

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

ASTRIT BEKTESHI, #41709-424

VS.

UNITED STATES OF AMERICA

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CIVIL ACTION NO. 4:14cv105

CRIM. NO. 4:09cr193(2)

MEMORANDUM OPINION AND ORDER

Movant Astrit Bekteshi, a prisoner confined at CI NE Ohio Correction Center in Youngstown, Ohio, proceeding with the assistance of counsel, filed the above-styled and numbered motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255.

I. BACKGROUND

On June 28, 2005, the Chicago, Illinois, office of the Federal Bureau of Investigation (FBI) initiated an investigation targeting an Albanian Organized Crime (AOC) group headed by Astrit Bekteshi (Movant). The Bekteshi organization was identified as a highly organized drug distribution organization dealing with hydroponic marijuana, ecstasy, and cocaine. The marijuana and ecstasy were obtained, in part, from a Chinese Organized Crime group in Vancouver, Canada, then smuggled into the United States. Early in the investigation of the Bekteshi Organization, agents learned that the group was obtaining cocaine from suppliers in Texas, and possibly, California and Florida. Movant's organization also operated illegal video gaming devices supplied by an Italian organized crime group.

Movant insulated himself from the "hands-on" aspects of the operation by using trusted

Albanian associates. The FBI in Chicago used wire and microphone intercepts during its investigation. In spite of how careful Movant and his subordinates were in their communications, investigations revealed that Movant was involved in numerous drug transactions involving large dollar amounts, including one occurring in Frisco, Texas. Movant and eight co-defendants were charged by Indictment on October 15, 2009. Count One charged Movant with conspiracy to possess with intent to distribute cocaine, heroin, 3,4 methylenedioxymethamphetamine (ecstasy), or marijuana, in violation of 18 U.S.C. § 846.

On November 15, 2011, Movant pleaded guilty to Count One pursuant to a written plea agreement. Under Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure, Movant and the Government agreed that the appropriate sentence was 135 months' imprisonment.

Eight months after pleading guilty, Movant filed a motion to withdraw his guilty plea on August 2, 2012. The court held a hearing on the motion. An interpreter was provided for Movant. Movant claimed that he was pressured by other prisoners to enter a plea. He also said that his counsel told him that if he went to trial, he could face a life sentence. Movant claims that he pleaded guilty because he was scared and because he did not understand the rules and regulations. The court denied the motion on October 5, 2012.

The presentence report calculated Movant's sentencing guideline range to be 168 to 210 months' imprisonment. This was based on a total offense level of 35, and a criminal history category of I. At sentencing, an interpreter was provided. The presentence report was read to Movant in Albanian, and he confirmed he understood it. He then confirmed that the report accurately reflected his background. Movant's counsel again asked to withdraw Movant's plea because Movant said he was not guilty. Counsel and Movant confirmed Movant's understanding that he would not receive

credit for acceptance of responsibility if he persisted in this posture.

The court accepted the findings of the presentence report, except that it found the offense level to be 38, and the sentencing guideline range to be 235 to 293 months, based on Movant's claim that he was not guilty. The court accepted the plea agreement, and sentenced Movant to 135 months' imprisonment pursuant to the written plea agreement and the Fed. R. Crim. P. 11(c)(1)(C) agreement. After initially filing a notice of appeal, Movant then filed a motion to dismiss the appeal. The United States Court of Appeals for the Fifth Circuit granted the motion, and dismissed the appeal on August 9, 2013. Movant filed the instant motion on February 15, 2014.

In his § 2255 motion, Movant claims that he is entitled to relief because his counsel was ineffective. Specifically, Movant asserts that his trial counsel was ineffective by (1) failing to move for a downward departure; (2) failing to conduct a reasonable investigation; (3) failing to reasonably communicate with Movant; and (4) failing to object to the presentence report. The Government filed a Response, asserting the claims are without merit. Movant did not file a Reply.

II. § 2255 PROCEEDINGS

As a preliminary matter, it should be noted that a § 2255 motion is "fundamentally different from a direct appeal." *United States v. Drobny*, 955 F.2d 990, 994 (5th Cir. 1992). A movant in a § 2255 proceeding may not bring a broad-based attack challenging the legality of the conviction. The range of claims that may be raised in a § 2255 proceeding is narrow. A "distinction must be drawn between constitutional or jurisdictional errors on the one hand, and mere errors of law on the other." *United States v. Pierce*, 959 F.2d 1297, 1300-01 (5th Cir. 1992). A collateral attack is limited to alleging errors of "constitutional or jurisdictional magnitude." *United States v. Shaid*, 937 F.2d 228, 232 (5th Cir. 1991).

III. WAIVER IN MOVANT'S GUILTY PLEA

The Fifth Circuit has upheld the informed and voluntary waiver of post-conviction relief in *United States v. Wilkes*, 20 F.3d 651, 653 (5th Cir. 1994). In *United States v. Henderson*, 72 F.3d 463, 465 (5th Cir. 1995), the Fifth Circuit held that a waiver may not be enforced against a § 2255 movant who claims that ineffective assistance of counsel rendered that waiver unknowing or involuntary. In *United States v. White*, 307 F.3d 336 (5th Cir. 2002), the Fifth Circuit held that an ineffective assistance of counsel claim raised in a § 2255 proceeding survives a waiver only when the claimed assistance directly affected the validity of that waiver or the plea itself. More recently, the Fifth Circuit noted that it has upheld § 2255 waivers except for when there is an ineffective assistance of counsel claim that affects the validity of that waiver or the plea itself or when the sentence exceeds the statutory maximum. *United States v. Hollins*, 97 F. App'x 477, 479 (5th Cir. 2004).

Signed Plea Agreement

A review of the record shows that Movant signed a plea agreement containing the following waiver provision:

Except as otherwise provided herein, the defendant expressly waives the right to appeal the conviction, sentence, fine and/or order of restitution or forfeiture in this case on all grounds. The defendant further agrees not to contest the conviction, sentence, fine and/or order of restitution in any post-conviction proceeding, included, but not limited to a proceeding under 28 U.S.C. § 2255. The defendant, however, reserves the right to appeal the following: (a) the failure of the Court, after accepting this agreement, to impose a sentence in accordance with the terms of this agreement; and (b) a claim of ineffective assistance of counsel that affects the validity of the waiver or the plea itself.

It also states:

I have read or had read to me this plea agreement and have carefully reviewed every part of it with my attorney. I fully understand it and voluntarily agree to it.

Additionally, the plea agreement states:

The defendant has thoroughly reviewed all legal and factual aspects of this case with defense counsel and is fully satisfied with defense counsel's legal representation. The defendant has received satisfactory explanations from defense counsel concerning each paragraph of this plea agreement, each of the defendant's rights affected thereby, and the alternatives to entering a guilty plea. After conferring with counsel, the defendant concedes guilt and has concluded that it is in the defendant's best interest to enter this agreement rather than proceeding to trial.

Finally, Movant stated in his plea agreement that the "plea of guilty is freely and voluntarily made and is not the result of force, threats, or promises other than those set forth in this Agreement." Consequently, any allegation that the guilty plea was not knowingly or voluntarily made is contradicted by Movant's signed plea agreement.

Plea Hearing

A review of the record shows that, at Movant's change of plea hearing, held on December 5, 2011, Movant said:

1. His plea was voluntary, and he was pleading guilty because he was, indeed, guilty;
2. He understood the charges against him and the elements of the charge;
3. He understood the sentencing range;
4. He understood that the sentence would be no less than ten years and no more than life imprisonment;
5. He understood how the Sentencing Guidelines might apply to his case;
6. He understood the rights he was waiving by pleading guilty;

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