



court imposed a sentence within the guideline range of 262-327 months' incarceration.

The pre-sentence report ("PSR") did not link the defendant to any transactions involving cocaine base, but detailed undercover transactions with other members of the conspiracy involving approximately 300 grams of cocaine base and 184 grams of powder cocaine. The PSR contained the details of a consensually monitored conversation in which the defendant's son "told the CI that his father did not want to cook the cocaine to base because he is a diabetic and about to have a blood test, and cooking the cocaine could adversely affect his test results." Based on the undercover investigation, surveillance and intelligence provided by cooperating informants, the PSR conservatively estimated that the defendant was responsible for distributing between 500 grams and less than 1.5 kilograms of cocaine base. The defendant also admitted to the probation officer that he was the leader of the conspiracy, and the PSR concluded that he had supervised at least four other persons. The defendant was also caught on wiretap talking about firearms with a coconspirator and a firearm was recovered during the search of his house. The defendant did not file any objections to the PSR.

At the plea hearing, the government's proffer included the following facts: An undercover officer had purchased powder cocaine and crack cocaine on a number of occasions from individuals named in count one of the superseding indictment, and that the defendant participated in wiretapped conversations in which he arranged to obtain cocaine and wholesale quantities of drugs for distribution. The government did not establish that the defendant had personally engaged in selling crack cocaine. The defendant denied that he had sold crack, but admitted to selling powder cocaine, and admitted that others in his organization were selling crack. Indeed, he stated "sometimes I would sell seven grams or 14 grams."

The court informed the defendant of the consequences of his plea and, inter alia, warned him that by pleading guilty, he could receive a maximum term of life imprisonment. The court found his guilty plea to be voluntary and knowing and accepted it pursuant to Fed. R. Crim. P. 11.

At the sentencing hearing, the court found the defendant's offense level total to be 39, a criminal history category of 1, and a guideline range of 262-327 months. It imposed a sentence of 262 months' imprisonment. At the time of his conviction and sentencing, § 841 (b)(1)(A) carried a

mandatory minimum sentence of ten years to life.

During plea negotiations and at the plea hearing, the defendant was represented by counsel, and was provided with a Spanish interpreter.

On appeal, the defendant filed a pro se supplemental brief arguing that the court erred in sentencing him on the basis of his distribution of cocaine base, rather than powder cocaine, and that there was no evidentiary basis to determine the quantity of cocaine or cocaine base attributable to him. While his appeal was pending, the United States Supreme Court issued the decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), which held that any sentencing factor which exposed a defendant to a term of imprisonment higher than the statutory maximum prescribed by statute must be charged in the indictment and proved beyond a reasonable doubt. The holding in Apprendi applied retroactively to all cases that were pending on direct review or not yet final, see Cuoco v. United States, 208 F.3d 27, 30 (2d Cir. 2000), and was applicable to this case.

In light of Apprendi, because the indictment in this case did not allege a particular quantity of narcotics, the maximum term of imprisonment for the defendant's conviction should have been 20 years pursuant to 21 U.S.C. § 841(b)(1)(C), the

section that applies to narcotics offenses without regard to quantity. See United States v. Thomas, 274 F.3d 655 (2d Cir. 2002) (en banc) (holding that where drug quantity is determined by the district court at sentencing, the defendant must be sentenced under 21 U.S.C. § 841(b)(1)(C)). For this reason, the government moved in the Court of Appeals to vacate the sentence of 262 months' incarceration imposed by this court and remand for resentencing.

Following remand, the defendant moved, inter alia to withdraw his guilty plea. [See doc. # 605]. At the hearing on October 7, 2002, and for the following reasons, the defendant's motion is DENIED.

#### DISCUSSION

In support of his motion to withdraw his guilty plea, the defendant asserts that the voluntariness of his plea is negated by the fact that he was improperly instructed that he could receive a maximum sentence of life imprisonment without proof of drug quantity and that he did not understand the maximum and minimum penalties he was facing. There is no merit to the defendant's claims.

Motions to withdraw guilty pleas are governed by Fed. R. Crim. P. 32(e). Under this rule, a defendant may move to withdraw a guilty plea upon a showing of a fair and just

reason. To support such a motion, a defendant must raise a significant question about the voluntariness of his original plea. See United States v. Maher, 108 F.3d 1513, 1529 (2d Cir. 1997). A defendant's allegations which simply contradict what he said at his plea allocution are not sufficient. See id. The decision to allow a defendant to withdraw a guilty plea is committed to the discretion of the district judge, see, United States v. O'Hara, 960 F.2d 11, 14 (2d Cir. 1992), and is reviewed under an abuse of discretion standard. See United States v. Williams, 23 F.3d 629, 635 (2d Cir. 1994). A motion to withdraw a guilty plea may be denied without a hearing where the defendant's allegations "merely contradict the record," are "inherently incredible" or are "simply conclusory." See id. Here, the defendant's allegations in support of his motion contradict the record, are inherently incredible and conclusory.

The defendant's argument that he would not have pleaded guilty if he had known that, instead of facing life imprisonment, he was only facing a maximum term of 20 years, is inherently incredible. Indeed, the Second Circuit, in United States v. Gutierrez Rodriguez, 288 F.3d 472 (2d Cir. 2002), expressly rejected a similar argument. In Gutierrez Rodriguez, the court affirmed a pre-Apprendi conviction by

guilty plea where the defendant had not been advised of his rights under Apprendi to have a jury determine drug quantity, and was misadvised at the time of his guilty plea that he faced life imprisonment.

In both Gutierrez Rodriguez and this case, the pertinent facts were not disputed. Moreover, as in Gutierrez Rodriguez, the record here shows that when the defendant appeared to enter his guilty plea, the court engaged in a lengthy colloquy to ensure that he was fully informed of the consequences of that plea. He was told that by pleading guilty he was waiving his right to compel the government to prove the crime at trial. The defendant confirmed that he understood the charges against him and the consequences of his plea. He stated that he understood the charges and admitted his role in the charged conspiracy and that he actually sold narcotics. Thus, the defendant's conclusory allegations as to voluntariness are contradicted by the record, including his own admissions to the court and his statements to the probation officer.

Thus, although the mix of information that was provided to the defendant was subsequently determined to be incorrect as to the maximum penalty that he was subjected to, this alone does not establish that his guilty plea was not knowing and voluntary, or constitute a fair and just reason to allow him to withdraw his guilty plea. Indeed, as the Supreme Court

noted in a different context, there is nothing in the Constitution that requires the court to allow a defendant to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that the maximum penalty then assumed applicable is found inapplicable. See Brady v. United States, 397 U.S. 742, 757 (1970).

CONCLUSION

For the foregoing reasons, the defendant's motion to withdraw his guilty plea is DENIED.

SO ORDERED this           th day of October, 2002, at  
Bridgeport, Connecticut.

---

Alan H. Nevas  
United States District Judge