppress. (Id. at 24-25.) The Court made sure that Lopez understood that it was not bound by either side’s sentencing recommendation and that Lopez had not received any promises concerning

what sentence would be imposed. (Id. at 25.) After in this manner ascertaining that the guilty plea was voluntary, the court accepted it. (Id. at 26).

The PSI's estimate of drug quantity was derived by calculating from cooperator statements the average quantity purchased each week between April and November 1999. (PSI at 5.) Even though Lopez joined the conspiracy in August, the full amount was attributed to him because he functioned as a leader of the group. (Id. at 6.) The total amount of all drugs for which Lopez was held accountable was 24,121 kilograms of marijuana equivalent. (Id. at 7.) After adjustments for leadership and weapons, Lopez's total offense level of 42 and Criminal History Category V produced a Guideline range of imprisonment for 360 months to life. (Id. at 12).

Defense counsel raised six objections to the PSI. (Id. at 15-17.) They included drug quantity, the proposed leadership enhancement, the firearms enhancement, and Lopez's criminal history category. (Id. at 15-16.) Counsel's fifth objection pertained to the statutory maximum. (Id. at 16.) Although both attorneys had agreed that without a new indictment, the statutory maximum would be limited to twenty years, the probation office concluded that Apprendi was still too new for the office to take an official position on its meaning. (Id.) Lopez's sixth objection concerned the recommendation against the USSG §3E1.1 acceptance of responsibility departure. (Id.) The PSI indicated that even if Lopez accepted responsibility for his conduct, his Guideline range would remain 360 months to life. (Id.) Finally, Lopez argued that a departure was in order, although he identified no basis for granting it. (Id. at 17.) On January 30, 2001, the probation officer submitted a supplemental addendum to the PSI. (PSI Supp. at 1.) It explained that Lopez had dictated a statement to his attorney and signed it. (Id.) Lopez admitted coming to

Maine to sell cocaine, but minimized his involvement in the conspiracy during September 1999, by claiming that he worked on his own delivering cocaine for Jason York, who was not named as a conspirator. (Id.) The presentence investigator explained that if the court found that Lopez accepted responsibility for his conduct, his guideline range would be imprisonment for 360 months to life, but pursuant to Apprendi would be limited to the statutory maximum of 240 months. (Id. at 2.)

On February 2, 2001, Lopez and his attorney appeared for sentencing. (Sentencing Tr. at 1.) Again, Lopez told the court he authorized his attorney to speak in his behalf. (Id. at 2.) Attorney and client confirmed that they had read the PSI and conferred and that Lopez understood its contents. (Id.) With Lopez's consent, counsel withdrew all but one objection to the PSI. (Id. at 3.) The remaining dispute concerned the sentence to be imposed in light of Apprendi. (Id.) The prosecutor told the court that Lopez's was one of the most serious drug cases to be prosecuted in Maine and that "if this sentence were not capped by the decision in ... Apprendi, I would be advocating for a sentence in excess of 30 years." (Id. at 4.) However, understanding what the change in law required, the prosecutor recommended a sentence of 240 months. (Id.) With the consent of the parties, so much of the plea agreement as called for Lopez to cooperate was withdrawn. (Id. at 5.) Defense counsel told the Court he understood from the presentence conference that the court would accept a stipulation that the sentence be 240 months. (Id.) The Court responded, "in light of the impact of the Apprendi decision, consent of the government, the Court is prepared to accept that." (Id.)

In allocution, Lopez said he had "no problem of taking responsibility for this case" and that he believed that he should be incarcerated. (Id.) Still, he was confused

because if the case had been tried elsewhere, such as in a major city, he would get “a slap on the wrist.” (Id.) Lopez knew he had broken the law, but “never thought that [he] would be here facing 20 years.” (Id. at 6.)

The Court explained that Lopez’s Guideline computations produced a total offense level of 35 and Criminal History Category V. (Id. at 7.) Nevertheless, invoking Apprendi, the Court found that the United States failed to charge or prove more than 500 grams and thus the maximum allowable term was 240 months. (Id.) Accordingly, the Court sentenced Lopez to 240 months in prison to be followed by five years of supervised release “on the usual terms and conditions and on the five special terms and conditions that will be specified precisely in the memorandum of sentencing judgment, those have all been explained to counsel at presentence conference. I understand there is no objection.” (Id. at 8.) Both sides confirmed and absence of objections. (Id.) “The reason for the sentence here,” the Court summarized, is that on the stipulated predicates, the facts and conclusions of the Court, it is clear the maximum sentence that can be imposed here is the sentence that has been imposed, 240 months, under the law as has been articulated by the United States Supreme Court as applies to the circumstances of this case. (Id. at 9.)

As anticipated, Lopez appealed his conviction. See United States v. Lopez, 300 F.3d 46 (1st Cir. 2002). This appeal for the most part focused on the propriety of the wiretap order and the denial of the motion to suppress. Id. at 51-57. As relevant to this § 2255 motion, Lopez also filed a pro se appellate brief arguing that his 240-month sentence violated Apprendi. Id. at 58. The First Circuit concluded that this issue was voluntarily waived. Id. It observed:

The sentence imposed by the district court insured that, even if López's belated Apprendi arguments could be reviewed for “plain error,” see Fed. R. Crim. P. 52(b), there is simply no “error” to correct. The “default” or “catchall” provision of the statute under which López was charged, 21 U.S.C. § 841(b)(1)(C), prescribes that a 240-month maximum sentence may be imposed for trafficking even the smallest quantity of cocaine. United States v. López-López, 282 F.3d 1, 22 (1st Cir. 2002). Thus, Judge Carter's sentence, set at the upper limit of what is permitted by 21 U.S.C. § 841(b)(1)(C), did not violate Apprendi, which “applies only when the disputed ‘fact’ enlarges the applicable statutory maximum and the defendant's sentence exceeds the original maximum.” United States v. Caba, 241 F.3d 98, 101 (1st Cir.2001).

Id. at 59 n.6. The Court also reflected:

Furthermore, López gained a valuable benefit by acquiescing to the charges in the original indictment. As noted above, the government was prepared to seek a superseding indictment with a specific drug quantity. Had the government done so, López would have doubtlessly faced a harsher sentence. For this reason, López's counsel recognized that, “from a strategic standpoint,” López was better off pleading guilty to the original indictment. López also admitted that his plea was based in part on his desire to limit his exposure for purposes of sentencing. López cannot now appeal what he earlier used as a pawn to better his situation.

Because López knowingly and voluntarily relinquished any appeal stemming from the Supreme Court's decision in Apprendi (and thereby gained a valuable benefit), we cannot review his claims of error.

Id. at 59 - 60.

### ***Counts Relating to the Five-year Period of Supervised Release***

Seeking re-sentencing, and not a vacation of his guilty plea, Lopez contends that he did not plead guilty knowingly and intelligently because he did not understand that, in addition to exposure to imprisonment for twenty years, he could get an additional five years of supervised release. He argues that the proper sentence under his plea agreement would be fifteen years of prison time and the five years of supervised release, as the latter, he believes, was mandatory. He faults the Court for never informing him that his maximum sentence exposure was twenty years imprisonment and five years of

supervised release. Lopez also lodges an ineffective assistance of counsel attack on his sentence arguing that counsel failed to advise him that, by pleading guilty, a period of supervised release could be imposed above and beyond his period of incarceration. He faults his attorney for not being apprised of the law that a term of supervised release was a consequence of his plea and not objecting at the time the sentence was opposed without ensuring that Lopez understood the consequences of supervised release. Furthermore, in Lopez's view, counsel should have sought enforcement of the plea agreement that provided that the total sentence would not exceed twenty years. In addition, Lopez states that his attorney was ineffective for not raising this error on appeal.

Perhaps one could review the record of the plea colloquy and conclude that there is some ambiguity as to whether the five years of supervised release was to be imposed only absent the agreement between the parties to cap Lopez's sentencing exposure at 240 months given the fact that the clearest articulation of the supervised release term was proffered by the Court in summarizing Lopez's 'worst case' scenario. However, as the United States points out, every indication by Lopez during the plea colloquy and sentencing proceedings was that counsel had explained fully his hypothetical exposure and the implications of proceeding with the plea based on the indictment. At sentencing the Court stated that the term of incarceration was limited to 240 months, finding that the government had failed to charge or prove a drug quantity of 500 grams or more as an element of Lopez's offense. (Sentencing Tr. at 7.) The Court then stated that its written memorandum would reflect the Court's conclusion that "a minimum term of 5 years of supervised release is required here." (*Id.*) Accordingly, the Court "adjudged that upon release the defendant be placed on supervised release for a term of 5 years." (*Id.* at 8.)

While it appears from this record that Lopez was apprised of the Court's intent (and the PSI's recommendation) to impose five years of supervised release, it is not at all clear to me from this record that counsel did not overlook the fact that under the agreement to cap Lopez's sentencing exposure to the 240 months set forth in 21 U.S.C. § 841(b)(1)(C), the mandatory minimum period of supervised release under that statutory subsection was three and not five years. Taking no position on the operative effect of Apprendi, the PSI did represent that the five year period was mandatory if Lopez was sentenced under § 841(b)(1)(A), also citing U.S.S.G. § 5D1.2(a)(1). In its sentencing memorandum, the Court provided:

The court CONCLUDES that a minimum term of five (5) years of Supervised Release is required by statute, pursuant to Guideline § 5D1.2(a)(1). The Court FINDS that a term of five (5) years Supervised Release is required for future protection of the public and to maximize this Defendant's potential for rehabilitation once released from incarceration. (Mem. Sentencing J. at 4.)

Because the Court made the actual finding that the five-year term was required for public protection and to further Lopez's rehabilitation prospects, the Court certainly had discretion to impose the five-year term. See, e.g., United States v. Cortés-Claudio, 312 F.3d 17, 18-20 (1st Cir.2002) (holding that 18 U.S.C. § 3583(b) does not limit the length of supervised release terms in cases under § 841 and observing that "§ 841(b) establishes a mandatory minimum term of supervised release, not a maximum."); accord United States v. Nieves, 322 F.3d 51, 56 (1st Cir. 2003). However, counsel did not even test the waters as to whether or not the Court might be inclined to reduce the five-year term that would have been mandatory under § 841(b)(1)(B). And, although the

imposition of the five-year term does not raise a concern under Apprendi, see Nieves, 322 F.3d at 56, it may raise a concern about the performance of counsel during the plea and sentencing phases, as well as on appeal, for not asking the Court to consider imposing a term of supervised release not more than the three-year statutory minimum term under § 841(b)(1)(C) or, perhaps, something in between that and five years. See Strickland v. Washington, 466 U.S. 668 (1984).<sup>2</sup> Although this claim is not developed by Lopez (as he is of the view that the five-year term was mandatory), it is the only thread identified in my § 2255 review that might induce the Court to consider, based on its firsthand knowledge of the earlier proceedings, unraveling Lopez’s sentence at this late stage of the game.

***Count Pertaining to the Acceptance of Responsibility Reduction***

In his remaining ground Lopez laments that his three-point reduction for acceptance of responsibility became a “mere paper calculation” because his total offense level was 35 with a 262-327 month range but that, because the statutory maximum was only 240 months, the United States Sentencing Guideline § 5G1.1(a) operated to keep his exposure at the statutory maximum. This, Lopez asserts, was contrary to the United States Sentencing Commission’s intent to recognize acceptance of responsibility by giving these defendants a lower sentence. He states that the commission failed to consider that § 5G1.1(a) would negate this societal interest. In light of this inadvertent anomaly in his case, Lopez argues that the sentencing Court should have set a guideline

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<sup>2</sup> I am highly skeptical of the notion that if Lopez was adequately apprised by counsel of his exposure to a five-year term of supervised release he would not have plead guilty but would have proceeded to trial via a re-indictment that promised exposure to significantly higher terms of imprisonment and a minimum mandatory five-year term of supervised release. See Hill v. Lockhart, 474 U.S. 53, 59 (1985). The stakes were high. The prosecutor indicated that, save for Apprendi, he would seek a sentence in excess of thirty years and the PSI indicated that Lopez’s exposure on a conviction obtained in conformity with Apprendi was thirty years to life.

range with a minimum sentence closest to the § 841(b)(1)(B) statutory maximum, then it should have reduced Lopez's level by three, from 34 with its 235-293 range to 31 with its 168-210 range. Lopez candidly admits that "authority for this application is almost non-existent," and he "implicitly relies on" United States v. Rodriguez, 64 F.3d 638 (11th Cir. 1995). (Sec. 2255 Mot. at 13.)<sup>3</sup> Apropos this ground, Lopez believes that his attorney should have fleshed out the merits of this argument at the time of sentencing, thereby preserving the "unique and meritorious issue that could have been raised as a matter of first impression in the First Circuit." (Sec. 2255 Mem. at 16.)<sup>4</sup>

I conclude that Rodriguez does not provide Lopez with a basis for challenging the Court's sentencing determination or counsel's performance vis-à-vis the lack of impact of acceptance of responsibility departure on Lopez's ultimate sentence. This is because the 240-month baseline for Lopez's sentence was the product of an agreement between Lopez and the United States and it was an agreement that limited his overall exposure to a term of imprisonment that was less than that generated by sifting Lopez's case through the sentencing guidelines and conferring the acceptance of responsibility departure. In Rodriguez, on the other hand, it was not a lower sentencing agreement verses a guideline range that was juxtaposed; Rodriguez involved a base offense level that was higher than the statutory maximum determined as a matter of law (and not agreement), and when the

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<sup>3</sup> Lopez is correct for taking the United States to task for its assertion that Lopez offered no support for his argument. Whether or not Rodriguez would be followed in this District or Circuit if push came to shove, it is authority that comes sufficiently close to supporting Lopez's claim to at least warrant acknowledgment by the United States.

<sup>4</sup> The United States contends that Lopez, having filed a pro se brief on direct appeal in addition to counsel's brief, cannot fault his attorney's performance for not raising the issue in his brief. This is a novel theory of waiver that makes little sense to me as the attorney has an obligation to raise challenges on direct appeal if they have merit. Lopez does assert that he did include a phrasing of this challenge in his brief in front of the First Circuit but that the Panel did not address it. Because I conclude that the claim has no legal merit even if it was not subject to proof of cause and prejudice, I need not concern myself with this facet of the dispute.

acceptance of responsibility departure was applied to the former, rather than the latter, the departure reaped no benefit to the defendant. The Eleventh Circuit concluded that the sentencing court had discretion (but was not required) to apply the three-level acceptance of responsibility adjustment to the lower statutory maximum sentence given that one provision of the Sentencing Guideline, U.S.S.G. 5G1(a), rendered another provision, U.S.S.G. § 3E1.1, ineffectual in that scenario. Id. at 643. In Lopez's case it is not simply a matter of a guideline negating the societal interest served by the adjustment. See id. Rather, it is the benefit of Lopez's bargain with the United States that makes the adjustment inoperative.

### ***Conclusion***

For these reasons, I recommend that the Court **DENY** Lopez relief from his sentence.

### **NOTICE**

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) 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.

March 11, 2004.

/s/ Margaret J. Kravchuk  
U.S. Magistrate Judge

**U.S. District Court  
District of Maine (Portland)  
CIVIL DOCKET FOR CASE #: 2:03-cv-00267-GC  
Internal Use Only**

LOPEZ v. USA

Assigned to: JUDGE GENE CARTER

Referred to: MAG. JUDGE MARGARET J.

KRAVCHUK

Demand: \$

Lead Docket: None

Related Cases: 2:99-cr-00079-GC

Case in other court: None

Cause: 28:2255 Motion to Vacate / Correct Illegal  
Sentenc

Date Filed: 11/17/03

Jury Demand: None

Nature of Suit: 510 Prisoner:

Vacate Sentence

Jurisdiction: U.S. Government

Defendant

**Plaintiff**

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