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

UNITED STATES OF AMERICA	)	
	)	CASE No. 5:07cr00063-14
Plaintiff	)	
v.	)	**REPORT AND RECOMMENDATION**
	)	
RANDI OJEDA POOT,	)	
	)	By: Hon. James G. Welsh
Defendant	)	U.S. Magistrate Judge
	)	

The Grand Jury previously returned a Superseding Indictment ("Indictment") charging this defendant in **Count One** with knowingly combining, conspiring, confederating, and agreeing with diverse persons, both known and unknown to the Grand Jury, to manufacture, distribute, and possess with the intent to distribute, more than five kilograms of a mixture or substance containing Cocaine HCL and more than fifty (50) grams of a mixture or substance containing cocaine base (commonly called "crack"), Schedule II narcotic controlled substances, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A), all in violation of Title 21, United States Code, Section 846; in **Count Forty-Three** with the knowing and willful distribution and possession with intent to distribute, a measurable quantity of a mixture or substance containing Cocaine HCL, a Schedule II narcotic controlled substance, on or about October 2, 2007, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(C); and in **Count Forty-Four** with aiding and abetting and with the knowing and willful distribution and possession with intent to distribute more than five(5) grams of a mixture or substance containing Cocaine HCL, a Schedule II narcotic controlled

substance, on or about October 10, 2007, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(B), and Title 18, United States Code, Section 2.

The defendant was previously arraigned and entered pleas of Not Guilty to each of these charges. The defendant having now indicated an intent to change one of his pleas, 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 April 30, 2008. The defendant was at all times present in person and with his counsel, Barbara S. Jenkins. The United States was represented by Donald R. Wolthuis, Assistant United States Attorney. The proceedings were recorded by a court reporter. *See* Rule 11(g), Federal Rules of Criminal Procedure. Also present was a properly qualified Spanish language interpreter for the defendant whom the defendant could understand and who could understand him. *See* Rule 28.

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.

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 statement that he gives under oath. *See* Rule 11(b)(1)(A).

The defendant testified that his full legal name is Randi Ojeda Poot, that he is twenty-nine (29) years of age, that he completed high school in Mexico, and that he can neither read nor write English. He understands it only "a little bit;" however, he is able to understand and participate fully in the proceedings with the assistance of the Spanish language interpreter. He denied having any medical condition, either physical or mental, which might interfere with his ability to understand and participate fully in the proceedings; he similarly denied using any medication or drugs which might impair his ability to understand and participate fully in the proceedings, and he stated that his mind was clear. Counsel for the defendant represented that she 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 and that it had been fully translated and read to him. He testified that he understood each of the charges against him, and he understood that each was a felony. *See* Rule 11(b)(1)(G). He also testified that he had discussed any defenses he might have and had been given adequate time to prepare any defenses he might have to the charges contained in the Indictment. He stated that he was fully satisfied with the services of his attorney,

and that it was his intention and desire to change a prior plea and to enter a plea of guilty to one of the charges pending against him.

The defendant confirmed that he fully recognized and understood his right to have the Rule 11 hearing conducted by a United States district judge, and he gave his verbal and written consent to proceed with the hearing before the undersigned United States magistrate judge. The defendant's written consent [1] 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 this defendant set forth in the Indictment and the range of punishment for each (¶ 1); the defendant's agreement to plead guilty to the charge set forth in Count One [2] (¶ 2); the defendant's acknowledgment of the maximum and applicable mandatory minimum sentence for the offense set forth in Count One(¶ 2); the government's agreement to request the dismissal of the remaining charges against this defendant at the time of sentencing (¶ 3); the parties' agreement to be bound by the court's factual determination of drug weight for purposes of Guideline sections 2D1.1 and 1B1.3 (¶ 4); the agreement's provision pertaining to the defendant's offense role (¶ 5); the "acceptance of responsibility" provision (¶ 6); the sentencing recommendation provision (¶ 7); the government's

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[1] Before executing his written consent, it was fully translated and read to the defendant by the interpreter.

[2] Counsel for the government noted for the record that this defendant was essentially a street level dealer and a low level participant in the conspiracy.

agreement for the defendant, if qualified, to have the benefit of the "safety valve" provision of Guideline section 5C1.2 (¶ 8); [3] the defendant's obligation to pay a One Hundred Dollar ($100.00) special assessment (¶ 9); the provision relating to any proffer of evidence by the defendant (¶ 10); the defendants's duty to provide a financial statement (¶ 11); the terms of the defendant's waiver of his right to appeal either his conviction or any sentencing guideline issues (¶ 12); the terms of the defendant's waiver of his rights to attack collaterally either his conviction or any part of the sentence which might be imposed by the court (¶ 13); the terms of the defendant's waiver of any right to access investigation or prosecution records (¶ 14); the agreement's substantial assistance provision (¶ 18); the agreement's provisions pertaining to the forfeiture of assets and contraband (¶¶ 15 and 19); and the substance of the agreements other terms (¶¶ 16, 17, and 20 through 23).

Counsel for the defendant and the defendant then separately stated that their understanding of the plea agreement was the same as that set forth by the government's attorney. Counsel for the defendant further represented that all of the terms of the plea agreement had been translated and reviewed with the defendant and that she was satisfied that the defendant understood each of its terms. The defendant was then shown the original of the plea agreement; and he affirmed it to be his signature on the document, and he confirmed that it had been previously fully translated and read to him. In addition, he stated that no one had made any other, different or additional promise or assurance of any kind in a effort to induce him to enter a plea of guilty in this case and that no one had attempted in any way to force him to plead guilty in the case. The plea agreement was then

[3] In his outline of this provision of the agreement, counsel for the government noted that "it appeared [the 'safety valve'] may well apply" in the defendant's case.

received, filed, and made a part of the record, and 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 testified that he knew his plea, if accepted, would result in him being adjudged guilty of a felony offense and that such adjudication may deprive him of valuable civil rights, such as the right to vote, the right to hold public office, the right to serve on a jury, and the right to possess any kind of firearm. He also expressly acknowledged that he was proposing to enter a plea of guilty to Count One of the Indictment which charged him with the specific conspiracy offense set forth above and also set forth in paragraphs 1 and 2 of the written plea agreement.

After the attorney for the government stated the mandatory minimum penalty provided by law for the offense charged in Count One of the Indictment, the defendant acknowledged unequivocally that he fully understood ten (10) years imprisonment to be the mandatory minimum penalty[4] which the court would be required to impose if his plea of guilty is accepted to Count One. *See* Rule 11(b)(1)(I).

After the attorney for the government stated the maximum possible penalty provided by law for the offense charged in Count One of the Indictment, 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 the remainder of his

[4] The defendant was informed that a sentence of less than the mandatory minimum, however, was possible only if the government in its discretion chose to make a motion pursuant to 18 U.S.C. § 3553(a) on his behalf or if he qualifies for the "safety valve" set forth in 18 U.S.C. § 3553(f).

life, and a $4,000,000.00 fine. *See* Rule 11(b)(1)(H). He also stated that he knew that he would be required to pay a mandatory One Hundred Dollar ($100.00) special assessment. *See* Rule 11(b)(1)(L).

The defendant was informed, and he 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 educational or 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. He acknowledged that he 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* Rule 11(b)(1)(J)–(K).

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* Rule 11(b)(1)(M); *United States v. Booker*, 543 U.S. 220 (2005). In addition, he acknowledged that he understood 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 parole had been abolished and that he would not be released on parole. Likewise, he acknowledged that upon release from prison at the conclusion of any sentence of imprisonment, he would be obligated to serve a significant term of supervised release which could include a specific condition that he be deported and remain outside the United States in accordance with 18 U.S.C. § 3583(d), and he stated that he understood that any violation of the terms of supervised release could result in his being returned to prison for an additional period of time.

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. *See Libretti v. United States*, 516 U.S. 29 (1995) and *Austin v. United States*, 509 U.S. 602 (1993). He expressly acknowledged that by pleading guilty he was giving-up his right to have a jury determine beyond a reasonable doubt any of the facts alleged in Count One, including those that may relate to sentencing. In addition, he 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 not reasonable, 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 was also explained, including: his right to persist in his previous pleas of not guilty to the offenses charged against him;

his attendant right to a trial by jury and right to be represented and to have the assistance of counsel at trial and at every other stage of the proceeding; his right at trial to see, to hear, to 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, or compulsory process, 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* Rule 11(b)(1)(B)–(E). The defendant testified that he understood his right to persist in his pleas of not guilty and the attendant rights that he would waive upon entry of a guilty plea to Count One. *See* Rule 11(b)(1)(F).

The defendant then stated under oath that he was pleading guilty because he was in fact guilty of the crime charged in Count One of the Indictment, and he stated that there was "no doubt" about his guilt.

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 plea did not result from any force, threats, or promises of any kind (*See* Rule 11(b)(2)), 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.

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 oral proffer fairly summarized the government's evidence.

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.

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 of guilty was fully voluntary and that he was fully satisfied with the advice, assistance and services of his attorney. He expressed how "thankful [he was] for all she had done for him," and he said that he "thanked God for her help."

In addition, he told the court that "[he] had made a mistake," that he had no money and got involved because of "a need at home," that "[he] apologized to the United States," that "[he] wanted to be punished for what [he] did," and that "[he] asked only to be judged as a human being."

After directing the preparation of a presentence report, the defendant was then 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, as part of the conspiracy, this defendant was a lower ("street") level dealer and was affiliated with other defendants on two controlled buys. The first of which was a 1.15 gram transaction on October 2, 2007, and the second was a 10.1 gram transaction on October 10, 2007. Both transactions occurred in Frederick County, Virginia. At the time of his arrest, this defendant had in excess of Seven Thousand dollars in his possession, the majority of which represented the proceeds of illegal drug transactions.

The scope of the conspiracy was such that it involved bringing 10s of kilos of cocaine (HCL) to the Winchester area between November 2006 and November 2007. Some of which was sold in its powdered form (cocaine HCL) and some of which was "cooked" and sold as "crack" (cocaine base). All relevant drug weights and proof of the Cocaine HCL content of all relevant drug seizures were confirmed by laboratory analysis.

Counsel for the defendant additionally noted that this defendants participation in the conspiracy came only near its end, that he succumbed due to necessitous circumstances at home, and that he was very remorseful.

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 fact, 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 was 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 analyses, 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 Counts Forty-Three and Forty-Four be granted,

and that a sentencing hearing be scheduled before the presiding district judge on July 24, 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: 12th day of May 2008.

s/ James G. Welsh
United States Magistrate Judge