IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-60341

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROLANDO MORGAN-GARCIA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(93 CR 241 11)

(October 5, 1995)

Before HIGGINBOTHAM, DUHE, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Rolando Morgan-Garcia appeals from the judgment of conviction and sentence entered by the United States District Court on May 9, 1994. We have jurisdiction, 28 U.S.C. § 1291, and we affirm.

I.

On March 2, 1993, in United States District Court for the Southern District of Texas, McAllen Division, Morgan-Garcia pled

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*Local Rule 47.5 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

guilty to conspiracy to possess with intent to distribute more than 100 kilograms of marihuana in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1), 846. He was sentenced to sixty-three months imprisonment. The McAllen conviction, which is not the subject of this appeal, arose from a conspiracy among six individuals during October 10-12, 1992 to transport approximately 1,800 pounds of marijuana from San Juan, Texas to Houston.

On December 1, 1992, prior to being taken into custody for the McAllen offense, Morgan-Garcia participated in the transportation of over 400 kilograms of marijuana from south Texas to Houston. As a result of this transaction, Morgan-Garcia was indicted on November 10, 1993 in the U.S. District Court for the Southern District, Corpus Christi Division and charged, along with ten other co-defendants, with possession with intent to distribute over 100 kilograms of marijuana in violation of 21 U.S.C. § 841(a)(1),(b)(1) and 18 U.S.C. § 2. The indictment also charged Morgan-Garcia with conspiracy to possess with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 846. Pursuant to a plea agreement negotiated with the assistant U.S. Attorney, Morgan-Garcia pled guilty to the possession charge on January 3, 1994.

The plea agreement provided that, in return for substantial cooperation, the government would recommend a downward departure from the sentencing guidelines and, in addition, "not be opposed to the Defendant's sentence to imprisonment in this case running concurrent to the federal sentence the Defendant is currently serving." The agreement further specified that "[a]ll parties to

this agreement understand that . . . once the motion is made it will be in the sole discretion of this Court to determine whether to grant or deny the motion and the extent of any departure."

At the sentencing hearing on April 29, 1994, the government recommended that Morgan-Garcia be sentenced to imprisonment for a term forty percent below the minimum sentence specified by the guidelines, such sentence to be served concurrently with one he was already serving for the McAllen conviction. Noting that the sentencing guidelines provided for concurrent sentences only where the two crimes were related, see U.S.S.G. § 5G1.3(c), the district court inquired about the relationship between the McAllen conviction and this one. After some confusion, the assistant U.S. Attorney conceded that the McAllen conviction was not related to this charge, and Morgan-Garcia's defense counsel, Patrick McGuire acknowledged that he was not conversant with the details of the McAllen case to suggest otherwise. After the U.S. Probation officer, Ed Watson, explained to the court that the two crimes were "completely separate," the court concluded that the two crimes were not related and that Morgan-Garcia therefore was ineligible for concurrent sentences. The district court sentenced Morgan-Garcia to 35 months imprisonment with this period to run consecutively to the term imposed in the McAllen conviction.

II.

Morgan-Garcia agrees that the district court correctly imposed a consecutive sentence. He argues, however, that his guilty plea

was invalid because he did not understand the consequences of his plea. We disagree.

Both the language of the agreement and the district court's explanation of the effect of the agreement negate any legitimate expectation Morgan-Garcia possessed that he would receive concurrent sentences. The plea agreement into which he entered did not guarantee that he would receive a concurrent sentence. To the contrary, the agreement provided that it was in "the sole discretion" of the district court whether and to what extent to depart from the sentencing guidelines. Moreover, in taking Morgan-Garcia's plea, the district court advised him:

> [T]he agreement that you have reached is with the United States Attorney's office. You have no agreement with me. I am not bound by any agreement. You have no promise from me. Any recommendation that the United States Attorney's office gives to me is just that, a recommendation and nothing more. I have the power to sentence you to the maximum possible punishment provided by statute, and if I do you cannot take back your plea of guilty."

Morgan-Garcia stated he understood this.

Similarly, that Morgan-Garcia possessed the erroneous belief that he was eligible for concurrent sentences does not render his guilty plea involuntary or unknowing. Rule 11 of the Federal Rules of Criminal Procedure does not require the district court to advise defendants that they may receive consecutive sentences. See Fed. R. Crim. P. 11(c) advisory committee's notes on 1974 and 1989 Amendments; United States v. Jackson, 627 F.2d 883, 885 (8th Cir.) (holding Rule 11(c) does not require court to inform defendant of ineligibility for concurrent state-federal sentences), cert.

denied, 449 U.S. 998, 101 S.Ct. 540, 66 L.Ed.2d 297 (1980); United States v. Hamilton, 568 F.2d 1302, 1304-06 (9th Cir.) (holding Rule 11 does not require court to inform defendant of possibility of consecutive sentences on multi-count indictment), cert. denied, 436 U.S. 944, 98 S.Ct. 2846, 56 L.Ed.2d 785 (1978). Rather, "[a]s long as the defendant understood the length of time he might possibly receive he was fully aware of his plea's consequences." United States v. Jones, 905 F.2d 867, 868 (5th Cir. 1990) (citation and internal quotation marks omitted).

Here, the district court informed Morgan-Garcia that "[i]n these circumstances, the maximum possible punishment is a period of 40 years in the penitentiary, no probation, no parole. There is a minimum mandatory sentence of at least five years. In other words, your sentence in this case is going to be at least five years." Morgan-Garcia acknowledged that he understood this. "No more was required to inform [Morgan-Garcia] of his sentencing exposure." United States v. Santa-Lucia, 991 F.2d 179, 180 (5th Cir. 1993). That the district court sentenced him to 35 months to be served consecutively to his current sentence -- a sentence far shorter than the statutory maximum -- precludes Morgan-Garcia from now claiming that he would not have pled guilty had he known the sentence he would receive.

Nor does the erroneous advice of Morgan-Garcia's defense counsel regarding his eligibility for or the likelihood of a concurrent sentence render Morgan-Garcia's guilty plea invalid. Jones, 905 F.2d at 868; United States v. Marsh, 733 F.Supp. 90, 93

(D. Kan. 1990) (holding defense counsel's promise of concurrent sentence does not render guilty plea involuntary). Morgan-Garcia's counsel may have erroneously advised his client that he was eligible for concurrent sentences. This mistake, however, is no different than that made by a defense counsel who advises her client that he will likely serve a term shorter than that actually provided by the Sentencing Guidelines, a mistake which does not undermine the validity of a guilty plea. See United States v. Turner, 881 F.2d 684, 686 (9th Cir.), cert. denied, 493 U.S. 871, 110 S.Ct. 199, 107 L.Ed.2d 153 (1989).

To the extent that Morgan-Garcia argues that his own defense counsel's failure to advise him of his ineligibility for concurrent sentences constitutes ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution, we decline to consider such a claim. "As a general rule, Sixth Amendment claims of ineffective assistance of counsel cannot be litigated on direct appeal, unless they were adequately raised in the district court." United States v. Gibson, 55 F.3d 173, 179 (5th Cir. 1995) (citation omitted); see United States v. Higdon, 832 F.2d 312, 313-14 (5th Cir. 1987), cert. denied, 484 U.S. 1075, 108 S.Ct. 1051, 98 L.Ed.2d 1013 (1988). Here, Morgan-Garcia did not raise this issue in the court below, leaving us unable to evaluate his claim "without factual development regarding the plea bargaining process." United States v. Jennings, 891 F.2d 93, 95 (5th Cir. 1989). Morgan-Garcia may raise such claim in a proper proceeding under 28 U.S.C. § 2255. Id.

We AFFIRM.[1]

[1] We conclude that a petition for certiorari challenging the results of this appeal would violate Supreme Court Rule 42.2 prohibiting the filing of frivolous petitions. We therefore relieve appointed counsel from the obligation to seek further review by the filing of a petition for writ of certiorari. Within seven days of the issuance of this opinion, counsel shall advise defendant in writing of this conclusion, and shall inform the defendant of the procedure for a pro se filing of a petition for writ of certiorari. See Austin v. United States, 115 S. Ct. 380, 130 L.Ed.2d 219 (1994).