Karimu v. United States of America Doc. 7

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---x
FARUK KARIMU,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.
---x

13 Civ. 1689 (PKC)
10 Cr. 422 (PKC)

MEMORANDUM AND ORDER

CASTEL, District Judge:

The petition of Faruk Karimu, pursuant to 28 U.S.C. § 2255, asserts, among other things, that his appointed counsel failed to provide the effective assistance of counsel guaranteed by the Sixth Amendment in failing to make pretrial motions, in falsely telling him that he could challenge the quantity of heroin at sentencing, in assuring him he would get a sentence of time served, in failing to seek a minor role adjustment, in failing to explain the concept of conspiracy and in failing to advise him properly on a possible coercion claim. He also asserts that his plea was not knowing and voluntary. Further, he claims his sentence amounts to cruel and unusual punishment in violation of the Eighth Amendment.

For reasons explained, the Court denies Karimu's petition.

THE PLEA AGREEMENT AND GUILTY PLEA

"It is well settled that a defendant's plea of guilty admits all of the elements of a formal criminal charge and, in the absence of a court-approved reservation of issues for appeal, waives all challenges to the prosecution except those going to the court's jurisdiction." Hayle v. United States, 815 F.2d 879, 881 (2d Cir. 1987) (citations omitted). "Thus, after a judgment of conviction has been entered upon the defendant's plea of guilty, the defendant may not raise

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nonjurisdictional challenges either on direct appeal or by collateral attack under § 2255." Id. (citations omitted).

At the plea proceeding, Karimu confirmed that he felt "OK" and that his mind was clear. (Oct. 28, 2010, Tr. at 4.) He confirmed that he had enough time to discuss all of his options with his lawyer and was satisfied with his lawyer's representation of him. (Id. at 5.) The rights he would have if he went to trial and the rights he was giving up by pleading guilty were explained in detail and in a manner compliant with Rule 11(b), Fed. Crim. P. (Id. at 7-9.) He confirmed that no one had threatened him or forced him to plead guilty and no one made any promises to induce him to plead guilty. (Id. at 13-14.) He stated that he had discussed his plea agreement (the "Plea Agreement") with his lawyer before signing it and understood it before signing it. (Id.)

He was expressly informed by the Court that "any prediction, calculation or estimate that anyone has made to you as to what sentence I might give you is not binding on me, and if it turns out to be wrong, you will not be permitted to withdraw your guilty plea." (Id. at 14.) He expressed his understanding of this admonition. (Id.)

He was informed about the process of sentencing, the manner in which the Guidelines range would be calculated and their advisory nature. (Id. at 12, 14-15.) He expressed understanding that in the Plea Agreement "[y]ou have waived your right to appeal or collaterally attack a sentence unless the sentence I impose is above the stipulated guideline range, and in that event the law will only allow you to challenge the sentence on the ground that it is unreasonable or contrary to law." (Id. at 15.) The Court's inquiry of Karimu was consistent with the terms of the Plea Agreement, which he understood and signed. That agreement provided, among other things, that he "will not file a direct appeal, nor litigate under Title 28, United States Code,

Section 2255 and/or 2241, any sentence within or below the Stipulated Guideline Range," which was principally 70 to 87 months' imprisonment. (Plea Agreement at 4.)

The Court inquired of the facts which led the defendant to believe he was guilty. He stated that he brought heroin into the United States from Africa and that he knew what he was doing was wrong and unlawful. (Oct. 28, 2010, Tr. at 17.) He was asked whether he had any questions for the Court and he did not. (Id. at 18.) He then entered a plea of guilty which the Court found to be knowing and voluntary. (Id.)

Upon review of the arguments presented in the petition, the Court reaffirms that the plea was knowing and voluntary. It was not coerced. It was not based upon any deception by anyone.

SENTENCING

Before sentencing, Karimu's lawyer submitted two letters to the Court. She urged the Court to sentence the defendant to time served and noted that he would be deported. She noted that he has feared for his life when he returns to Ghana based upon what he has told the government. When given the opportunity to speak at sentencing, Karimu asserted that his mother was sick and he had no money and he was approached to bring back a "diamond" for money. (Jan. 18, 2011, Tr. at 11.) He traveled with "their bag" and gave it to a person and he never saw what was inside the bag. (Id. at 11-12.) He said he went back to Ghana "know[ing] they give me the drug before." (Id. at 12.) They took his passport and they told him to swallow something. (Id.) He later said, "I know it's drug but I have to do it because I need my green card and my passport back. I do it." (Id.) He stated: "I never think to commit no crime. This was pressure about my mother. That's why." (Id. at 13.)

Upon completion of Karimu's remarks the Court inquired of his counsel: "is your client suggesting that he did not commit the crime, that he was the subject of duress and that he does not have criminal culpability here?" (Id. at 13-14.) Defense counsel stated that she had "discussed those issues . . . with my client, Judge, we've talked about them. And I don't believe he is asking that." (Id. at 14.) She went on to say that "he knew it was drugs when he went there. He swallowed the drugs. Certainly he didn't mention anything about what I think amounts to the legal defense of duress. And nor do I think we could ever prove such a claim in court and win this case." (Id.) Karimu confirmed, upon the Court's inquiry directly of him, that he agreed with what his lawyer said and did not wish to withdraw his guilty plea. (Id. at 15.) The government then outlined the information about Karimu's involvement that Karimu himself stated in the course of three proffer sessions, including a prior trip in which he brought heroin in a trap in a suitcase. (Id. at 15-18.)

Karimu, who otherwise faced a mandatory minimum of 120 months' imprisonment, was found to qualify for the "safety valve." The Court announced a proposed sentence of principally 70 months' imprisonment, the low end of the Guidelines range, which was also the Stipulated Guideline Range in the Plea Agreement, and inquired whether there was any objection. Karimu's counsel responded, "There is no legal objection[]. Obviously my client would like the Court to know it is more than what he would like, but there's no legal objection[]." (Id. at 25.) The Court then imposed the 70 months' imprisonment. (Id.)

The Court informed defendant of his right to appeal, that the time limits for filing a notice of appeal are brief and strictly enforced, that he may apply for leave to appeal as a poor person and that if he requested the clerk of court would file a notice of appeal on his behalf

immediately. (Id. at 26.) The defendant expressed his understanding of the foregoing. (Id. at 27.)

THE WAIVER OF A COLLATERAL ATTACK UPON THE SENTENCE

The waiver in the Plea Agreement of the right to appeal or collaterally attack a sentence within or below the Stipulated Guidelines Range forecloses Karimu's petition. The Second Circuit has routinely looked to the law of contracts in considering the validity and enforceability of the terms of a plea agreement, see United States v. Stearns, 479 F.3d 175, 178 (2d. Cir. 2007) (per curiam), and has consistently upheld the validity and enforceability of waivers of a right to appeal set forth in a plea agreement, see, e.g., United States v. Pearson, 570 F.3d 480 (2d Cir. 2009) (per curiam); United States v. Salcido-Contreras, 990 F.2d 51 (2d Cir. 1993) (per curiam). The enforcement of such waivers promotes certainty and predictability as to the terms of a plea agreement; it ensures that one party – the defendant – does not secure the benefit of the bargain without the accompanying detriments. See United States v. Morgan, 406 F.3d 135, 137 (2d Cir. 2005). While much of the case law addresses waivers of direct appeals, a waiver of a defendant's right to collaterally attack a sentence is also valid and enforceable. See Garcia-Santos v. United States, 273 F.3d 506 (2d Cir. 2001) (per curiam) (enforcing a waiver barring collateral attack on a sentence).

A sentence "conceivably imposed in an illegal fashion or in violation of the Guidelines" will not vitiate a waiver, if the sentence was within the range agreed upon in the plea agreement. United States v. Gomez-Perez, 215 F.3d 315, 319 (2d Cir. 2000). However, a court ought not uphold a waiver "on a basis that is unlimited and unexamined." United States v. Ready, 82 F.3d 551, 555 (2d Cir. 1996). While the exceptions are "very circumscribed," the Second Circuit has declined to enforce an appellate waiver in three circumstances. Gomez-

Perez, 215 F.3d at 319. First, a waiver that is not knowing and voluntary is not enforceable. See, e.g., id.; Ready, 82 F.3d at 557 (The "record [must] clearly demonstrate[] that the waiver was both knowing . . . and voluntary." (quotation marks omitted)). A court will look to the questioning at the plea allocution to determine whether the waiver was knowing and voluntary. See United States v. Tang, 214 F.3d 365, 367 (2d Cir. 2000). Here, the Court concludes that the plea was knowing and voluntary as was the entry into the Plea Agreement with the waiver of the right to appeal or attack a sentence. Indeed, the United States Court of Appeals for the Second Circuit has already concluded that the waiver provision of the Plea Agreement foreclosed appellate review of Karimu's sentence. See United States v. Karimu, 470 Fed. App'x. 45, 46 (2d Cir. 2012) ("The plea colloquy transcript makes clear that the district court carefully confirmed with Karimu that he understood the consequences of the plea agreement and that his waiver was knowing and voluntary.").

Second, a sentence imposed based upon certain impermissible factors is not immunized from review by reason of a waiver. If the district court bases its sentence on "constitutionally impermissible factors, such as ethnic, racial or other prohibited biases," the appellate waiver is unenforceable. Gomez-Perez, 215 F.3d at 319. See also United States v. Johnson, 347 F.3d 412 (2d Cir. 2003) (indigent status); United States v. Jacobson, 15 F.3d 19 (2d Cir. 1994) (naturalization status). The type of illegality that would prevent enforcement of an appellate waiver is of the kind that would trigger "the public policy constraints that bear upon the enforcement of other kinds of contracts." United States v. Yemitan, 70 F.3d 746, 748 (2d Cir. 1995). In addition to unconstitutional biases, failure to enunciate any rationale for a sentence may invalidate a waiver. See Gomez-Perez, 215 F.3d at 319. However, a district judge's failure to explain why he chose a sentence within a Guidelines range that exceeded 24 months (as

required by the Guidelines) did not raise a public policy concern sufficient to render the waiver unenforceable. Yemitan, 70 F.3d at 748. There is no claim that Karimu's sentence was imposed based upon impermissible factors.

The third circumstance in which a court will not enforce an appellate waiver is when the government has "breached" the plea agreement. Gomez-Perez, 215 F.3d at 319; see United States v. Rosa, 123 F.3d 94, 98 (2d Cir. 1997) (citing United States v. Gonzalez, 16 F.3d 985 (9th Cir. 1993)). No such claim is made by Karimu.

The waiver of the right to collaterally attack a sentence dooms Karimu's claims that he was not afforded a minor role adjustment or that his sentence amounts to cruel and unusual punishment.

INEFFECTIVE ASSISTANCE OF COUNSEL

On a claim of ineffective assistance of counsel in violation of the Sixth Amendment, a defendant must first overcome a presumption of effective representation by presenting evidence that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms. Strickland v. Washington, 466 U.S. 668, 688-90 (1984). Second, the defendant must prove prejudice by showing a reasonable probability that, but for counsel's performance, the result would have been different. Id. at 693-94. It is insufficient to show that counsel's errors had "some conceivable effect" on the outcome. Id. at 693. Instead, the defendant must show "a probability sufficient to undermine confidence in the outcome." Id. at 694; see also Mayo v. Henderson, 13 F.3d 528, 534 (2d Cir. 1994).

Here, no conduct of counsel has been shown to have fallen below an objective standard of reasonableness based on prevailing professional norms. Petitioner complains that counsel "did not file any pre-trial motions to test the case of prosecution for its firmity and/or

validity as the Sixth [A]mendment would require for effective challenge(s) against any criminal offens[e](s) . . . ." (Petition at 5.) There is no blunderbuss motion in the federal system that tests the "firmity and/or validity" of the prosecution's case. The indictment was facially valid and no motion would have been available.

Petitioner claims in a conclusory fashion that he was told "he could challenge the quantity of [h]eroin which conclusively formed the basis for Movant's sentence . . . ." (Id. at 7.) But the Plea Agreement, which the Court has concluded was entered into knowingly and voluntarily, expressly provides that the parties stipulate that "the offense involved at least 1 kilogram[] but less than 3 kilograms of heroin . . . ." (Plea Agreement at 2.) Thus, Karimu knew that he was limited to arguing at sentencing that the quantity was within that range. Moreover, at sentencing he was asked if he wished to withdraw his guilty plea and he stated that he did not. (January 18, 2011, Tr. at 15.)

Petitioner claims he did not understand the elements of the charge of conspiracy. Yet greater information from his counsel as to the elements of a charge of conspiracy would not have assisted petitioner in any way because in his plea allocution he admitted all of the required elements. (October 28, 2010, Tr. at 16-17.)

With regard to purported duress, the facts were set forth on the record at sentencing by Karimu, himself, and his counsel and his counsel opined that it did not amount to the legal defense of duress. Karimu was asked if he agreed with his lawyer's statements and he said he did. (January 18, 2011, Tr. at 15.) There is no indication in existing case law that his actions, particularly after his return to Ghana following the first drug trip, amounted to the defense of duress. See Dixon v. United States, 548 U.S. 1, 4 (2006).

His lawyer argued as a mitigating factor that he "was afraid, and reluctant but was told he would not get his green card or passport back to the U.S. if he did not comply" and that "[o]ne of the men had a gun." (Sentencing Letter of Jan. 13, 2011, at 2.) Further, that "he was teased by the conspiracy's higher ups because he couldn't swallow as many [packets] as a woman." (Id.) She argued that he was "nothing more than a 'mule,'. . . ." (Id. at 3.) Karimu ingested 33 pellets of heroin and the woman with whom he was travelling ingested about 50 pellets. (Id. at 2.)

There were two sides to the story. According to the government, Karimu had engaged in a courier job in February 2010, two months before the trip for which he was arrested, in which he used a suitcase with a trap to hide the drugs. (Jan. 18, 2013, Tr. at 16.) The government also represented that in the proffer sessions Karimu acknowledged that he was paid about $2,000 for his work. (Id.)

Karimu also complains that counsel was ineffective in allowing him to go into proffer sessions with the government. But it was these same proffer sessions that enabled Karimu to qualify for the "safety valve" and thereby avoid the imposition of a mandatory minimum sentence, which was 50 months higher than the sentence he received.

Karimu also complains of the failure of his counsel to obtain a minor role adjustment. But over the course of the "safety valve" proffers, which resulted in a lower Guidelines range and an escape from the mandatory minimum, the government learned of his role in the prior importation of drugs. This made a minor role adjustment less easily attainable.[1]

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[1] "Couriers are indispensable to the smuggling and delivery of drugs and their proceeds. The culpability of a defendant courier must depend necessarily on such factors as the nature of the defendant's relationship to other participants, the importance of the defendant's actions to the success of the venture, and the defendant's awareness of the nature and scope of the criminal enterprise." United States v. Garcia, 920 F.2d 153, 155 (2d Cir. 1990).

Plea negotiations often involve some given-and-take. The government ascribed no quantity of drugs to the February 2010 trip and could likely have engaged in a good-faith, fact-based estimation based on the dimensions of the suitcase had it chosen to do so. In recommending a deal that included "safety valve' eligibility and cabined the drug quantity but contained no "minor role" adjustment, counsel's performance did not fall below an objective standard of reasonableness.

The Court has considered the balance of petitioner's contentions and finds them to be without merit.

CONCLUSION

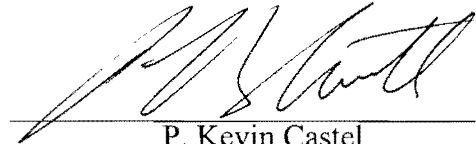
The Court concludes that the knowing and voluntary plea of guilty precludes any non-jurisdictional challenges to the conduct of the case. Karimu's knowing and voluntary entry into the Plea Agreement, which included a waiver of the right to challenge a sentence within the Stipulated Guidelines Range set forth therein, forecloses any challenge to the sentence received. Karimu's counsel's performance did not fall below an objective standard of reasonableness based on prevailing professional norms.

The petition is DENIED and the case is closed.

Petitioner has not made a substantial showing of the denial of a constitutional right and, accordingly, a certificate of appealability will not issue. 28 U.S.C. § 2253; see Lozada v. United States, 107 F.3d 1011, 1016-17 (2d Cir. 1997), abrogated on other grounds by United States v. Perez, 129 F.3d 255, 259-60 (2d Cir. 1997). This Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith and in forma pauperis status is denied. See Coppedge v. United States, 369 U.S. 438, 444-45 (1962).

SO ORDERED.

Dated: New York, New York
August 6, 2013



P. Kevin Castel
United States District Judge