NO. 98-1865

United States of America
First Circuit Court of Appeals

UNITED STATES OF AMERICA,

Appellee,

v.

EDGAR COMACHO

Defendant/Appellant

BRIEF OF APPELLANT

APPEAL FROM CONVICTION IN THE MASSACHUSETTS DISTRICT COURT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF JURISDICTION

The First Circuit Court of Appeals has jurisdiction of this case pursuant to 28 U.S.C. § 1291. The defendant was charged in the Massachusetts District Court with criminal violations of 21 U.S.C. § 846, 21 U.S.C. § 841(a)(1), 18 U.S.C. § 2, and 21 U.S.C. § 853.

Edgar Comacho plead guilty on March 5, 1998 and was sentenced on July 2, 1998 in the United States District Court for the District of Massachusetts (*Patti B. Saris,* J.).

STATEMENT OF ISSUES

1. The court's failure to inquire into, and create a record regarding, the quantity of drugs the Edgar Comacho allegedly sold during his plea hearing, when he is being held liable for quantities sold by another, violated rule 11 in that there is no factual grounds on which to base his plea.

2. Because is no evidence of Edgar Comacho's involvement in quantities of drugs sold by his brother, the court erred in sentencing him for them.

3. Edgar Comacho's attorney, who apparently approved of his plea to quantities of drugs with which he was not involved, did not provide effective assistance of counsel.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Edgar Camacho, and his twin brother William, ran the El Dorado Bakery in Chelsea, Massachusetts. The Government alleges that in early May 1996 a person identified only as "cooperating witness," *3/5/98 Trn.* at 21, met with William Camacho at the bakery, following which William made two sales of cocaine, totaling about 245 grams, to the cooperating witness. PRE-SENTENCE REPORT ¶¶ 17-25 *Addendum* at 22, 24-25.

The Government further alleges that in June, the cooperating witness went back to the bakery for more. William was visiting family overseas, so the cooperating witness spoke to Edgar, the defendant here. Although Edgar was apparently unaware of his brother's previous business with the cooperating witness, and had some difficulty in locating his brother's source of drugs in William's absence, he managed to arrange two sales of cocaine to the cooperating witness. PRE-SENTENCE REPORT ¶¶ 26-40, 32, 36. These sales totaled about 248 grams. PRE-SENTENCE REPORT ¶¶ 32, 36, 46, 89; 3/5/98 *Trn.* at 24-28.

Both brothers were initially charged with four counts of conspiracy and possession with intent to distribute and distribution of cocaine.

Edgar plead guilty to the conspiracy change, but pursuant to his plea agreement, the count involving the sales by his brother William was dismissed.

Edgar's plea agreement, however, contained a quantity of 493 grams, which is the total amount of all four sales rather than just the two that Edgar arranged. PLEA AGREEMENT, *Addendum* at 16, 17. Edgar's attorney apparently advised the defendant to enter the agreement.

At the plea hearing, the court heard no offer of proof concerning the quantity for which Edgar was liable. *See 3/5/98 Trn.* Other than the agreement, the court only had the district attorney's offer of proof on which to accept the plea to 493 grams. *3/5/98 Trn* at 21-28.

Prior to the sentencing hearing, the Department of Probation, however, wrote that Edgar was responsible for just 248 grams, and not the additional 245 grams which were sold by his brother. PRE-SENTENCE REPORT ¶ 89 ("The Probation Department does not have any information which shows that Edgar Camacho should be held accountable for these additional drug amounts."). The Government objected to the report, but Edgar's attorney noted his agreement with it. LETTER from Keven P. McGrath, Assistant U.S. Attorney to Thomas M. Griffin, U.S. Probation Department (May 11, 1998), *Addendum* at 38; LETTER from Attorney William A. Brown, to Thomas M. Griffin , U.S. Probation Officer (May 14, 1998) *Addendum* at 42.

At the sentencing hearing, the court heard the dispute. Edgar's attorney

argued that he should be liable only for that quantity listed in the Pre-Sentence report. The Government argued that the tenuous connections between Edgars' and Williams' sales were sufficient to hold Edgar liable for the additional quantity sold by his brother.

The court agreed with the Government, and sentenced Edgar to 37 months of imprisonment, 60 months of supervised release, a $5,000 fine, and forfeiture of assets. 7/2/98 *Trn*. at 28; JUDGMENT, *Addendum* at 43.

SUMMARY OF ARGUMENT

Edgar Comacho first points out that during his Rule 11 hearing, the court made no inquiry into the quantity of drugs alleged sold. Edgar's plead to quantities sold by his brother and not him. He argues that because the court failed to base its acceptance of his plea to these additional quantities upon sufficient factual grounds, the plea should be vacated.

Edgar next points out the government's acknowledgment that it has no direct evidence of Edgar's responsibility for his brother's quantities. He argues that the logical path by which the government and the court arrived at Edgar's liability for these additional quantities is nothing more than conjecture.

Finally, Mr. Comacho argues that his plea of guilty to quantities not sold by him was caused by the ineffective assistance of his counsel, and that had he been effectively counseled he would not have plead to the elevated amount.

ARGUMENT

I. The District Court Did Not Have Enough Evidence of the Quantity of Drugs Sold by the Defendant to Accept his Plea of Guilty

Rule 11 of the Federal Rules of Criminal Procedure directs the district courts that "[n]otwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea." The rule "makes clear that the sentencing judge must develop, *on the record*, the factual basis for the plea, as, for example, by having the accused describe the conduct that gave rise to the charge." *Santobello v. New York*, 404 U.S. 257, 261 (1971) (emphasis in original); *Libretti v. United States*, 516 U.S. 29 (1995). To set aside a plea, the defendant must show a fundamental defect or miscarriage of justice. *United States v. Japa*, 994 F.2d 899, 902 (1st Cir. 1993).

The rule serves important purposes. It is intended to keep a defendant from pleading to acts which do not constitute the crime charged, *McCarthy v. United States*, 394 U.S. 467 (1969), and to make sure there is evidence to justify the conclusion that the defendant is guilty of the crime charged. *Id.*; *United States v. Carter*, 117 F.3d 262 (5th Cir. 1997).

The factual basis can come from nearly any source, *see e.g., United States v.*

Zorilla, 982 F.2d 28, 30-31 (1st Cir. 1992), *but cf. United States v. Tucker*, 425 F.2d 624 (4th Cir. 1970) (generalized statement by defendant's attorney not sufficient), but the court is *required* to make the inquiry into what the facts are so that there is some factual basis for the plea in the record. *United States v. Maher*, 108 F.3d 1513 (2d Cir. 1997); *United States v. Tunning*, 69 F.3d 107 (6th Cir. 1995).

When a difference of quantity has legal effect, an inquiry must be made into the matter. *See United States v. Japa*, 994 F.2d 899 (1st Cir. 1993).

While absolute technical compliance is not required, FED.R.CRIM.P. § 11(h), this court will grant relief when the defendant is prejudiced. *Zorilla*, 982 F.2d at 30-31 (1st Cir. 1992);

United States v. Blackwell, 172 F.3d 129 (2nd Cir. 1999); *United States v. Andrades*, 169 F.3d 131 (2nd Cir. 1999); *United States v. Carrington*, 96 F.3d 1 (1st Cir. 1996), *cert. denied*, 117 S.Ct. 1328 (1997).

In Mr. Comacho's case, the district court at the plea hearing made no inquiry into the factual basis for the quantity of cocaine he was alleged to have sold, and thus there is no basis on the record for the court's acceptance of his plea to 493 grams. Mr. Comacho's case is not like *United States v. Baker*, 853 F.Supp. 1084, 1087 (N.D. Ill. 1994), in which, during his Rule 11 hearing, the defendant

"expressly acknowledged the accuracy" of the quantity charged.

Here there was no such acknowledgment on the record, and Mr. Comacho received a sentence based on the higher amount. He was thus prejudiced by the failure of the court to ground his plea on reliably established facts.

The difference in quantity has a legal effect, and the District Court's failure to inquire into the matter thus violates Rule 11. Accordingly, this court should vacate Mr. Comacho's plea to the extent it claims responsibility for any amount in excess of 248 grams of cocaine.

II. The District Court Did Not Have Sufficient Evidence of a Connection Between the Defendant's Conduct and His Brother to Sentence the Defendant for Quantities Sold by His Brother

This court construes the law regarding sentencing *de novo*. *United States v. Muniz*, 49 F.3d 36 (1st Cir. 1995); *United States v. Sepulveda*, 15 F.3d 1161, 1196 (1st Cir. 1993), *cert. denied* 516 U.S. 1223 (1994) ("[t]o the extent that the challenges raise `pure' questions of law or require interpretation of the guidelines, our review is plenary"). This court reviews the district court's findings for clear error. *United States v. Wihbey*, 75 F.3d 761, 776 (1st Cir. 1996). Quantities in excess of the amount charged must be proved by a preponderance of the evidence, *United States v. Lindia*, 82 F.3d 1154 (1st Cir. 1996), which the government has the burden of meeting. *United States v. Alicea-Cardoza*, 132 F.3d 1, 6 (1st Cir. 1997); *Sepulveda*, 15 F.3d at 1198.

To meet its burden, the government must show that the evidence in support of the additional quantity is reliable. *United States v. Muniz*, 49 F.3d 36 (1st Cir. 1995); *United States v. Montoya*, 967 F.2d 1 (1st Cir. 1992), *cert. denied*, 506 U.S. 990; *United States v. Beasley*, 2 F.3d 1551, 1561-62 (11th Cir. 1993), *cert. denied*, 512 U.S. 1240 (must be specific evidence in the record to hold defendant accountable for more than the indicted quantity).

The only evidence connecting the defendant here with the conduct of his

brother is a conjecture based on an assumption. The government best described it during the sentencing hearing. The district attorney offered:

> "William Camacho engaged in two cocaine transactions with the CW at the restaurant that the brothers and their family owned, the Eldorado Bakery. And, William has acknowledged that the source of that cocaine was . . . Heriberto Paraja, who subsequently died. What happens is – and the government will [ac]knowledge that there's no direct evidence that Edgar Camacho participated in the first two drug deals. . . . What happens, however, is that when the CW goes back into Eldorado after the second deal looking for William, he's told by Edgar that William is in Colombia. Within very short order, Edgar agrees to engage in a cocaine transaction with the CW. . . . And, again, the government will acknowledge that there's no direct evidence that William participated in the third and fourth transaction directly. And . . . we don't have any direct evidence of communication between the two brothers regarding the four deals. But the government's position is that after the fourth deal . . . he explains to the CW that the reason Edgar had problems getting the cocaine in a timely fashion was the source had been seriously ill and died . . . and, in fact, Heriberto Paraja subsequently died. So, I think it certainly is a very strong inference that, No. 1, William and Edgar both got their cocaine from the same source, Paraja. No. 2, the alacrity with which Edgar agreed to participate in a drug transaction with the CW, who he had never met [sic] before, indicates strongly that there was an ongoing conspiracy between him and his brother. And, in fact, in one of the first conversations Edgar asks the CW: How much have you bought off William? As if it's not a big surprise, it's just a pont of clarification. And I think that is also evidence that . . . Edgar is aware of the fact that William's a drug dealer and clearly was aware of who William's source was because he goes to the same source."

7/2/98 Trn. at 6-8 (paragraphing omitted).

The government admits there is no direct evidence of a conspiracy between

the brothers. It nonetheless claims three items connecting them.

The first is that both their sources died. The government *assumes*, but has no proof, that therefore the source is the same person. Sick and dead drug dealers, however, are not uncommon. There simply are far too many to assume that because both are dead they must be the same person. Moreover, simply having the same source does not make two dealers part of a conspiracy. *United States v. Hoskins*, 173 F.3d 351, 354(6th Cir. 1999).

The second item the government claims to connect the brothers is that Edgar was *aware* that William was a drug dealer. Even if true, mere awareness of a crime does not make a conspiracy. *United States v. Cabrera*, 116 F.3d 1243, 1244 (8th Cir. 1996) ("[m]erely proving that the defendant knew of the existence of the conspiracy is insufficient to support a conviction for conspiracy"); *United States v. Hubbard*, 96 F.3d 1223, 1226 (9th Cir. 1996) ("mere association with members of a conspiracy or knowledge of the conspiracy . . . is not sufficient to make one a conspirator"); *United States v. Heater*, 63 F.3d 311, 324 (4th Cir. 1995) ("mere knowledge, acquiescence, or approval of a crime is not enough to establish that an individual is part of a conspiracy"), *cert. denied*, 516 U.S. 1083 (1996); *United States v. Lyons*, 53 F.3d 1198 (11th Cir. 1995), ("[m]ere presence, guilty knowledge, even sympathetic observation . . . fall short of the proof required to

support" conviction of conspiracy) *cert. denied*, 516 U.S. 937.

The third item is that upon the cooperating witness telling Edgar that William had sold him drugs, Edgar willingly did the same. This may (or may not) be proof that one can generally trust one's brother, and by extension, one's brother's friends (for Solomon said, only God "sticketh closer than a brother," *Proverbs*, 18:24). It is too far a jump, however, to assume criminal conspiracy based on brotherly trust.

Thus, at most, the government can conjecture a conspiracy based on an assumption. This is not sufficient evidence to connect Edgar to the quantities sold by William. *Hoskins*, 173 F.3d at 351.

During the sentencing hearing, the government dismissed the count against Edgar that involved the sales by William. By holding him liable in sentencing for that additional quantity, however, Edgar got sentenced for acts he did not commit, and also did not get the benefit of his plea.

Accordingly, this court should remand for re-sentencing based on the quantity of drugs for which Mr. Comacho was actually responsible.

III. Mr. Comacho was Prejudiced by His Attorney's Ineffective Assistance

This court may review ineffective assistance of counsel without the issue being raised below when the factual basis for the allegation is apparent on the face of the record, *United States v. Natanel*, 938 F.2d 309 (1st Cir. 1991), and when there is plain error. *See, e.g., United States v. Reeder*, 170 F.3d 93 (1st Cir. 1999); *United States v. Olano*, 507 U.S. 725, 733-35 (1993) (defining "plain" and "error"). When there is no need to have a developed record, there is no bar to reaching the issue. *United States v. Hoyos-Medina*, 878 F.2d 21 (1st Cir. 1989); *United States v. Arango-Echeberry*, 927 F.2d 35 (1st Cir. 1991).

A. *Per se* Ineffective Assistance of Counsel

Counsel is generally presumed to be competent, but there are situations where that presumption must be abandoned. *United States v. Cronic*, 446 U.S. 648 (1984). There is a distinction between inadequate lawyering and no lawyering:

> "The difference between bad and no lawyering is critical . . . because very different results flow from the label which is attached to the conduct in question. If the lawyering is merely ineffective, then the decision to upset the conviction, which turns on the presence of incompetence and prejudice, is made on a case by case basis. . . . If, on the other hand, the defendant was constructively denied the assistance of counsel, then the conviction must be overturned because prejudice is presumed.

Woodard v. Collins, 898 F.2d 1027, 1028 (5th Cir. 1990) (attorney recommended client plea guilty when attorney conducted no investigation).

In this circuit, *per se* ineffective assistance applies in "structural cases" in which there is no need to review the record. *Scarpa v. Dubois*, 38 F.3d 1, 12 (1st Cir. 1994), *cert. denied*, 513 U.S. 1129.

B. Case by Case Ineffective Assistance of Counsel

In cases where *per se* ineffective assistance does not apply, a defendant is denied his right to counsel when the attorney's performance falls below an objective standard of reasonableness resulting in prejudice to the defendant. *Strickland v. Washington*, 466 U.S. 668 (1984); *Scarpa* 38 F.3d at 8 (1st Cir. 1994). There is prejudice when either the result is unreliable, *Lockhart v. Fretwell*, 506 U.S. 364 (1993); *Kimmelman v. Morrison*, 477 U.S. 365 (1986), or the outcome may have been different, *Nix v. Whiteside*, 475 U.S. 157 (1986). *See Matthews v. Rakiey*, 54 F.3d 908 (1st Cir. 1995). There is no ineffective assistance of counsel when the attorney's conduct was a strategic choice. *Scarpa*, 38 F.3d at 1.

Constituting ineffective assistance of counsel, for example, are the failure of an attorney to present a sentencing issue causing the defendant additional incarceration, *United States v. Soto*, 132 F.3d 56 (D.C. Cir. 1997) (counsel failed

to request downward departure when client fit into provision), failing to point out an illegal sentence, *Smullen v. United States*, 94 F.3d 20 (1st Cir. 1996), and advising a client to plea to facts which enlarge a crime. *Soto v. United States*, 37 F.3d 252 (7th Cir. 1994) (plea to dates of conduct outside range specified in statute).

C. Edgar Camacho's Attorney Provided Him Ineffective Assistance, Which Caused Him Prejudice

Edgar Comacho's attorney allowed Mr. Camacho to plea guilty to a quantity that even the Department of Probation could not support, and which is based on a thin thread of conjecture and assumption. The attorney did not raise the quantity issue until after it was pointed out in the pre-sentence report, thus showing that the attorney never looked carefully into the issue.

Because the attorney did not raise a critical issue at the stage of the proceeding where it could have made a difference, there is plain error here. Because the attorney was effectively not there for the defendant, the plea is not reliable and thus this case presents *per se* ineffective assistance of counsel. Even if it does not, however, there is prejudice to Mr. Camacho: had he been effectively counseled, his plea agreement would have included only that quantity for which he was responsible and would be a more reliable indicator of his actual conduct, he may not have plead guilty to the elevated amount, and the court may not have held

him liable for his brother's sales.

In *Porcaro v. United States*, 784 F.2d 38, 42 (1st Cir. 1986), *rehrg. den.*, 789 F.2d 73, *on remand* 641 F.Supp. 1375, *affirmed* 832 F.2d 208, *cert. den.*, 479 U.S. 916, counsel was held not ineffective for failing to point out problems in a document only because the judge indicated that the court had not relied on it for its sentencing information. In Mr. Comacho's case, on the other hand, it is unavoidable that the court took notice of the (erroneous) quantity in his plea agreement.

In *United States v. Baker*, 853 F.Supp. 1084 (N.D. Ill. 1994), the court found that the attorney was not ineffective for failing to object to an excess quantity only because there was a basis in the record for the quantity.

> "Because the government had a solid basis for its drug calculation and defendant has offered no evidence showing that he was not responsible for the amount of drugs reported in the plea agreement, defense counsel was not deficient in failing to challenge the government's proof."

Baker, 853 F.Supp. at 1088. In Mr. Comacho's case, however, the government does not have any solid basis for the quantity, rather only conjecture based on shaky assumptions. Thus, unlike *Baker*, Mr. Comacho suffered prejudice.

Accordingly, Mr. Comacho's sentence should be set aside.

CONCLUSION

Edgar Comacho requests that this court vacate his plea, or in the alternative, remand his case to the district court for re-sentencing without regard to the additional quantity alleged by the government.

Mr. Comacho requests that his attorney be allowed to present oral argument.

Respectfully submitted,
Edgar Camacho,
By his Attorney,
Law Office of Joshua L. Gordon

Dated: August 6, 2000

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I hereby certify that on August 6, 2000, two copies of the foregoing, as well as a computer disk containing the foregoing, formatted by WordPerfect 8, will be forwarded to Keven P. McGrath, Assistant United States Attorney.

Dated: August 6, 2000

Joshua L. Gordon, Esq.

I hereby certify that this brief complies with the type-volume limitations contained in F.R.A.P. 32(a)(7)(B) and that it contains no more than 3,795 words.

Dated: August 6, 2000

ADDENDUM

APPENDIX