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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. 5:07CR00063-2
v.	)	REPORT AND RECOMMENDATION
ERIC IVAN GIL SESENA, *Defendant*	)	By: James G. Welsh U.S. Magistrate Judge

The Grand Jury previously returned a Superseding Indictment ("Indictment") on December 12, 2007 charging this defendant in Count One with willfully and knowingly combined, conspired, confederated and agreed with persons known and unknown, to manufacture, distribute and possess with intent to distribute more than five kilograms of a mixture or substance containing cocaine HCL, and more than 50 grams of a mixture or substance containing cocaine base ("crack cocaine"), and more than 50 grams of pure methamphetamine, Schedule II narcotic controlled substances in violation of 21 U.S.C. § 846. The Grand Jury also charged the defendant in Counts Eleven, Twenty-Seven, Twenty-Nine, Thirty-Seven, Forty-Seven, Forty-Eight and Fifty-Five with separate counts of knowingly and willfully distributing and possessing with intent to distribute, either as the principal or as the aider and abetter, a measurable quantity of a mixture or substance containing cocaine HCL, on seven separate occasions between February 1 and November 9, 2007, each in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C).

The defendant was previously arraigned and entered pleas of Not Guilty to Counts One, Eleven, Twenty-Seven, Twenty-Nine, Thirty-Seven, Forty-Seven, Forty-Eight and Fifty-Five. The defendant having now indicated an intent to change his plea to one of the charges, this case was 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 July 25, 2008. The defendant was at all times present in person and with his counsel, Peter T. Hansen. The defendant was provided with a Spanish language translator who was placed under oath to provide an accurate translation of the proceedings. The United States was represented by Donald Ray Wolthuis, 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 plea, and the defendant entered a plea of guilty to Count One 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 Eric Ivan Gil Sesena; he is 23 years of age; he has a ninth grade education in Mexico; and he can neither read nor write English. However, the defendant confirmed that he could fully understand the proceedings with the help of the Spanish language translator. In response to further questioning concerning his capacity to participate fully in the proceedings, the defendant denied having any medical condition, either physical or mental, which might interfere with his ability to understand and participate fully in the proceedings; he denied using any medications or drugs which might impair his ability to understand and participate fully in the proceedings, and he 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 plea and to enter a plea of guilty to the offense charged in Count One.

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 he 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 he might have to the charges against him in the Indictment. He also 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 to Count One and enter a plea of guilty to the offense alleged therein.

The defendant confirmed that he fully recognized and understood his right to have the Rule 11 hearing conducted by a United States district judge. After the written waiver form was fully translated and read to the defendant, 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 plea was 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 the Indictment, and the range of punishment for each (¶ 1); the defendant's agreement to enter a plea of guilty to Count One (¶ 2); the defendant's acknowledgment of both the mandatory minimum and maximum sentence for the offense charged in Count One (¶¶ 1 and 2); the defendant's obligation to pay the $100.00 special assessment (¶¶ 2 and 7); the government's agreement to dismiss the remaining Counts of the Indictment alleged against the defendant (¶ 3); the parties' agreement to be bound by the court's factual determination of relevant drug weights for purposes of Guideline sections 2D1.1 and 1B1.2 (¶ 4); the agreement's provision pertaining to the defendant's offense role (¶ 5); the acceptance of responsibility provision (¶ 6); the agreement's provision concerning any evidence proffered by the defendant (¶ 8); the defendant's waiver of his right to appeal his sentence and to attack collaterally the judgment and sentence imposed by the court (¶¶ 10 and 11); the defendant's waiver of any statute of limitations defense (¶ 14); the agreement's substantial assistance provision (¶ 16); the agreement's forfeiture provision (¶ 17); and the substance of the agreement's other provisions (¶¶ 9, 12-13, 15, and 18-21).

Counsel for the defendant and the defendant each stated separately that their understanding of the plea agreement were the same as those set forth by the government's attorney. Defendant's counsel further represented that all of the terms of the plea agreement had been fully translated and 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 a plea of guilty in this case. He also stated that no one had attempted in any way to force him either to enter into the plea agreement or 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 a guilty plea to the charge of conspiring to distribute more than five kilograms of a substance containing Cocaine HCL, in violation of 21 U.S.C. § 846. The defendant confirmed his understanding and testified that he knew his plea, if accepted, would result in him being adjudged guilty of a felony. He 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 penalty provided by law for conviction under Count One of the Indictment, the defendant expressly acknowledged that he understood ten years confinement in a federal penitentiary to be the minimum sentence for the said offense.[1]

After the government's attorney stated the maximum penalty provided by law for the offense charged in Count One, the defendant expressly acknowledged that he understood the maximum possible penalty provided by law for conviction of the felony set forth in Count One of the Indictment to be confinement in a federal penitentiary for life and a $4,000,000.00 fine. *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 sentencing disparities; and any need to provide for restitution.

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[1] The defendant was informed that he could be sentenced to less than ten years imprisonment if the government makes a motion pursuant to 18 U.S.C. § 3553(e) on his behalf, or if he qualifies for the "safety valve" set forth in 18 U.S.C. § 3553 (f).

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. *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). In addition, 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 plea 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 Count One, 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 conviction, 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 conviction or his sentence 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 offense 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 proposed plea 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). In addition, the defendant stated under oath that he was in fact guilty of the offense charged in Count One of the Indictment.

After consultation with his attorney, the defendant waived a reading of the Indictment and entered a plea of GUILTY to Count One alleging the defendant's violation of Title 21, United States Code, Section 846.

To permit the court to determine that an independent factual basis existed for the defendant's guilty plea to Count One, 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 oral proffer fairly summarized the government's evidence.

After entering his plea as aforesaid, after an independent basis for the plea was established, and after being informed that the undersigned would recommend acceptance of his aforesaid plea, the defendant reiterated that his plea was fully voluntary and that he was fully satisfied with the advice, assistance and services of his attorney.

The preparation of a presentence report was directed, 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 this defendant, Eric Ivan Gil Sesena, was a central participant in a conspiracy to distribute a large amount of cocaine HCL in the Winchester, Virginia area from November 2006 to November 2007. On November 15, 2007, over eight kilograms of cocaine were recovered from the defendant and various of his co-conspirators. Testimony from one of the defendant's co-conspirator, Isidro Hernandez-Hernandez, would show that between November 2006 and May 2007 he brought tens of kilograms of cocaine from North Carolina to the Winchester, Virginia area for distribution. This large amount of cocaine was then redistributed by the various co-conspirators in this case, including the defendant.

The government proffered that various co-conspirators would testify and reveal the defendant's involvement in the drug trafficking conspiracy. For example, Leonardo Flores-Lopez would testify that he provided cocaine to the defendant for distribution. Similarly, Kevin Vince Stottlemyer, Jr., would testify that he bought cocaine from the defendant on at least ten occasions. Likewise, Patrick Jeffery Egan and Philip Lowell Lockhart, co-defendants case no. 5:07cv00037, would provide additional testimony about their purchase of significant amounts of cocaine from the defendant on numerous occasions. Counsel for the government also noted that co-conspirators Alejandro Quiroz Guerrero and Dustin Scott Files would each testify that he was supplied cocaine by the defendant.

In addition to the testimony of these individuals, the government's evidence would implicate the defendant in each of the controlled cocaine purchases outlined in Counts Eleven, Twenty-Seven, Twenty-Nine, Thirty-Seven, Forty-Seven, Forty-Eight, and Fifty-Five. The Count Eleven purchase

was on February 1, 2007; on that occasion a confidential informant who purchased 3.73 grams of cocaine HCL from the defendant. The Count Twenty-Seven purchase was on July 13, 2007; on that occasion the confidential informant contacted the defendant for the purposes of purchasing $250.00 worth of cocaine which was later delivered by a third individual; it was determined to be 3.6 grams of cocaine HCL. The Count Twenty-Nine purchase was on July 24, 2007; on that occasion an undercover officer and the confidential informant contacted the defendant for $200 worth of cocaine which was later delivered by the defendant's brother and found to be 4.7 grams of cocaine HCL. The Count Thirty-Seven purchase was on August 29, 2007; on that occasion the undercover officer and the confidential informant purchased 45.5 grams of cocaine for $2200.00 directly from the defendant. The Count Forty-Seven purchase was on October 10, 2007; on that occasion the defendant personally sold the undercover officer and confidential informant 48.8 grams of cocaine for $2300.00. The Count Forty-Eight purchase was made on November 2, 2007, and on that occasion the confidential informant and undercover officer negotiated a purchase of 26.9 grams of cocaine for $1200.00 from the defendant which his brother later delivered. Finally, the Count Fifty-Five purchase was made on November 9, 2007; on that occasion the confidential informant negotiated a 4.3 gram purchase of cocaine for $250.00 with the defendant which co-conspirator Jose Ginez Hernandez subsequently delivered. The content and weight of all drugs were confirmed by laboratory analysis.

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 an informed plea of guilty;

2. The defendant is fully aware of the nature of the charge and the consequences of his guilty plea;

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 plea 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 a plea of guilty to Count One were made with the advice and assistance of counsel;

6. The defendant's entry of a plea of guilty to Count One was made with knowledge and an understanding both of the nature of the offense and the full range of punishment which might be imposed;

7. The defendant's plea of guilty is 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); and

9. The evidence presented by the government established an independent basis in fact supporting the offense to which the defendant is pleading guilty, including *inter alia* proof of the offense elements, venue, laboratory analysis, and criminal intent.

D. RECOMMENDED DISPOSITION

Based on the above findings of fact, the undersigned RECOMMENDS that the court accept the defendant's plea of guilty to Count One, that the defendant be ADJUDGED GUILTY of this offense, that the government's motion to dismiss the remaining Indictment charges against the

defendant be GRANTED, and that a sentencing hearing be scheduled before the presiding district judge on October 2, 2008 at 10:00 a.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 or specified findings or recommendations to which an 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 presiding district 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 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: 14th day of August 2008.

s/ James G. Welsh
United States Magistrate Judge