

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

SHPETIM KONCI, #41710-424	§	
	§	
VS.	§	CIVIL ACTION NO. 4:14cv134
	§	CRIMINAL ACTION NO. 4:09cr193(3)
UNITED STATES OF AMERICA	§	

MEMORANDUM OPINION AND ORDER

Movant Shpetim Konci, a prisoner confined at Moshannon Valley Correctional Institution in Philipsburg, Pennsylvania, 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. 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. Shpetim Konci (Movant) was identified as Bekteshi's "right-hand man," and was found to be directly involved in the illegal drug transactions. Movant was charged by Indictment on October 15, 2009.

On March 11, 2013, the district court sentenced Movant to 151 months' imprisonment after

he pleaded guilty pursuant to a written plea agreement to conspiracy to possess with intent to distribute cocaine, heroin, 3,4 methylenedioxymethamphetamine (ecstasy), or marijuana, in violation of 18 U.S.C. § 846. On January 20, 2014, the United States Court of Appeals for the Fifth Circuit dismissed the appeal as frivolous pursuant to *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed.2d 493 (1967). *Konci v. United States*, 552 F. App'x 364, 365 (5th Cir. 2014). Movant filed the instant motion on March 7, 2014. On July 1, 2015, the district court reduced his sentence to 121 months' imprisonment pursuant to 18 U.S.C. § 3582(c)(2).

In his § 2255 motion, Movant claims that he is entitled to relief because his counsel was ineffective. Specifically, Movant asserts that his trial counsel induced him to enter his guilty plea by (1) promising an 87-month sentence; (2) promising a safety valve reduction, and (3) promising a reduction for substantial assistance (5K reduction). Movant also claims that his guilty plea was involuntary because he suffered from cognitive and language deficiencies. Finally, he complains that the Government breached the plea agreement by failing to file for a reduction in sentence. 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) any punishment imposed in excess of the statutory maximum 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. I 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 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 November 15, 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;

7. He was not under the influence of drugs or alcohol that affected his mental capabilities;
8. His guilty plea was voluntary, and not the produce of any force, threat, or promise;
9. He discussed the facts and the defenses of his case with counsel and is satisfied that counsel fully considered his case;
10. He affirmed that the written plea agreement contained the entire agreement concerning his plea of guilty;
11. He read the entire agreement, discussed it with counsel, and translated it into his native language, if necessary;
12. He agreed to the three stipulations listed in the plea agreement:
 - a. The defendant admits he conspired to distribute or possess with the intent to distribute more than 15 kilograms but less than 50 kilograms of a mixture containing cocaine;
 - b. The defendant acknowledges he should not receive a minor or mitigating role adjustment pursuant to United States Sentencing Guidelines Section 3B1.2; and
 - c. A reduction of two levels for acceptance of responsibility under U.S.S.G. §3E1.1 applies; however, this stipulation is subject to recommendation of the United States Probation Office. **If circumstances indicating that the defendant has not accepted responsibility become known after execution of this Agreement, this stipulation is void and the defendant may object to the failure of the Presentence Report to recommend the reduction. The government WILL NOT request to decrease the offense level by one additional level in accordance with U.S.S.G. § 3E1.1(b) because it was determined in the competency evaluation that the defendant was malingering;**
13. He read the factual statement, translated it into his native language, if necessary, and discussed it fully with counsel, and agreed to everything contained in it;

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