

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION**

UNITED STATES OF AMERICA,

)
)
) Case No. 1:09CR00007
)

v.

) **OPINION**
)

ARTURO VICTORIANO,

) By: James P. Jones
) United States District Judge
)

Defendant.

*Jennifer R. Bockhorst, Assistant United States Attorney, Abingdon, Virginia,
for United States; Arturo Victoriano, Pro Se Defendant.*

The defendant, a federal inmate, brings this Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C.A. § 2255 (West Supp. 2010). Upon review of the record, I find that the government’s Motion to Dismiss must be granted on the ground that the defendant waived his right to bring this action.

I

A grand jury of this court returned a multi-count Indictment on February 3, 2009, charging that Arturo Victoriano and others possessed 500 grams or more of methamphetamine with the intent to distribute, in violation of 21 U.S.C.A. § 841(b)(1)(A) (West Supp. 2010) (Count One), and conspired to distribute 500 grams or more of methamphetamine, in violation of 21 U.S.C.A. §§ 841(b)(1)(A) and

846 (West 1999) (Count Three).¹ Victoriano entered into plea negotiations with the government, and on August 11, 2009, pleaded guilty to the conspiracy charge, pursuant to a written Plea Agreement. At sentencing, I found that Victoriano qualified for a sentence below the statutory mandatory minimum, pursuant to the “safety valve” in 18 U.S.C.A. § 3553(f) (West Supp. 2010) and sentenced him to 70 months imprisonment. He did not appeal.

Victoriano filed this § 2255 motion, alleging ineffective assistance of counsel at sentencing. The government has filed a Motion to Dismiss, arguing that all of Victoriano’s § 2255 claims must be dismissed as waived, pursuant to the Plea Agreement. Victoriano has responded, making the matter ripe for disposition.

II

A. PLEA AGREEMENT WAIVER OF § 2255 RIGHTS.

It is settled circuit law that a “criminal defendant may waive his right to attack his conviction and sentence collaterally, so long as the waiver is knowing and voluntary.” *United States v. Lemaster*, 403 F.3d 216, 220 (4th Cir. 2005). Whether the waiver is intelligent and voluntary depends “upon the particular facts and

¹ A Superseding Indictment that issued on March 3, 2009, added additional defendants.

circumstances surrounding that case, including the background, experience and conduct of the accused.” *United States v. Davis*, 954 F.2d 182, 186 (4th Cir. 1992) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). “[I]n the absence of extraordinary circumstances, the truth of sworn statements made during a Rule 11 colloquy is conclusively established, and a district court should . . . dismiss any § 2255 motion that necessarily relies on allegations that contradict the sworn statements.” *Lemaster*, 403 F.3d at 221-22. After determining that the defendant had entered a valid guilty plea and waiver of his § 2255 rights, the court in *Lemaster* addressed the defendant’s ineffective assistance claims only to the extent that they had some alleged bearing on the validity of the plea. *Id.* at 222-23. Claims that had no bearing on the validity of the guilty plea, such as claims alleging ineffective assistance at sentencing, the court dismissed as waived. *Id.* at 223.

B. VICTORIANO’S VALID GUILTY PLEA AND WAIVER.

Before accepting Victoriano’s guilty plea, with an interpreter present to assist him, I questioned him thoroughly to ensure that his plea was knowing and voluntary.² Victoriano stated that he was 30 years old and had completed five or six years in school. He denied that he had ever been treated for mental illness and denied that he

² During the guilty plea hearing, counsel informed the court that Victoriano preferred to be identified as “Mr. Quezada.” However, for the sake of consistency within the court’s record, I will continue to refer to the defendant as Victoriano in this opinion.

was under the influence of any medication or alcohol at the time of the plea. He also denied having any health problems, and counsel stated that he did not question the defendant's competence to enter a guilty plea.

Victoriano affirmed that he had had adequate time to read and review the charges with counsel and understood them. He affirmed that he had signed and initialed each page of the Plea Agreement as an indication that it had been read to him. He stated that he had had adequate time to review the Plea Agreement with counsel before signing it. He also affirmed that he was fully satisfied with counsel's representation.

Counsel for the government then summarized the terms of the Plea Agreement. Victoriano's signature on the Plea Agreement indicated, among other things, that he was pleading guilty because he was, in fact, guilty; that he understood the rights he was waiving pursuant to the Agreement, including his right to appeal and his right to bring a collateral attack such as this § 2255 motion; that he agreed to forfeiture of certain property related to the offense; that the offense to which he was pleading carried a mandatory minimum sentence of ten years imprisonment; that he stipulated to conduct involving at least 500 grams, but less than 1.5 kilograms of methamphetamine; and that the government would not object to application of the

safety valve provisions if applicable to reduce the sentence below the mandatory minimum.

I expressly questioned Victoriano about his understanding of the Plea Agreement provisions whereby he waived his right to appeal and his right to bring a collateral attack under § 2255, and he affirmed his understanding of these waivers. He denied that anyone had promised him anything outside the Plea Agreement that caused him to plead guilty, or that anyone had tried to force him to plead guilty.

I asked if Victoriano understood that the sentence imposed might be different from any estimate his attorney had given him, and he affirmed his understanding. I reviewed with Victoriano the rights he waived by pleading guilty and the elements of the offense that the government would have to prove at trial, and he affirmed that he understood.

The prosecutor then offered a summary of the evidence in support of the plea. The government would have presented evidence that pursuant to a search warrant executed in January 2009, law enforcement agents found Victoriano and others in a residence in which they also found about two pounds of methamphetamine, half of which had already been divided into smaller quantities for distribution. Further investigation indicated that Victoriano and his associate had supplied the drugs that were seized and that Victoriano was aware of the conspiracy and the fact that it

involved more than 500 grams of methamphetamine. Victoriano did not contest any of this evidence, denied that he had any further questions for the court or counsel, and affirmed his intention to plead guilty to Count Three of the Superseding Indictment.

Victoriano's statements during the guilty plea colloquy offered no indication that he was not competent to enter a valid guilty plea, that he did not understand the proceedings, or that he was not voluntarily pleading guilty. I find from this record that Victoriano's guilty plea and the waiver of his right to bring this collateral attack under § 2255 were knowing and voluntary and therefore, valid.

Furthermore, Victoriano does not attack the validity of his guilty plea or the Plea Agreement. Rather, his § 2255 claims assert that counsel should have argued for additional downward departure in this case, based on his eligibility for the safety valve, exceptional remorse, his family situation, pretrial conditions, and his status as a deportable alien and other factors. As stated, counsel did argue, and the sentencing calculations included, application of the safety valve. Moreover, because Victoriano's sentencing claims do not bear on the validity of his guilty plea or the Plea Agreement, the defendant does not allege any extraordinary circumstance under which he should not be bound by the guilty plea and the waivers contained in the Plea Agreement. Thus, as in *Lemaster*, Victoriano's claims of ineffective assistance at

sentencing must be dismissed as waived, pursuant to his Plea Agreement waiver of the right to pursue § 2255 relief. 403 F.3d at 223.

III

For the stated reasons, I conclude that the Motion to Dismiss Victoriano's § 2255 claims as waived, pursuant to his valid Plea Agreement and guilty plea, must be granted and that his § 2255 motion must be denied.

A separate Final Order will be entered herewith.

DATED: March 21, 2011

/s/ JAMES P. JONES
United States District Judge