

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8457
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JOHN BRETT ALLEN,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(A 91 CA 259 (A 80 CR 35 (01)))

January 13, 1994

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

John Allen appeals the denial of his motion, made pursuant to 28 U.S.C. § 2255, to set aside or correct his sentence. Concluding that there is a need for further development in this case, we vacate and remand.

* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Allen pleaded guilty to aiding and abetting the importation of approximately 600 pounds of marihuana in violation of 18 U.S.C. §§ 960(a)(1), 952(a), and 2 (count 11) and aiding and abetting the failure to report the transportation of U.S. currency from the United States into Mexico in violation of 31 U.S.C. §§1101(a) and 1059 and 18 U.S.C. §2 (count 13). The district court imposed a pre-Sentencing Guidelines sentence of five years' imprisonment on each count and a special parole term of ten years on count 11. The sentences were consecutive to any sentence he was then serving.

Allen did not appeal his conviction and sentence but filed a motion to modify his sentence under former FED. R. CRIM. P. 35(b). The district court denied the motion, and Allen filed a notice of appeal. The record is devoid of any information concerning the appeal.

Approximately ten years later, Allen filed a motion under § 2255, seeking to withdraw his guilty plea because the government had failed to "honor its obligations" under the plea agreement. He alleged that the government had agreed that he would suffer no adverse effect from the dismissed counts of the indictment; the United States Parole Commission, however, had considered the dismissed counts in denying parole.¹ The district court denied

¹ Allen challenged the decisions of the Parole Commission denying parole on two occasions under 28 U.S.C. §2241. See Allen v. Hadden, 536 F. Supp. 586 (D. Colo. 1982); Allen v. Haddon [sic], 558 F. Supp. 400 (D. Colo. 1983). The Commission appealed, and the decision of the district court in the second case (continued...)

relief, stating that it had no jurisdiction to hear the § 2255 motion because Allen had not complied with the available administrative procedures.

II.

A.

Allen argues that the district court erred in deciding that his § 2255 motion was not properly before it. He contends that the district court misconstrued his argument as an attack on the execution of his sentence and that it accordingly instructed that Allen first must exhaust his administrative remedies under 28 C.F.R. §§ 542.10 et seq. Allen asserts that he is not challenging the actions of the Parole Commission. He argues that he challenged the validity of his conviction because the government breached the terms of the plea agreement.

"[I]f a prisoner's guilty plea is base `in any significant degree' on a prosecutor's promise which reasonably may be said to be part of the consideration for the agreement, that promise must be fulfilled." United States v. Birdwell, 887 F.2d 643, 645 (5th Cir. 1989) (quoting Santobello v. New York, 404 U.S. 257, 262, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971)). "The breaking of such a promise may be grounds for vacating a conviction or granting other relief under section 2255." Id.

Allen's § 2255 motion alleged that a breach of the plea

(...continued)
was reversed in Allen v. Hadden, 738 F.2d 1102 (10th Cir. 1984).

agreement invalidated his conviction. Therefore, the motion was properly before the district court.

III.

Allen argues that the government breached the plea agreement by submitting information concerning the dismissed charges of the indictment to the Parole Commission even though the government promised that he would suffer no adverse effect from the dismissed charges. Allen also argues that the State of Texas breached its plea agreement, which was incorporated in the agreement with the government, in several respects.

"Whether the government's conduct violated the terms of the plea agreement is a question of law." United States v. Palomo, 998 F.2d 253, 256 (5th Cir.), cert. denied, 114 S. Ct. 358 (1993) (internal quotation and citation omitted). "In determining whether there has been a breach of the plea agreement, we must determine whether the government's conduct is consistent with the defendant's reasonable understanding of the agreement." Id. (internal quotations and citation omitted). If the government's promise "can be said to part of the inducement or consideration," the promise must be fulfilled. Id. (quoting Santobello, 404 U.S. at 262). Moreover, if a state plea offer is incorporated into the federal plea agreement, the breaking of promises by the state authorities may affect the voluntariness of the federal plea if the state's promises were significant in inducing the defendant to plead guilty to the federal charge. Birdwell, 887 F.2d at 645.

In exchange for Allen's guilty plea, the government agreed inter alia, (1) to dismiss the remaining counts in the indictment if Allen agreed to testify at his co-defendant's trial and (2) to refrain from prosecuting Allen based upon information obtained from his cooperation. Allen further agreed to plead guilty to state charges in accordance with an agreement with the State of Texas. Paragraph 15 of the plea agreement specifically addressed the role of the Parole Commission:

The Government agrees that there is nothing present in the facts of this case to warrant a recommendation from the Government or its agents or the DEA or its agents to the United States Parole Commission that Defendant should be handled by the Parole Commission outside the normal regulations and guidelines which control their decision-making process. In other words, the Government will not interfere with the Parole Commission's normal considerations. This should not be considered, however, to mean that the United States Attorney's office is making a specific recommendation as to leniency.

At the re-arraignment, the government presented the terms of the plea agreement to the district court, and the district court accepted the agreement. Defense counsel stated,

That's our understanding, Your Honor, and that at the time of sentencing if the Court accepts the plea, that the Government will move to dismiss the remaining counts of the indictment, and they would have no adverse effect on the defendant, and the counts will be dismissed with prejudice as I understand it, at the time of sentencing.

The government acknowledged that the statement was correct.

In his "Response to Government's Response to Petitioner's Traverse and Request for Reconsideration," Allen presented defense counsel's affidavit in support of his allegations, stating the

following:

Although not mentioned in the written plea agreement, it was Mr. Allen's understanding and my understanding that all remaining counts in the indictment in A-80-Cr-35 would be dismissed (and in fact were dismissed at the time of sentencing) and that the dismissed counts would have no adverse effect on Mr. Allen in the future. I believe that I mentioned this to the Court at the time of his sentencing and that the prosecutor agreed with this.

The purpose for mentioning that the dismissed counts would have no adverse effect was to insure that the United States Parole Commission would not use dismissed counts in calculating Mr. Allen's release date on parole.

I attended the initial parole hearing with Mr. Allen in Englewood FCI, Colorado. The Parole Commission did use the dismissed counts in calculating his presumptive release date. It is my opinion that the Parole Commission by its actions bypassed or attempted to circumvent the plea bargain in the federal case in Austin.

As to the incorporated plea agreement with the State of Texas, defense counsel stated that the prosecutor in the federal case had required Allen to plead guilty in the state case as part of the plea bargain in the federal case.

Accordingly, there are questions whether the broad statement made by defense counsel at re-arraignment contemplated future actions by the Parole Commission and induced Allen in any significant degree to plead guilty. Moreover, it cannot be determined, from this record, whether the state agreement induced Allen to plead guilty in the federal case or whether the state breached its promises.

We do not make factual assessments in the first instance. Birdwell, 887 F.2d at 645. "Under the mandate of section 2255, the district court must make findings of fact and conclusions of law

unless the motion, files, and record conclusively show that the prisoner is entitled to no relief." Id. (internal quotation and citations omitted). An evidentiary hearing is warranted when the petition "is based on an unkept promise in a plea agreement, and [the] petition contains specific factual allegations, not directly contradicted in the record, of circumstances undermining [the] plea." Id. (internal quotation and citations omitted). Thus, we VACATE the judgment and REMAND for further proceedings.