

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

UNITED STATES OF AMERICA,)	CASE NO. 3:06CR00040-2
)	
v.)	
)	<u>REPORT AND RECOMMENDATION</u>
JUAN PABLO RODRIQUEZ,)	
)	
)	By: B. WAUGH CRIGLER
Defendant.)	U.S. MAGISTRATE JUDGE

In accordance with the provisions of Title 28 U.S.C. § 636(b)(3) and upon the defendant's consent, this case was referred to the undersigned to conduct a plea hearing.

DEFENDANT'S RESPONSES TO RULE 11 INQUIRY

The Grand Jury has returned a multiple count Indictment charging defendant in Count One with unlawfully, knowingly and intentionally distributing or possessing with intent to distribute, or aiding and abetting in the distribution or possession with intent to distribute, 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers, a Schedule II narcotic controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(A) and Title 18, United States Code, Section 2; in Count Two with knowingly using, carrying or possessing a loaded .45 caliber High Point semi-automatic pistol, during and in relation to, or in furtherance of a drug trafficking crime for which he may be prosecuted in a court of the United States, as set forth in Count One of the Indictment, all in violation of Title 18, United States Code, Section 924(c)(1); in Count Three with after having been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly and intentionally possess or receive a firearm, which had been shipped or transported in interstate or foreign commerce, in violation of Title 18, United States Code, Section 922(g)(1); and in Count Four with in committing the felony offense alleged in Count

Two of the Indictment, which offense involved the following firearm, to wit: .45 caliber High Point semi-automatic pistol, serial #X424952, and ammunition, said firearm and ammunition are subject to seizure and forfeiture. All interest defendant has, or may have had in the firearm is vested in the United States of America and is hereby forfeited to the United States in accordance with Title 18, United States Code, Section 924(d)(1).

On December 11, 2006, a plea hearing was conducted before the undersigned, and the defendant entered a plea of guilty to Counts One and Two of the Indictment. At this hearing, the defendant was placed under oath and testified that his full legal name is Juan Pablo Rodriquez, he was born in Mexico on October 14, 1972, and received six years of education in Mexico. The defendant stated that he speaks “a little” English and can understand some English; however, he cannot write or read the English language.¹ The defendant stated that he was fully aware of the nature of the charges against him and the consequence of pleading guilty to those charges. The defendant further testified that he was not under the influence of alcohol, medicine, or any drug. Defendant stated that he had no other physical or mental condition which impaired his ability to understand the nature of the proceedings being held. Defendant’s counsel stated that he had no reservations as to the defendant’s competency to enter a plea of guilty to the offenses.

The defendant testified that he had received a copy of the Indictment pending against him and that he had fully discussed the charges therein, and his case in general, with his counsel. The defendant stated that he was pleading guilty of his own free will because he was, in fact, guilty of the offenses charged. The defendant also stated that no one had made any promises, assurances or threats to him in an effort to induce his plea. The defendant testified that he understood that the

¹An interpreter assisted the defendant during the hearing.

offenses with which he is charged in Counts One and Two are felonies, and that if his plea is accepted, he will be adjudged guilty of those offenses. Moreover, the defendant testified that he understood that he will be required to pay a mandatory assessment of \$200 and that, at the discretion of the court, he may also be denied federal benefits, as that term is defined in 21 U.S.C. § 862(a), for a period of years or indefinitely, as set forth in the plea agreement. The defendant acknowledged that he consented to the administrative forfeiture, official use and/or destruction of any illegal firearms or contraband seized by any law enforcement agency from his possession or from his direct or indirect control. The defendant further acknowledged that he consented to forfeit any right, title and interest he has in assets purchased with proceeds of his illegal activity, directly or indirectly and that such a forfeiture of property is proportionate to the degree and nature of the offenses he committed and does not raise any of the concerns addressed in *United States v. Austin*, 113 S.Ct. 2801 (1993). The defendant testified that he understood that under the terms of the agreement he was waiving any right to appeal or to collaterally attack his conviction or sentence and that he was waiving his right to have a jury determine beyond a reasonable doubt the facts alleged in Counts One and Two, including any facts related to sentencing. The defendant further testified that he knew that the government retained the right to appeal any sentence the court imposed that was below the applicable sentencing guideline range or below the government's recommended sentence. The defendant stated that he was waiving his right to raise the defense of the statute of limitations if for any reason the plea agreement is withdrawn or otherwise not consummated. The defendant also testified that he was waiving all rights under the Freedom of Information Act, 5 U.S.C. § 552, or the Privacy Act, 5 U.S.C. § 552a, to request or receive from any department or agency of the United States any records pertaining to the investigation or prosecution of his case.

The defendant was informed that the maximum possible penalty provided by law for the offense with which he is charged in Count One, is life imprisonment and a fine of \$4,000,000, together with supervised release. The defendant was further informed that Count One has a mandatory sentence of ten years imprisonment. The defendant was also informed that the maximum possible penalty for Count Two is a fine of \$250,000 and a term of five years mandatory imprisonment. The defendant was made aware that the sentences imposed in Counts One and Two would be set to run consecutive to one another. The defendant was also informed that the maximum possible penalty for Count Three is twenty years imprisonment, a fine of \$250,000, and a period of supervised release. The defendant was informed that Count Four is a forfeiture allegation, and the maximum statutory penalty for this charge is forfeiture of the firearm referenced in Counts Two and Three of the Indictment. Finally, the defendant was informed that his assets may be subject to forfeiture.

The defendant was informed that under the Sentencing Reform Act of 1984, the United States Sentencing Commission has issued guidelines for judges to follow in determining the sentence in a criminal case. The defendant was then informed that, in light of the United States Supreme Court's decision in *United States v. Booker*, 125 S.Ct. 738 (2005), the sentencing guidelines are no longer mandatory but that the sentencing judge may apply them in an advisory fashion in determining a reasonable sentence. The defendant stated that he understood that, contingent upon his acceptance of responsibility and continued cooperation in the sentencing process, and fulfillment of his duties under the plea agreement, the government will recommend a two-level (2) reduction under USSG § 3E1.1(a), and because he meets the listed criteria, he should be granted an additional one-level (1) reduction under USSG 3E1.1(b). The defendant stated that

he understood that the government is under no obligation to file a motion for substantial assistance, but that to the extent the government does exercise such discretion in this regard, he must provide such assistance in a manner set forth in the plea agreement. The defendant stated that he understood that a determination as to whether he had provided “substantial assistance” was a matter within the discretion of the United States Attorney’s Office. The defendant stated that he was aware that pursuant to the Sentencing Guidelines the sentencing judge could add or subtract up to four sentencing points to his sentencing level based upon his role in the offense; however, defendant and the government have stipulated that his base offense level would not be increased based upon his role in the offense. The defendant stated that he and the government agreed that for purposes of USSG §§ 2D1.1 and 1B1.3 he would be held responsible for 447.1 grams of a substance containing a detectable amount of methamphetamine. The defendant agreed that USSG § 2D1.1(c)(4), with a base offense level of 30, was applicable to his criminal conduct. The defendant stated he understood that a substantial likelihood exists that he will be incarcerated and that he would not be eligible for parole during any term of imprisonment imposed. The defendant was informed that the government will recommend that he receive a sentence of incarceration at the low end of the applicable sentencing guidelines range. Defendant stated he understood that the location for service of any term of imprisonment is ultimately determined by the Bureau of Prisons, but that to the extent it was consistent with Bureau of Prisons’ applicable rules and regulations, the government would not object to any request he might make to be confined at a community correctional facility.

The defendant testified that he and his counsel had discussed how the sentencing guidelines might apply in his case. The defendant also testified that he understood that the court would not be able to determine the applicable guideline range, for advisory purposes, until after a presentence

report has been prepared and both parties have been given an opportunity to challenge the reported facts and application of the guidelines. He stated that he understood that the eventual sentence imposed may be different from any estimate his attorney had given him and that the court has the authority to impose a sentence that is either higher or lower than that called for by the guidelines, so long as the sentence is not greater than the statutory maximum for the offenses to which the defendant is pleading guilty. The defendant stated that he knew that parole had been abolished and that if he is sentenced to prison he will not be released on parole but on supervised release, a violation of which could result in additional incarceration. The defendant stated he understood that any information given by him during a proffer or cooperation would not be used against him to enhance his sentence under USSG § 1B1.8.

The defendant testified that he understood that he had the right to a trial by a jury, in addition to the following rights, which will be waived or given up if his guilty plea is accepted:

1. The right to plead not guilty to any offense charged against him;
2. The right at trial to be presumed innocent and to force the government to prove his guilt beyond a reasonable doubt;
3. The right of assistance of counsel at trial and in any subsequent appeal;
4. The right to see, hear and cross-examine witnesses;
5. The right to call witnesses to testify in his own behalf and to the issuance of subpoenas or compulsory process to compel the attendance of witnesses;
6. The right to decline to testify unless he voluntarily elects to do so in his own defense;
7. The right to a unanimous guilty verdict; and
8. The right to appeal a guilty verdict.

The defendant stated that he was fully satisfied with the advice and representation given to him in this case by his counsel. The defendant also stated that he believed his counsel's representation had been effective. The defendant testified that he understood the possible consequences of his plea.

THE GOVERNMENT'S EVIDENCE

The defendant waived his right to have the government's Factual Summary read in open court and had no objection to the Summary. The Factual Summary having been filed in open court, the evidence presented therein regarding the offenses charged is as follows:

On August 14, 2006, a Confidential source ("CS") contacted co defendant Amanda Cervantes with regards to the purchase of 1 pound of "ice" methamphetamine for \$18,000. Cervantes met with the CS, at which time they agreed to the amount and price. At the conclusion of the meeting, the CS told Cervantes that the "buyer" would be accompanying the CS when the deal was made. The "buyer" was an undercover police officer ("UC") with the Virginia State Police.

Later that afternoon, the CS telephoned Cervantes. Cervantes and the CS agreed to meet at the Church of the Blue Ridge, in Afton, VA. Cervantes advised the CS that an unknown individual would accompany Cervantes to the meet location. At approximately 7:17 p.m., Cervantes and the defendant Juan Pablo Rodriguez arrived at the meet location. The defendant got out of Cervantes's car and entered the back seat of the car containing the CS and UC. At this time, the UC gave the arrest signal, and police arrested the defendant and Cervantes. As the police were moving in, the UC observed the defendant pull the pound of "ice" methamphetamine and a .45 caliber High Point pistol, serial #X424952 out of his pants and put both on the rear floor of the vehicle.

The methamphetamine was recovered along with the firearm. The methamphetamine was sent to the DEA lab and tested positive for methamphetamine, weighing 447.1 grams, with 156.4 grams of actual methamphetamine. The .45 pistol contained 8 hollow point rounds in the magazine, but none in the chamber. Pistol manufactured outside state of Virginia.

FINDINGS OF FACT

Based on the evidence presented at the plea hearing, the undersigned now submits the

following formal findings of fact, conclusions and recommendations:

1. The defendant is fully competent and capable of entering an informed plea;
2. The defendant is aware of the nature of the charges and the consequences of his plea;
3. The defendant knowingly and voluntarily entered a plea of guilty to Counts One and Two of the Indictment; and
4. The evidence presents an independent basis in fact containing each of the essential elements of the offenses to which the defendant is pleading guilty.

RECOMMENDED DISPOSITION

Based upon the above findings of fact, the undersigned RECOMMENDS that the court accept the defendant's plea of guilty to Counts One and Two and adjudge him guilty of those offenses. The undersigned further DIRECTS that a presentence report be prepared. A sentencing hearing hereby is scheduled for February 27, 2007 at 10:30 a.m. before the presiding District Judge in Charlottesville.

NOTICE TO PARTIES

Notice is hereby given to the parties of the provisions of 28 U.S.C. § 636(b)(1)(C): Within ten days after being served with a copy of this Report and Recommendation, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. The presiding District Judge shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. The presiding District Judge may accept, reject, or modify, in whole or in part, the findings or recommendations made by the

undersigned. The judge may also receive further evidence or recommit the matter to the undersigned with instructions.

Failure to file timely written objections to these proposed findings and recommendations within 10 days could waive appellate review. At the conclusion of the 10-day period, the Clerk is directed to transmit the record in this matter to the presiding United States District Judge.

The Clerk is hereby directed to send certified copies of this Report and Recommendation to all counsel of record.

ENTERED:

United States Magistrate Judge

Date

