

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3
4 August Term 2008
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6 Argued: October 10, 2008 Decided: October 8, 2009

7 Docket No. 06-2295-cr(L), 06-2344-cr(con), 06-5172-cr(con)

8 - - - - -
9 UNITED STATES OF AMERICA,

10 Appellee,

11 v.

12 JOSUE FLORES CARRETO, GERARDO
13 FLORES CARRETO, and DANIEL PEREZ
14 ALONSO,

15
16 Defendants-Appellants.

17 - - - - -
18 Before: PARKER and LIVINGSTON, Circuit Judges,
19 and CHIN, District Judge.*

20 Appeal from judgments of the United States District
21 Court for the Eastern District of New York (Frederic Block,
22 District Judge) convicting defendants, following their guilty
23 pleas, of sex trafficking crimes. Defendants contend, inter
24 alia, that the district court abused its discretion in denying

* Honorable Denny Chin, United States District Judge for the Southern District of New York, sitting by designation.

1 their motions to withdraw their guilty pleas and imposed
2 sentences that were excessive and based on improper
3 considerations. Alonso also contends that the district court
4 improperly denied his motion for substitute counsel.

5 AFFIRMED.

6 Laurie S. Hershey, Esq., Manhasset,
7 New York, for Defendant-Appellant
8 Josue Flores Carreto.

9 Julia Pamela Heit, Esq., New York,
10 New York, for Defendant-Appellant
11 Gerardo Flores Carreto.

12
13 Stephanie M. Carvlin, Esq., New York,
14 New York, for Defendant-Appellant
15 Daniel Perez Alonso.

16 Monica Ryan, Assistant United States
17 Attorney, for Benton J. Campbell,
18 United States Attorney, Eastern
19 District of New York (David C.
20 James, Assistant United States
21 Attorney, Eastern District of New
22 York, on the brief).

23 CHIN, District Judge:

24 On April 5, 2005, defendants-appellants Josue Flores
25 Carreto ("J. Carreto"), Gerardo Flores Carreto ("G. Carreto"),
26 and Daniel Perez Alonso ("Alonso") pled guilty to conspiracy to
27 commit sex trafficking and related crimes. Defendants did so two
28 months after they had rejected the Government's global plea offer
29 and just a few minutes before the start of their trial.

1 Concerned with the timing of defendants' plea, the district court
2 conducted a thorough allocution and accepted their pleas only
3 after it was satisfied that defendants were pleading guilty
4 knowingly and voluntarily.

5 Approximately one year later, as they were about to be
6 sentenced, defendants moved to withdraw their guilty pleas. The
7 district court denied the motions to withdraw and sentenced J.
8 Carreto and G. Carreto principally to 50 years' imprisonment each
9 and Alonso principally to 25 years' imprisonment.

10 Defendants appeal their convictions on several grounds.
11 For the reasons that follow, the judgments of the district court
12 are affirmed.

13 STATEMENT OF THE CASE

14 A. The Facts

15 From approximately 1992 until their arrests in 2004,
16 defendants operated a prostitution ring that smuggled Mexican
17 women into the United States and forced them into prostitution.
18 Defendants used violence, manipulation, and threats of physical
19 restriction to control their victims. Defendants purposefully
20 seduced women, including some who were under eighteen years of
21 age, and many of whom were, according to the Government, poor and
22 uneducated.

1 The victims were forced to prostitute themselves in
2 brothels in Queens, Brooklyn, and Manhattan nearly every day.
3 Defendants profited financially from the prostitution activities,
4 and the victims were not allowed to keep the money they earned.

5 Immigration and Customs Enforcement agents arrested
6 defendants on January 5, 2004, when they raided apartments in
7 Queens, New York. Four victims were found in the apartments.

8 B. Proceedings Below

9 On November 16, 2004, a grand jury returned a 27-count
10 superseding indictment against defendants. The Government
11 thereafter extended plea offers to defendants, giving them the
12 opportunity to plead guilty to certain crimes in satisfaction of
13 all the charged crimes. The final offer was contingent on all
14 three defendants pleading guilty by February 18, 2005.

15 On January 6, 2005, the district court (Frederic Block,
16 District Judge) held a conference to discuss Alonso's request for
17 new counsel, as set forth in his December 20, 2004, pro se
18 letter. Alonso requested that the court replace his attorney
19 because the attorney had "no interest" in his case and Alonso "no
20 longer trust[ed]" him. Counsel explained to the court that he
21 had visited Alonso seven times, for approximately an hour each

1 time, over the course of the case. Counsel explained that he had
2 also provided Alonso with discovery material. In response,
3 Alonso stated that he was sent discovery material that did not
4 pertain to him and his counsel was "not doing anything to help
5 [him] out a little bit." Counsel explained to the district court
6 that he provided Alonso with discovery material that pertained to
7 the other defendants because it affected Alonso and his client
8 "has to have knowledge of all the discovery that the government
9 provides." The court, finding no basis to substitute counsel,
10 denied Alonso's request. The court instructed counsel as
11 follows:

12 Explain very carefully why you are giving him
13 this material, why you believe he should
14 think about it and why it's relevant in terms
15 of the totality of circumstances that he
16 should be mindful of. You know what you have
17 to do. Spend some special time, that seems
18 to be the crux of his complaint. Now that we
19 have fleshed it out in court I'm sure it's
20 going to be attended to.

21 On February 16, 2005, the district court held a
22 conference to discuss whether defendants intended to accept the
23 plea offer. The parties informed the court that defendants had
24 not yet decided whether to accept the plea offer. In addition,
25 although the Government's deadline for defendants to accept the

1 plea was February 18, 2005, Alonso's counsel had travel plans
2 requiring him to leave New York the next day, February 17, 2005.
3 The Government refused to extend the deadline, as the case was
4 scheduled for trial beginning on March 28, 2005. Accordingly,
5 the district court questioned Alonso's counsel as to his
6 unavailability. Although sympathetic to counsel's personal
7 commitments, the district court declined to relieve him of his
8 duties at the "eleventh hour." Notwithstanding Alonso's
9 counsel's travel plans, the court ordered all defense counsel to
10 meet with their clients and to return to court the next day.

11 The parties returned to court the next day, February
12 17, 2005. The district court confirmed that the plea offer had
13 been read to and adequately discussed with defendants. The
14 defendants did not wish to plead guilty at that time. Pursuant
15 to the terms of the global plea offer, the Government revoked the
16 offer as to all three defendants. The trial was rescheduled for
17 April 4, 2005.

18 As the conference was about to adjourn, Alonso handed a
19 second pro se letter, dated February 14, 2005, to the court. The
20 letter, like the one prior, requested new counsel. The court
21 explained that everything raised in the letter had "been

1 superseded by what has happened since then" and had been "fleshed
2 out." G. Carreto then handed up a letter requesting new
3 representation because he could not afford his counsel's fees.
4 G. Carreto's counsel assured the court that he would continue to
5 zealously represent his client regardless of his client's ability
6 to pay. J. Carreto then orally requested a different attorney.
7 The court denied all three requests, holding that there was no
8 basis to substitute counsel.

9 On April 4, 2005, the trial court selected and
10 empaneled a jury. The next day, just as the trial was about to
11 commence, defendants informed the court that they wished to plead
12 guilty to the entire 27-count superseding indictment, without any
13 plea agreements. The court carefully examined the defendants and
14 their counsel to confirm that defendants understood the
15 implications of their pleas, especially as a jury had already
16 been empaneled and the trial was about to commence:

17 The reason why I'm taking this amount of time
18 is because I'm confronted with a situation
19 when defendants are willing to plead to an
20 entire indictment -- and you are talking
21 about serious crimes and serious time -- it
22 is important to make sure that they
23 understand that they may have little to risk
24 by going forward with the trial, since it may
25 well be by pleading they are not going to do
26 any better.

1 The court, after a thorough colloquy, was satisfied that
2 defendants understood the consequences of their pleas. In
3 particular, they were asked if they were satisfied with their
4 attorneys, and all three defendants responded affirmatively.
5 Each defendant then read out loud a statement acknowledging that
6 he, together with the two co-defendants, smuggled four (or five)
7 women, identified by first name and first initial of the last
8 name, from Mexico into the United States and forced them to
9 engage in prostitution -- "commercial sexual acts" -- in brothels
10 in Brooklyn and Queens. Each acknowledged knowing that at least
11 one of the women was under the age of eighteen. Each
12 acknowledged using force and threats of force against the women.
13 The court then accepted each defendant's plea of guilty to all 27
14 counts of the superseding indictment.

15 On April 27, 2006, more than a year later, the parties
16 appeared for sentencing. Alonso had retained new counsel. His
17 new counsel stated, and the court noted, that defendants had
18 filed pro se motions to withdraw their guilty pleas. The motions
19 alleged that (1) defendants were not adequately advised of their
20 right to testify at trial, (2) the court did not verify that the
21 plea was voluntary, and (3) counsel were ineffective in failing
22 to obtain relevant documents from Mexico. Defense counsel

1 informed the court that they had just been made aware of
2 potentially exculpatory information contained in Mexican trial
3 transcripts involving the victims in the case.

4 The court denied defendants' motions to withdraw their
5 guilty pleas, finding that the new evidence did not "affect the
6 fact that they pled guilty" and defendants made a "reasoned
7 decision to take the[] pleas." The court also denied defendants'
8 request to adjourn sentencing. Four victims spoke and described
9 the physical and psychological harm they had suffered. The court
10 then sentenced defendants. In response to an argument by counsel
11 for G. Carreto that G. Carreto was "to some extent a product of
12 his environment" and was from a town in Mexico where
13 "prostitution is something that occurs very frequently," the
14 district court commented that it was important to "send a
15 message" that prostitution "is not going to be accepted in this
16 country."

17 The court sentenced G. Carreto principally to 50 years'
18 imprisonment, J. Carreto principally to 50 years' imprisonment,
19 and Alonso principally to 25 years' imprisonment.

20 DISCUSSION

21 Defendants appeal to this Court on several grounds.

1 The issues we address below are the only ones that warrant
2 detailed discussion.

3 A. Defendants' Efforts to Withdraw Their Guilty Pleas

4 Defendants contend that the district court erred in
5 denying their motion to withdraw their guilty pleas. We review a
6 district court's denial of a motion to withdraw a guilty plea for
7 abuse of discretion. See United States v. Adams, 448 F.3d 492,
8 498 (2d Cir. 2006).

9 A plea may be withdrawn only if "the defendant can show
10 a fair and just reason for requesting the withdrawal." Fed. R.
11 Crim. P. 11(d)(2)(B). To determine whether a defendant has met
12 this burden, a court should consider: "(1) whether the defendant
13 has asserted his or her legal innocence in the motion to withdraw
14 the guilty plea; (2) the amount of time that has elapsed between
15 the plea and the motion (the longer the elapsed time, the less
16 likely withdrawal would be fair and just); and (3) whether the
17 government would be prejudiced by a withdrawal of the plea."

18 United States v. Schmidt, 373 F.3d 100, 102-03 (2d Cir. 2004).

19 The district court can also rely on a defendant's in-court sworn
20 statements that he "understood the consequences of his plea, had
21 discussed the plea with his attorney, [and] knew that he could

1 not withdraw the plea." United States v. Hernandez, 242 F.3d
2 110, 112 (2d Cir. 2001).

3 In denying defendants' motions to withdraw their pleas
4 here, the district court did not abuse its discretion.

5 First, defendants did not assert their legal innocence
6 in moving to withdraw their pleas. Second, defendants did not
7 move to withdraw their pleas until approximately a year after
8 they had pled guilty -- and only after the Government had
9 prepared for trial, a jury had been selected, and the trial was
10 about to begin. See United States v. Gonzalez, 970 F.2d 1095,
11 1100 (2d Cir. 1992). Third, the Government would have been
12 prejudiced by a withdrawal of the guilty pleas, as the Government
13 surely would have encountered difficulties were it required to
14 re-assemble its evidence after more than a year's delay.

15 Moreover, in the end, defendants simply did not show "a
16 fair and just reason" for withdrawing the guilty pleas. In their
17 motions, defendants claimed that they were not advised of their
18 right to testify at trial, the court did not verify the
19 voluntariness of their pleas, and they received ineffective
20 assistance from their respective counsel, who failed to obtain
21 the purportedly exculpatory evidence from Mexico. These
22 assertions were meritless. To the contrary, the district court

1 conducted a thorough allocution that fully complied with Rule 11
2 of the Federal Rules of Criminal Procedure.

3 The district court advised defendants of their right to
4 proceed to trial and informed defendants that, if they went to
5 trial, they would have the right to testify. Indeed, the court
6 instructed defendants: "while you have the right to testify, if
7 you wish to do so, you could not be required to testify."

8 The court also ensured that the pleas were taken
9 knowingly and voluntarily. Concerned with defendants' decision
10 to plead guilty as trial was about to begin, the Court asked
11 defendants' counsel to explain why their clients were pleading
12 guilty at the "eleventh hour," as they "could do no worse if they
13 went to trial and were convicted." Each counsel, in turn,
14 explained their respective client's reasoning -- that they were
15 throwing themselves on the mercy of the sentencing judge. In
16 response, the court explained that no promises were being made to
17 defendants and "that the sentence might well be more strict than
18 they would hope it to be." The attorneys indicated that their
19 clients were aware of the uncertainties regarding sentencing.

20 Moreover, the court verified with each defendant individually

1 that his plea was voluntary and not based on any extrinsic
2 promises.

3 Lastly, the alleged exculpatory Mexican trial
4 transcripts brought to the district court's attention at
5 sentencing did not warrant withdrawal of the pleas. The
6 transcripts did not alter the fact that defendants had knowingly
7 and voluntarily pled guilty to the charges against them. See
8 Blackledge v. Allison, 431 U.S. 63, 74 (1977) ("Solemn
9 declarations in open court carry a strong presumption of
10 verity."). Indeed, although defense counsel represented that the
11 transcripts showed that three of the victims had testified -- in
12 an exculpatory manner -- in Mexico, the record showed that both
13 the defendants and the victims had not been in Mexico since prior
14 to January 2004. Hence, whatever the victims might have said
15 while they were still in Mexico could not have significantly
16 undermined defendants' admissions that they smuggled the victims
17 into the United States and forced them into prostitution here.
18 Moreover, these transcripts -- unverified, in Spanish, and
19 without translations -- were submitted to the court literally as
20 the sentencing was about to begin, more than a year after
21 defendants had pled guilty. Understandably, the court refused to

1 attach any significance to them.²

2 Accordingly, the district court did not abuse its
3 discretion in denying defendants' motion to withdraw their guilty
4 pleas.

5 B. Alonso's Request for New Counsel

6 _____Alonso appeals the district court's denial of his
7 request to substitute counsel. We review the district court's
8 denial for abuse of discretion. See United States v. Simeonov,
9 252 F.3d 238, 241 (2d Cir. 2001). To determine whether the trial
10 court abused its discretion, we consider: (1) the timeliness of
11 defendant's request for new counsel; (2) the adequacy of the
12 trial court's inquiry into the matter; (3) whether the conflict
13 resulted in a total lack of communication between the defendant
14 and his attorney; and (4) whether the defendant's own conduct
15 contributed to the communication breakdown. United States v.
16 John Doe No. 1, 272 F.3d 116, 122-23 (2d Cir. 2001).

17 Alonso's request for new counsel was addressed almost

² Defendants' contention that their counsel were ineffective because they failed to obtain the transcripts is more appropriately considered in the form of a petition under 28 U.S.C. § 2255. See Massaro v. United States, 538 U.S. 500, 504-05 (2003) (indicating that "in most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective assistance," because the district court is the "forum best suited to developing the facts necessary to determining the adequacy of representation").

1 immediately by the district court and the court inquired
2 adequately into the matter. There was not a total lack of
3 communication between Alonso and his counsel. To the contrary,
4 Alonso's counsel had met with him seven times, for approximately
5 an hour each time. The court inquired as to the frequency and
6 length of their meetings and was satisfied with the attention
7 that counsel had given to the case. Counsel also provided his
8 client with discovery materials. The court, understanding that
9 Alonso was confused by some of the materials, requested that
10 counsel spend some "special time" explaining the materials to his
11 client. Counsel agreed to do so. Accordingly, the court's
12 denial of Alonso's request was based on a detailed inquiry that
13 assured the court that substitution of counsel was not warranted.
14 The district court did not abuse its discretion.³

15 C. The District Court's Comments at Sentencing

16 Defendants argue that the district court commented on
17 their national origin during sentencing and that these comments
18 compromised the appearance of justice. This argument is
19 rejected, as the record contains nothing to suggest that the
20 district court improperly considered, or appeared to improperly

³ Moreover, it should be noted that when Alonso pled guilty, he told the district court that he was satisfied with his attorney.

1 consider, defendants' national origin in sentencing them.

2 Our judicial system takes seriously the proposition
3 that "not only must justice be done, it also must appear to be
4 done." United States v. Edwardo-Franco, 885 F.2d 1002, 1005 (2d
5 Cir. 1989). "A defendant's race or nationality may play no
6 adverse role in the administration of justice, including at
7 sentencing." United States v. Leung, 40 F.3d 577, 586 (2d Cir.
8 1994). When a sentencing judge comments on a defendant's
9 national origin in a negative or seemingly negative manner, at a
10 minimum, the appearance of justice is compromised. Whether a
11 district court improperly considers a defendant's national origin
12 is a question of law, and thus this aspect of a sentencing is
13 reviewed de novo. United States v. Kaba, 480 F.3d 152, 156-57
14 (2d Cir. 2007).

15 At sentencing here, defendants' national origin was
16 initially raised by defense counsel. G. Carreto's counsel argued
17 that his client was a "product of his environment" and that
18 "prostitution is something that occurs very frequently" in his
19 hometown in Mexico. In response, the district court asked: "Are
20 you suggesting because prostitution may be rampant in Mexico that
21 the United States of America should condone it . . . when it
22 happens here?" The court continued: "You don't think it's

1 necessary to perhaps send a message to others who may want to
2 come to the United State because they think prostitution is A-
3 okay and everything else that happened here is okay?" When
4 speaking about deterrence, the court added:

5 I'm not going to speak about Mexico. I have
6 great respect for the country, Mexico. I can
7 only talk about the laws of the United States
8 which I am familiar with. . . . And it's, I
9 think, terribly important in particular in
10 this case to send a message loud and clear
11 that people -- I don't care where they come
12 from, whether they come from the United
13 States, Mexico, any place. If they commit
14 these crimes in the United States, they're
15 going to be treated harshly by the law.

16 The record shows that defendants' national origin
17 played no "adverse role" in the district court's sentencing
18 decision. Although the district court did refer to Mexico,
19 defendants' country of origin, it did so only in response to
20 defense counsel's suggestion that G. Carreto should be treated
21 more leniently because prostitution was acceptable in his
22 hometown in Mexico. Moreover, the district court did not say its
23 sentencing of defendants was intended to serve as a message to
24 people in Mexico. Indeed, the court explicitly stated that
25 defendants' national origin was not being considered, and that
26 the court's intent was to send a message to anyone who would
27 engage in these types of crimes, no matter where they came from,

1 whether it was Mexico or elsewhere. Accordingly, the statements
2 referencing Mexico in this case are different from the statements
3 referencing national origin or countries of origin in United
4 States v. Leung, 40 F.3d 577 (2d Cir. 1994), and United States v.
5 Kaba, 480 F.3d 152 (2d Cir. 2007). In both Leung and Kaba, "the
6 district court referred to the publicity a sentence might receive
7 in the defendant's ethnic community or native country and
8 explicitly stated its intention to seek to deter others sharing
9 that national origin from violating United States laws in the
10 future." Kaba, 480 F.3d at 157. Here, defendants' national
11 origin was not improperly considered.

12 CONCLUSION

13 For the foregoing reasons, we AFFIRM the judgment of
14 the district court.

15