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

UNITED STATES OF AMERICA, Plaintiff	)	Case No. 5:08CR00009
v.	)	**REPORT AND RECOMMENDATION**
WILLIAM WESLEY JACOBS, Defendant	)	By: James G. Welsh U.S. Magistrate Judge

The Grand Jury previously returned an Indictment on March 20, 2008 charging this defendant with five separate felony offenses, including *inter alia* in Count One as a person who knowingly and intentionally combined, conspired, confederated and agreed with other persons known and unknown to the Grand Jury, to distribute fifty (50) grams or more of a mixture and substance containing a detectable amount of cocaine base, also known as crack cocaine, a Schedule II narcotic controlled substance, in violation of 21 U.S.C. §§ 846 and in Count Five as a person who knowingly and intentionally possessed with the intent to distribute fifty (50) grams or more of a mixture and substance containing a detectable amount of cocaine base, also known as crack cocaine, a Schedule II controlled substance, in violation of 21 U.S.C. §§ 841 (a)(1) and (b)(1)(A).

The defendant was previously arraigned and entered pleas of Not Guilty to each of the charges against him in the indictment. The defendant having now indicated an intent to change his pleas to Counts One and Five, this case has been referred to the undersigned for the purpose of conducting a plea hearing in accordance with the provisions of Title 28 U.S.C. § 636(b)(3).

The plea hearing was conducted before the undersigned on June 12, 2008. The defendant was at all times present in person and with his counsel, Frederick Theodore Heblich, Jr. The United States was represented by Jeb T. Terrien, Assistant United States Attorney. The proceedings were recorded by a court reporter. *See* Fed. R. Crim. P. 11 (g).

With the defendant's informed and written consent, the undersigned made a Rule 11 inquiry: the government presented an oral proffer of evidence for the purpose of establishing an independent basis for the pleas, and the defendant entered pleas of guilty to Counts One and Five of the Indictment. *See* Fed. R. Crim. P. 11 (a) (2).

A. DEFENDANT'S RESPONSES TO RULE 11 INQUIRY

The defendant was placed under oath and addressed personally in open court. He expressly acknowledged that he was obligated to testify truthfully in all respects under penalty of perjury and that he understood the government's right, in a prosecution for perjury or false statement, to use against him any statements that he made under oath. *See* Fed. R. Crim. P. 11 (b)(1)(A).

The defendant testified that his full legal name is William Wesley Jacobs; that he is 37 years of age; that he had an eleventh (11th) grade education; and that he could read and write English. He denied having any medical condition, either physical or mental, which might interfere with his ability to understand and participate fully in the proceedings. Likewise, he denied using any medications or drugs which might impair his ability to understand and participate fully in the proceedings and

stated at the time that "his mind was clear." The defendant's counsel represented that he had no reservations about the defendant's competency to change his pleas and to enter pleas of guilty to the offenses charged in Counts One and Five.

The defendant testified that he had discussed the charges with his attorney and that he had previously received a copy of the Indictment against him. He testified that he understood the charges against him, and also understood that the charges were felonies. *See* Fed. R. Crim. P. 11 (b)(1)(G). Additionally, the defendant testified that he had discussed with his attorney any defenses he might have and had been given adequate time to prepare any defenses to the charges against him. He stated that he was fully satisfied with the services of his attorney and that it was his intention and desire to change his prior plea and enter pleas of guilty to Counts One and Five.

The defendant confirmed that he fully recognized and understood his right to have the Rule 11 hearing conducted by a United States district judge. He gave his verbal and written consent to proceed with the hearing before the undersigned United States magistrate judge. The defendant's written consent was filed and made a part of the record.

The attorney for the government informed the court that the defendant's proposed pleas were to be made pursuant to a written plea agreement. The government's understanding of the plea agreement was then stated in some detail including: an outline of the charges against the defendant set forth in Counts One and Five of the indictment and the range of punishment for each (¶ 1); the defendant's agreement to enter pleas of guilty to Counts One and Five (¶ 1); the defendant's

acknowledgment of the maximum sentences (¶ 1); the defendant's obligation to pay the $100.00 special assessment per felony count (¶¶ 1 and 5); the government's agreement to dismiss Counts Two, Three, and Four of the Indictment (¶ 2); the agreement of the parities to be bound by the court's determination of any sentence-related issue (¶ 3); the acceptance of responsibility provision (¶ 4); the government's agreement that once the defendant fulfills his obligations under the plea agreement, the government will recommend a sentence between the midpoint and the low end of the sentencing guidelines (¶ 6); the agreement's provision concerning any evidence proffered by the defendant (¶ 7); the defendant's waiver of his right to appeal sentence and to attack collaterally the judgment and sentence imposed by the court (¶ 8); the agreement's provision concerning the abandonment of any contraband (¶ 11); the agreement's substantial assistance provision (¶ 14); the defendant's waiver of any statute of limitations defense (¶ 12); the agreement's completion of prosecution provision (¶ 15); remedies for breaches of the plea agreement (¶ 17); and the substance of the agreement's other provisions (¶ ¶ 9,10,13,16,18-19).

Counsel for the defendant and the defendant both separately stated that their understandings of the plea agreement were the same as those set forth by the government's attorney. The defendant's counsel further represented that all of the terms of the plea agreement had been reviewed by the defendant and that he was satisfied that the defendant understood each of its terms.

The defendant was then shown the original plea agreement and affirmed it to be his signature on the document. In addition, he stated that no one had made any other different, or additional promise, or assurance of any kind, in an effort to induce him to enter pleas of guilty in this case.

Furthermore, the defendant stated that no one had attempted in any way to force him to plead guilty in this case. The plea agreement was then received, filed, and made a part of the record. The undersigned noted for the record that the written Plea Agreement constituted the best statement of its terms and as such it "speaks for itself."

The defendant was thereafter asked if he understood that he was proposing to enter guilty pleas to the charges of conspiracy to distribute 50 grams or more of cocaine base and possession with the intent to distribute 50 grams or more of cocaine base. *See* 21 U.S.C. §§ 846, 841 (a)(1) and (b)(1)(A). The defendant confirmed his understanding and testified that he knew his pleas, if accepted, would result in him being adjudged guilty of a felony. The defendant also acknowledged that such adjudication may deprive him of valuable civil rights, such as the right to vote, the right hold public office, the right to serve on a jury, and the right to possess any kind of firearm.

After the government's attorney stated the minimum possible penalties provided by law for conviction for the offenses charged in Counts One and Five, the defendant expressly acknowledged that he understood the minimum possible penalties provided by law for conviction of the felonies[1] set forth in Counts One and Five of the Indictment to be confinement in a Federal penitentiary for ten (10) years. After the government's attorney stated the maximum possible penalties provided by law for conviction for the offenses charged in Counts One and Five, the defendant expressly acknowledged that he understood the maximum possible penalties provided by law for conviction

[1]The defendant was informed that he could be sentenced to less than 10 years imprisonment only if the government makes a motion pursuant to 18 USC § 3553(a) on his behalf.

of the felonies set forth in Counts One and Five of the Indictment to be confinement in a Federal penitentiary for the remainder of his life, and a $4,000,000.00 fine for each Count. *See* Fed. R. Crim. P. 11 (b)(1)(H).

The defendant was informed and expressly acknowledged that the court's determination of his sentence would include consideration of multiple factors including: the nature and circumstances of the offense; the defendant's history and characteristics; the seriousness of the offense; the need to promote respect for the law; the need to provide for just punishment and afford adequate deterrence; the need to protect the public; any determined need to provide the defendant with education, vocational training, medical care or other correctional treatment in the most efficient manner; the kinds of available sentences; the pertinent sentencing guidelines and policy statements; the need to avoid unwanted sentence disparities; and any need to provide for restitution. The defendant recognized and understood that the court may order him to make full restitution to any victim and may require him to forfeit certain property to the government. *See* Fed. R. Crim. P. 11 (b)(1)(J)-(K). He acknowledged that in the event the government was seeking forfeiture of property, it could seek forfeiture of substitute assets and he was waiving his rights to a jury determination of forfeitability and to appeal any issues of proportionality. He also stated that he knew he would be required to pay a mandatory One Hundred Dollar ($100.00) special assessment per felony Count. *See* Id. at 11 (b)(1)(L).

The defendant testified that he and his attorney had talked about how the Sentencing Commission Guidelines might apply to his case, including the obligation of the court to consider

these Guidelines and the court's discretion to depart from them under certain circumstances and in accordance with applicable court decisions. *See* Id. at 11 (b)(1)(M); United States v. Booker, 543 U.S. 220 (2005). Furthermore, he acknowledged that he understood that the court would not be able to determine the recommended guideline sentence for his case until after the presentence report had been completed and he and the government each had an opportunity to challenge the facts reported by the probation officer. He acknowledged that he understood, irrespective of any sentence imposed by the court, he would have absolutely no right to withdraw his pleas of guilty. He was informed and acknowledged that upon release from prison at the conclusion of any sentence of imprisonment, he could be obligated to serve a significant term of supervised release and if he violated the terms of the supervised release it could result in his being returned to prison for an additional period of time.

He expressly acknowledged that by pleading guilty he was giving up his rights to have a jury determine beyond a reasonable doubt any of the facts alleged in Counts One and Five, including those relating to sentencing. The defendant stated that he fully understood that, pursuant to the terms of the plea agreement, he was waiving any right to appeal his convictions, any right to appeal any sentencing guideline issues, any right to appeal any sentence of the court within the guideline range on the ground that it is unreasonable, and any right to challenge his convictions or his sentences in any post-conviction proceeding.

Each of the defendant's procedural rights surrendered on a plea of guilty were also explained including: his right to persist in his previous plea of not guilty to the offenses charged; his attendant

right to a trial by jury; his right to be represented by counsel at trial and at every other stage of the proceeding; his right at trial to see, hear, confront, and to have cross examined all adverse witnesses; his right to be protected from compelled self incrimination; his right to testify and to present evidence in his defense; his right to the issuance of subpoenas, compulsory process or to compel the attendance of witnesses to testify in his defense; his presumption of innocence; the obligation of the government to prove his guilt beyond a reasonable doubt; the right on his part to decline to testify unless he voluntarily elected to do so in his own defense; and his right to have a unanimous guilty verdict. *See* Fed. R. Crim. P. 11 (b)(1)(F).

In response to further questioning to ensure that his proposed plea was voluntary, the defendant again stated that (other than the promises expressly set forth in the written plea agreement) his pleas did not result from any force, threats, or promises of any kind, that his decision to plead guilty was in fact fully voluntary on his part and that it was being made with the advice and assistance of counsel. *See* Id at 11 (b)(2).

The defendant stated that he was in fact guilty of voluntarily participating in a scheme to distribute significant amounts of crack cocaine in the Harrisonburg, Virginia area as alleged in Counts One and Five of the indictment.

To permit the court to determine that an independent factual basis existed for the defendant's guilty plea, counsel for the government made an oral proffer summarizing the principal facts which

the government was prepared to prove at trial. The defendant and his counsel then separately stated that the government's written proffer fairly summarized the government's evidence.

After consultation with his attorney, the defendant waived a reading of the Indictment and entered pleas of GUILTY to Count One alleging his violation of Title 21, United States Code, § 846, and to Count Five alleging his violations of Title 21, United States Code, Sections 841 (a)(1), and (b)(1)(A).

After entering his pleas as aforesaid, after an independent basis for the pleas was established, and after being informed that the undersigned would recommend acceptance of his aforesaid pleas, the defendant reiterated that his pleas were fully voluntary and that he was fully satisfied with the advice, assistance and services of his attorney. The undersigned thereafter directed the preparation of a presentence report and the defendant was remanded to the custody of the United States Marshal pending its completion.

B. GOVERNMENT'S EVIDENCE

Pursuant to its oral proffer, the government was prepared at trial to establish beyond a reasonable doubt that William Wesley Jacobs engaged in a conspiracy to distribute 50 grams or more of cocaine base, and knowingly and intentionally possessed with the intent to distribute 50 grams or more of cocaine base.

On August 27, 2007 investigators with the Virginia State Police and the local Drug Task Force were notified by an informant that William Wesley Jacobs was a distributor of crack and powdered cocaine in the Harrisonburg, Virginia area.

On August 30, 2007 the informant telephoned Jacobs and made arrangements to purchase a quarter ounce of crack cocaine for $375.00 on consignment. The informant met with Jacobs on August 30, 2007 in the parking lot of Food Lion on Virginia Avenue in Harrisonburg. The informant got into the defendant's car and purchased approximately one-quarter ounce of crack cocaine from Jacobs for $375.00 on consignment. Law enforcement officers surveilled the informant to and from the informant's meeting with Jacobs and electronically monitored and recorded their conversation. The crack cocaine was submitted to the DEA Mid-Atlantic Laboratory for chemical analysis and was determined to be 4.8 grams of cocaine base.

On August 31, 2007, the informant telephoned Jacobs and arranged to meet Jacobs for the purposes of paying Jacobs $375.00 for the August 30 purchase and to purchase an additional one-half ounce of crack cocaine for $750.00 on consignment. On August 31, 2007 the informant met with Jacobs in the Food Lion parking lot . The informant got into the defendant's 1992 Toyota and drove onto Birch Street. The informant paid Jacobs $375.00 for the previous 4.8 grams of crack cocaine. The informant purchased an additional one-half ounce for $750.00 on consignment. The informant and Jacobs drove back to the Food Lion. Law enforcement officers surveilled the informant to and from the informant's meeting with Jacobs and electronically monitored and

recorded their conversation. The suspected crack cocaine was subsequently submitted to the DEA Mid-Atlantic Laboratory for chemical analysis and was determined to be 11.5 grams of cocaine base.

On August 31, 2007, the informant telephoned Jacobs and made arrangements to pay Jacobs $750.00 for the August 31, 2007 purchase of the 11.5 grams of crack cocaine and to purchase one-half ounce of crack cocaine for $750.00 on consignment. While under surveillance by law enforcement, the informant met with Jacobs inside the Food Lion grocery and paid Jacobs for the earlier purchase that day of $750.00 and to purchase another one-half ounce of suspected crack cocaine from Jacobs on consignment. The second August 31, 2007 purchase was determined by the DEA Mid-Atlantic Laboratory to be 11.3 grams of cocaine base.

On September 5, 2007 the informant telephoned Jacobs and made arrangements to meet with Jacobs for the purposes of paying him the $750.00 for the August 31, 2007 purchase of 11.3 grams of crack cocaine and to purchase additional crack cocaine on consignment. On September 5, 2007 Jacobs arrived at the Food Lion in a 2002 Oldsmobile. The informant got into the front passenger seat with Jacobs and paid Jacobs the $750.00 for the 11.3 grams of crack cocaine and then agreed to purchase an ounce of crack for $1500.00. Later that day, investigators observed Jacobs enter the Food Lion parking lot driving the 2002 Oldsmobile. The informant and a law enforcement investigator drove past Jacobs and the informant positively identified Jacobs as the driver.

After stopping and detaining the defendant, a search of his vehicle disclosed a digital scale in the center console. Jacobs was informed of his Miranda rights and agreed to be interviewed. He

thereafter informed law enforcement officers that he was currently in possession of a quantity of crack cocaine. A search of Jacobs' person revealed $750.00 and an amount of crack cocaine. Jacobs admitted that he was at the Food Lion to deliver the crack cocaine to the informant and that he had two to three ounces of crack cocaine stored at his residence. Jacobs voluntarily accompanied law enforcement to his residence and gave verbal consent to search his apartment.

The September 5, 2007 search of Jacobs' apartment revealed a Honeywell safe underneath the defendant's bed. Within the safe were several bags containing crack cocaine and a digital scale. Jacobs provided investigators with the name and cell phone numbers of his crack cocaine source of supply and told officers that he purchased 4 ½ ounces of crack from his Norfolk, Virginia supply source. The suspected crack cocaine seized from Jacobs' person and apartment were subsequently submitted to the DEA Mid-Atlantic Laboratory for chemical analysis. The crack cocaine seized from Jacobs' person totaled 50.3 grams of cocaine base and the crack cocaine seized from the apartment totaled 77 grams of cocaine base.

C. FINDINGS OF FACT

Based on the evidence, representations of counsel, and defendant's sworn testimony presented as part of the Rule 11 hearing, the undersigned submits the following formal findings of facts, conclusions and recommendations:

1. The defendant is fully competent and capable of entering informed pleas of guilty;

2. The defendant is fully aware of the nature of the charges and the consequences of his guilty pleas;

3. The defendant is fully informed and he understands the enumerated items set forth in Rule 11 (b)(1)(A)-(N);

4. Before entering his pleas of guilty, the defendant and the government reached a plea agreement which was reduced to writing;

5. The defendant's entry into the written plea agreement and his tender of pleas of guilty to Counts One and Five were made with the advice and assistance of counsel;

6. The defendant's entry of pleas of guilty to Counts One and Five were made with knowledge and an understanding both of the nature of the offenses and the full range of punishments which might be imposed;

7. The defendant's pleas of guilty are fully voluntary and did not result from any force, threats, or promises other than those contained in the plea agreement;

8. The plea agreement complies with the requirements of Rule 11 (c)(1);

9. The evidence presented by the government established an independent basis in fact supporting the offenses to which the defendant is pleading guilty, including *inter alia* proof of the offense elements, venue, drug weights, "crack" cocaine content, and criminal intent; and

10. The government's motion to dismiss Counts Two, Three and Four should be granted.

D. RECOMMENDED DISPOSITION

Based on the above findings of fact, the undersigned RECOMMENDS that the court accept the defendant's pleas of guilty to Counts One and Five, that the defendant be ADJUDGED GUILTY of these offenses, that the government's motion to dismiss Counts Two, Three And Four be granted, and that a sentencing hearing be scheduled before the presiding district judge on August 18, 2008 at 2:00 p.m.

E. NOTICE TO PARTIES

Notice is hereby given to the provisions of 28 U.S.C. § 636 (b)(1)(c). Within ten (10) 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 the rules of this court. The presiding district judge shall make a *de novo* determination of those portions of the report, specified findings, or recommendations to which an objection is made. The presiding judge may accept, reject, or modify, in whole or in part, the findings or recommendations made by the undersigned. The presiding district judge may also receive further evidence or recommit the matter to the undersigned with instructions.

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

The clerk is directed to transmit a copy of this Report and Recommendation to all counsel of record.

DATED: 13th day of June 2008.

s/ James G. Welsh
United States Magistrate Judge