Docket No. 12-1618
United States Court of Appeals
For the Seventh Circuit

United States of America,

Plaintiff-Appellee,

v.

Flavio Argumedo Hernandez,

Defendants-Appellant.

Appeal from a judgment of conviction and sentence entered in the United States District Court (ED-Wis), the Honorable Lynn Adelman, presiding
District Court No. 10-CR-142

Brief and Short Appendix of the Appellant, Flavio A. Hernandez
Anders Brief

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Disclosure Statement

The attorney for the appellant is Jeffrey W. Jensen who is a sole practitioner in Milwaukee, Wisconsin with an office located at the address set forth on the cover of this brief. During the trial court proceedings, attorney Richard Kaiser also appeared on behalf of Mr. Hernandez. Mr. Kaiser's contact information is:

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Jurisdictional Statement

A. The District Court had jurisdiction over the matter pursuant to 21 U.S.C. sec. 841(a)(1) because an indictment was filed naming the defendant and alleging a violation of that section.

B. The Court of Appeals has jurisdiction over the matter pursuant to 18 U.S.C. sec. 3742 as a direct appeal of the appellant's conviction and sentence.

C. The judgment of conviction was entered on March 5, 2012, finding the defendant guilty of a violation of 21 U.S.C. § 843(b), use of a telephone to facilitate a drug transaction, and sentencing him to time served. The notice of appeal was filed on March 16, 2012. Therefore the appeal was timely.

D. The appeal is from a final judgment of conviction in a criminal case and, therefore, the appeal is from a final judgment that disposes of all parties' claims.

Statement of the Issues Presented for Review

I. Whether the appellate court would set aside Hernandez's guilty plea on appeal.

Answered by the District Court: (not presented to the District Court)

II. Whether the lower court abused its sentencing discretion.

Answered by the District Court: (not presented to the District Court).

Statement of the Case

The defendant-appellant, Flavio Argumedo Hernandez (hereinafter "Hernandez"), was named in an indictment filed on August 3, 2010, with a violation of 21 U.S.C. Sec. 841(a)(1), 841(b)(1)(B), and 846. The indictment alleged that Hernandez and others conspired to distribute cocaine in the Eastern District of Wisconsin. (Doc. 25) Hernandez entered a not guilty plea.

Attorney Richard Kaiser was appointed to represent Hernandez. There were no pretrial motions filed.

On May 4, 2011, Attorney Kaiser moved to withdraw as defense counsel (Doc. 89), and the court granted the motion. Thereafter, the undersigned was appointed to represent Hernandez.

The case was set for trial on November 28, 2011. Plea negotiations continued even as the jury was set to be brought into the courtroom. An agreement was reached under which Hernandez waived indictment (Doc. 140), and the government filed an information alleging that Hernandez used a phone to facilitate a drug transaction, contrary to 21 U.S.C. Sec. 841(a)(1) and 843(b). (Doc. 139).

Hernandez pleaded guilty to the information. The court informed Hernandez of the constitutional rights that he was waiving by pleading guilty, and Hernandez acknowledged that he understood this and he was voluntarily waiving those rights. (Doc 198-5) Hernandez told the court that no one was forcing him to plead guilty. (Doc. 198-6) Hernandez told the court that he was pleading guilty because he was, in fact, guilty. (Doc. 198-7, 8)

On February 29, 2012, the court sentenced Hernandez to time served. (Doc. 177, 178)[1]

Statement of the Facts

Concerning the factual basis for the plea, the government summarized its evidence for the court:

> On May 4th, approximately four phone calls took place between Erik Estrada and Flavio Argumedo Hernandez in which they discussed the purchase of nine. The term nine was used in reference to cocaine. They asked -- Mr. Flavor Hernandez asked what the price for seven was or for nine. There was some discussion as to whether the deal was going to take place. They agreed -- Mr. Estrada agreed that he would have to see his guy first and that Flavio Argumedo Hernandez indicated that "we would leave it for tomorrow," or the following day.
>
> On May 5th there was a series of telephone calls regarding prices, again, for nine and a possible reduction in the sale price of that cocaine.
>
> Had the case gone to trial the government would have presented the trial testimony of Erik Estrada Carbajal who was the participant in those phone calls. He would have indicated that he had a -- on these dates he had discussions with Flavio Argumedo Hernandez to purchase cocaine from Mr. Estrada.

(Doc. 198-7).

Summary of the Arguments

I. Appeal to set aside Hernandez's guilty plea. Any appeal to set aside Hernandez's guilty plea would lack arguable merit. Firstly, a motion to withdraw a guilty plea after sentencing is, for all intents

[1] There was an Immigration and Customs Enforcement hold on Hernandez and, therefore, he was not released from custody at sentencing. On March 16, 2012, the undersigned was contacted by Wisconsin attorney Aileen Henry, who indicated that she had consulted with Hernandez concerning his immigration situation, and that Hernandez had asked her to convey to the undersigned that he wanted to appeal his conviction in this case. Thus, the notice of appeal was filed. According to Attorney Henry, it was likely that Hernandez would be removed from the country within days. *See,* defense counsel's motion to withdraw.

and purposes, forbidden under Rule 11 Fed. R. Crim. P. Two rare exceptions exist and they are where the court's Rule 11 colloquy failed to properly admonish the defendant *and* the defendant can persuade the appellate court that had he received the missing admonition he would not have entered the guilty plea; or, where the defendant was denied his Sixth Amendment right to effective assistance of counsel or where was denied due process of law by the government failing to disclose exculpatory evidence. Here, the court's plea colloquy mirrored the requirements of the statute. Moreover, Hernandez received effective assistance of counsel at all stages of the proceeding.

II. Sentence Modification. An appeal of Hernandez's sentence lacks arguable merit. Firstly, the court did consider all of the factors required by statute and the judge stated on the record the court's reasoning for the sentence imposed. Secondly, the court's sentence was *below* the guideline range and, therefore, it is presumed to be reasonable as to the defendant. All of this is not to mention the fact that, as a time-served sentence, Hernandez is no longer in custody on this case.

Argument

I. Hernandez's guilty plea was freely, voluntarily, and intelligently entered and, therefore, any appeal to set aside the guilty plea would be frivolous.

Hernandez entered a guilty plea and did not move the court to withdraw the plea prior to sentencing. Thus, Hernandez is, for most

purposes, barred from withdrawing his guilty plea at this point. Only two rare exceptions to the rule exist and neither of them apply here.

Rule 11 Fed Rules Crim P. provides:

> (e) **Finality of a Guilty or Nolo Contendere Plea**. After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.

There are generally two, albeit rare, circumstances under which a defendant might be permitted to withdraw a guilty plea after sentencing: (1) Where the defendant can establish that the court failed to conduct a proper colloquy under Rule 11 *and* the defendant can satisfy the appeals court that had he received the proper admonition he would not have entered his guilty plea; or, (2) Where the defendant has had a consitutional right denied such as the right to effective assistance of counsel or was denied exculpatory evidence, *see, Brady v. Maryland*, 373 U.S. 83 (1963) .

A. The court conducted a proper Rule 11 colloquy

Rule 11, FRCrP, provides:

> b) **Considering and Accepting a Guilty or Nolo Contendere Plea.**
>
> (1) Advising and Questioning the Defendant. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:
>
> (A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;
>
> (B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be represented by counsel--and if necessary have the court appoint counsel--at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(M) the court's obligation to apply the Sentencing Guidelines, and the court's discretion to depart from those guidelines under some circumstances; and

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

(2) Ensuring That a Plea Is Voluntary. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

(3) Determining the Factual Basis for a Plea. Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

Here, the transcript of the plea colloquy suggests that the trial judge literally went through the litany provided by Rule 11 item-by-item. Hernandez was given all of the applicable admonitions.

Even if the court missed one, though, Hernandez does not get to withdraw his plea as a matter of course. In, *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004). the Supreme Court explained:

> We hold, therefore, that a defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under Rule 11, must show a reasonable probability that, but for the error, he would not have entered the plea. A defendant must thus satisfy the judgment of the reviewing court, informed by the entire record, that the probability of a different result is "'sufficient to undermine confidence in the outcome'" of the proceeding. Strickland, supra, at 694, 80 L. Ed. 2d 674, 104 S. Ct. 2052; Bagley, supra, at 682, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (opinion of Blackmun, J.).

Let us assume that the court failed to give Hernandez any of the admonitions listed by Rule 11. Given the benefit that Hernandez received under the plea agreement it is difficult to imagine which of these admonishments, had he received it, would have prompted Hernandez to go to trial.

B. Hernandez was not denied any constitutional right

Even after sentencing a defendant may challenge his guilty plea on the ground that counsel's ineffective assistance rendered his plea unknowing or involuntary. *United States v. Broce*, 488 U.S. 563, 569 (1989). at 569. *see also Chichakly v. United States*, 926 F.2d 624, 627-28 (7th Cir. 1991) (reviewing defendant's claim that his attorney acted ineffectively when he advised him to plead guilty); *Liss v. United States*, 915 F.2d 287, 291 (7th Cir. 1990) (reviewing defendant's claim that counsel's ineffectiveness in failing to raise an advice of counsel defense rendered his guilty plea involuntary).

Here, the record does not suggest that Hernandez's counsel was in any way ineffective.

There simply is no basis to claim that counsel was ineffective much less that any ineffectiveness on counsel's part rendered Hernandez's plea involuntary. For what it is worth, Hernandez never has never complained to the court that counsel's representation was ineffective.

For these reasons an appeal (or a motion before the district court) to set aside Hernandez's guilty plea is frivolous.

II. The District Court did not abuse its sentencing discretion

A sentence that falls within the guidelines range is presumed reasonable on appellate court review. *United States v. Mykytiuk*, 415 F.3d 606, 607-08 (7th Cir. 2005). To comport with *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), a district judge need only "consider the guidelines and make sure that the sentence he gives is within the statutory range and consistent with the sentencing factors listed in 18 U.S.C. § 3553(a)." *United States v. Demaree*, 459 F.3d 791, 795 (7th Cir. 2006).

The presentence investigation report calculated Hernandez's guideline range to be 27 to 33 months. (Doc. 170-20) The court sentenced *below the guideline range* to a time-served disposition of approximately nineteen months in prison.

Moreover, as far as the defendant is concerned, if a sentence within the guideline range is considered to be reasonable, how much more reasonable is a sentence that is *below* the guideline range?

Under these circumstances, an appeal of the defendant's sentence not only lacks arguable merit it would be foolhardy. The defendant is no longer in custody.

Conclusion

For these reasons it is respectfully requested that the court find that any further appellate proceedings could lack arguable merit and grant appointed counsel's motion to withdraw.

Certification as to Form and Length

The undersigned hereby certifies that this brief meets the length and format requirements of Fed. R. App. P. 32(a)(7). A fourteen point "Georgia" font was used with justification and automatic hyphenation. The length of the brief is 2182 words not counting the table of authority and table of contents. The word court was determined using the word count function of the word processing software *Google Docs*.

Circuit Rule 31(e) Statement

An electronic copy of this brief consisting of digital media has been uploaded to the Seventh Circuit Court of Appeals Legal Brief System. I certify that the file does not contain a computer virus. I additionally certify that, pursuant to Circuit Rule 31(e)(4), a digital copy of the brief has been served upon each party individually represented by counsel.

Circuit Rule 30(d) Statement

All materials required by Circuit Rule 30(a) and (b) are included in the attached appendix.

Certificate of Service

Fifteen copies of this brief are being served and filed at the Clerk of Court Office, United States Court of Appeals for the Seventh Circuit, 219 S. Dearborn Street, Chicago, Illinois on _____ by placing the same in the United States Mail. Two copies of this brief are being served on the United States Attorney's Office, 517 E. Wisconsin Ave., Room 530, Milwaukee, Wisconsin on _____, by placing the same in the

United States Mail. According to the Bureau of Prisons web site as of May 14, 2012, the defendant is not an inmate in the Bureau of Prisons. Counsel has also searched the ICE online detainee locator, and Hernandez is not an ICE detainee. Since counsel received the message from attorney Aileen Henry that Hernandez desired to appeal counsel has had no communication from Hernandez. Counsel has reason to believe that Hernandez has been removed from the country.

Dated at Milwaukee, Wisconsin, this __11th_ day of May, 2012

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Short Appendix

A. Transcript of the plea colloquy
B. Judgment in Criminal Case
C. Docket Entries