United States District Court
For the Eastern District of Wisconsin

United States of America,

Plaintiff,

Case No. 05-CR-00146-CNC

v.

Orlandes Nicksion,

Defendant.

Motion to Withdraw Guilty Plea

Now comes the above-named defendant, by his attorney, Jeffrey W. Jensen, and pursuant to Rule 11(d) F.R.Crim.P., hereby moves to withdraw the guilty plea entered in this matter. As grounds, the undersigned alleges and shows to the court as follows:

1. In entering his guilty plea Orlandes Nicksion believed that the temporal scope of the conspiracy to which he was admitting began in 2004 and continued through May 16, 2005.

2. Nicksion's belief was reasonable because ¶4 of the plea agreement, in fact, alleges that the conspiracy began sometime in 2004 and continued through May 16, 2005. Additionally, the "factual basis" attachment to the plea agreement only recites conduct that occurred in the year 2005. Finally, when the court orally examined Nicksion about the factual basis Nicksion told the court that he distributed cocaine in 2005.

3. Nicksion's reasonable belief concerning the temporal scope of the conspiracy is material to his decision to plea guilty because the government seeks to present evidence of offense-specific guideline conduct that occurred well before 2005. Specifically, the government seeks to present evidence of a murder that occurred in 2002; and, further, the government's testimony concerning the weight of the drugs

involved in the conspiracy focuses on Nicksion's alleged drug activities in the summer of 2003.

4. That had Nicksion understood that the temporal scope of the alleged conspiracy began in 2002 he would not have entered a guilty plea. Nicksion is, in fact, not guilty of the Benion homicide nor did he distribute drugs during 2003.

Wherefore, it is respectfully requested that the court grant Nicksion leave to withdraw his guilty plea.

This motion is further based upon the attached Memorandum of Law.

Dated at Milwaukee, Wisconsin, this 20th day of November, 2008.

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United States District Court
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Memorandum of Law in Support of Motion to Withdraw Guilty Plea

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Factual Background

The history of this case, in terms of its duration and its Byzantine complexity, rivals any Tolstoy novel. In June, 2005, the defendant, Orlandes Nicksion (Nicksion), was charged, along with several others, as being part of a conspiracy to deliver cocaine in the Eastern District of Wisconsin. A simple enough allegation. The first indictment claimed that Nicksion, and the others, "Beginning sometime in 2004 and continuing through May 16, 2005" conspired to deliver cocaine. (Doc. 37) Nicksion entered a not guilty plea.

On July 19, 2005, though, there was a superseding indictment. This new indictment alleged the same time-frame for the conspiracy, though (2004-2005). (Doc. 81) Again, Nicksion pleaded not guilty.

There was a volley of pretrial motions. Nicksion complained about the fact that government agents, without a warrant, and in the dark of the night, crept into the parking lot of Nicksion's apartment complex and attached a global positioning satellite device to the undersigned of Nicksion's car. In other motions, Nicksion questioned the ability of a drug-sniffing dog to smell marijuana from one hundred yards away from a storage shed; other defendants, including Nicksion, challenged the veracity of

government agents who claimed in an affidavit that they had obtained cell phone information prior to the time any court authorization existed for them to obtain the information. The hearing on this motion devolved into a series of stories- and then changed stories- about how the government agents obtained the information in question. (*See,* Doc. 416)

On August 22, 2006, though, there was a second superseding indictment. Again, the temporal scope of the conspiracy was alleged to be the years 2004 to 2005. (Doc. 259) Again, Nicksion's plea was not guilty.

The case was set for trial on October 29, 2007.

Finally, on September 18, 2007, little over a month before the trial date, yet a third superseding indictment was filed. (Doc. 419) This time, though, the indictment contained an accusation that from "sometime in 2002 and continuing through May 16, 2005" the defendants conspired to deliver cocaine. In effect, the indictment added two additional years to the alleged temporal scope of the conspiracy. Nicksion objected to the timeliness of the filing of the third superseding indictment. When his objection was overruled, though, Nicksion entered a not guilty plea.

On the morning of the first day of trial, though, the parties informed the court that the three remaining defendants (Mark Cubie, Orlandes Nicksion, and Ronald Terry) had reached a plea agreement. The government informed the court that this final offer was extended to the defendants the previous day (Sunday) and that the offer must be accepted by all three defendants or the offer will be withdrawn.

Nicksion's plea agreement was signed and he entered a guilty plea. ¶2 of the plea agreement provides that Nicksion, "[H]as been charged in three counts of a nine-court **third** superseding indictment." (emphasis provided) However, ¶4 of the plea agreement, which sets forth the charge, alleges that "Beginning sometime in 2004 and continuing through May 16, 2005 . . ."[1] the defendant conspired to deliver cocaine. Concerning the weight of the drugs involved, ¶17 of the plea agreement recited that the

1 The reader should note that, in fact, the third superseding indictment alleged that the conspiracy began in 2002 not in 2004. Thus, the plea agreement incorrectly recited the allegations of the third superseding indictment.

government would argue that the government would recommend a base offense level of 36[2]; however, the plea agreement recited that, "The parties acknowledge and understand that the defendant will not join in this recommendation." (Doc. 467-6)

Concerning the factual basis, attachment A to the plea agreement reads as follows:

> This investigation began in January 2005 at the Milwaukee HIDTA. Case agents developed several confidential informants (CIs) and by the end of January, efforts were focused squarely on Mark Cubie. Historical CI information indicated that Cubie was a multi-kilogram cocaine dealer whose source of supply (Lopez) was based in Chicago.
>
> CI-3 made several recorded calls to Cubie and then several controlled contacts, including a buy of one kilogram of cocaine and a money payment of $8,000. On February 2, 2005, after watching Cubie conduct a drug deal, uniform officers stopped Cubie. He had cocaine, crack, marijuana, cash, and a gun in his vehicle. A GPS was placed on his car and Cubie was released.
>
> From February 2 until April 26, 2005, surveillance and pen/trap/toll data indicated that Cubie had several stash houses in Milwaukee and distributed cocaine to several individuals, including Orlandes Nicksion, Ronald Q. Terry, Delano Hill, and Edward Cubie. Anthony Burke and Sylvester Pigram assisted Cubie by renting cars, stashing dope, money, and guns, and driving trail cars. The investigation during this time period also established that Cubie was traveling to Chicago to meet with Lopez to pick up cocaine and make money deliveries.
>
> On April 26, 2005, case agents began court-authorized monitoring of Cubie's cellular telephone.
>
> During the weeks that followed, monitoring, combined with surveillance and pen/trap/toll data confirmed that Cubie was supplying Nicksion, Hill, Edward Cubie, and others and was assisted by Burke, Pigram, and his girlfriend, Machelle Jelks. Cubie typically fronted the drugs to his regular distributors. He used his cellular telephone to arrange drug deliveries and money payments. He and his associates routinely used code words over the to mask the true meaning of their drug trafficking activities. Court-authorized monitoring also established that Cubie's source of

2 Without identifying it as such, ¶17 also states that, in the alternative, the government might recommend the "murder cross-reference" contained in U.S.S.G. § 2D1.1(d)(1) and U.S.S.G. §2A1.2(a).

> supply was Jose G. Lopez in Chicago. Monitoring and surveillance captured several multikilogram transactions and money transfers between Cubie and Lopez. Lopez typically fronted the cocaine to Cubie, usually meeting Cubie at Gurnie Mills Mall in Gurnie, Illinois, or at Lopez' business on Western Avenue in Chicago. Usually once several days pasted after each receipt of cocaine, Cubie gathered money in Milwaukee from his regular distributors and then traveled to Chicago to pay Lopez and retrieve more cocaine. During the course of the conspiracy, the defendants obtained and distributed at least five kilograms of cocaine.

During Nicksion's plea colloquy, the court examined Nicksion about what he had done that made him guilty of conspiracy to deliver cocaine. The colloquy went as follows:

> THE COURT: What did you do as a member of this conspiracy, if anything?
> THE DEFENDANT: Oh, distributor.
> THE COURT: A distributor of what?
> THE DEFENDANT: Of cocaine.
> THE COURT: What kind of cocaine?
> THE DEFENDANT: Powder.
> THE COURT: When were you distributing cocaine powder?
> THE DEFENDANT: Um, '05, 2005.
> THE COURT: Is that the only time?
> THE DEFENDANT: Yes.

(Doc. 570; Trans. 10-29-07 p. 16).

After the court accepted Nicksion's guilty plea the court ordered a presentence investigation. The PSI was conducted and a report was filed. Significantly, the PSI report suggested that the court apply the so-called "murder cross-reference" to Nicksion due to his alleged involvement in the murder of Earl Benion in 2002. The PSI report did not make a recommendation concerning the weight of the drugs involved in the conspiracy.

The PSI report set off a year-long series of objections and recriminations between the parties. Nicksion argued that the Benion homicide occurred two years before the conspiracy in question was alleged to have existed. (Doc. 494-6) The

government's retort was that the recitation of the charge in ¶4 of the plea agreement (which states that the conspiracy began in 2004 rather than in 2002) was a "typographical error" because ¶2 of the plea agreement recites that Nicksion was pleading guilty to the third superseding indictment (which actually alleges that the conspiracy began in 2002). Additionally, the government argued, Nicksion's objection on the weight of the drugs were "mere denials." Finally, it began apparent that the government, in order to reach the quantity of cocaine needed for a base offense level of 36, intended to present the testimony cooperating witnesses whose claim was that they bought cocaine from Nicksion in 2003.

It has become clear that Nicksion's guilty plea is beyond redemption. As will be set forth in more detail below, the plea was not freely, voluntarily, and intelligently entered because Nicksion, in entering the guilty plea, believed he was admitting to being involved in a conspiracy that began in 2004 and continued through 2005. The government, though, plans to urge the court to impose a lengthy prison sentence based upon offense-specific guideline conduct that occurred well before 2004.

Argument

I. The court must permit Nicksion to withdraw his guilty plea because it was not knowingly, voluntarily, and intelligently entered.

Everything, from the recitations of the charge in the plea agreement, to the factual basis for the plea, suggested that the temporal scope of the conspiracy was the years 2004 and 2005. Thus, it is no wonder that Nicksion, in entering his guilty plea, believed that he was admitting to involvement in the conspiracy only during those years. In fact, at the plea hearing, Nicksion testified that his only involvement was in the year 2005. Thus, the guilty plea was entered under a reasonable misapprehension over the duration of the conspiracy. This confusion makes a difference, too, because the two years added in the third superseding indictment bring into play for sentencing purposes evidence of grave prior conduct by Nicksion. Nicksion would not have pleaded guilty

had he understood that the government alleged that the conspiracy began in 2002.

Rule 11(d), F.R.Crim.P. provides that after the court has accepted the guilty plea, but prior to sentencing, the defendant may withdraw the plea if "the defendant can show a fair and just reason for requesting the withdrawal." However, the defendant does not have an unlimited right to withdraw the plea; rather, the burden is on the defendant to demonstrate a fair and just reason for such withdrawal. *United States v. Schilling,* 142 F.3d 388, 398 (7th Cir. 1998).

The Supreme Court has noted that a plea "operates as a waiver of important rights, and is valid only if done voluntarily, knowingly, and intelligently, 'with sufficient awareness of the relevant circumstances and likely consequences.'" *Bradshaw v. Stumpf,* 545 U.S. 175, 183, 125 S. Ct. 2398, 162 L. Ed. 2d 143 (2005) (quoting *Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970)).

Here, Nicksion alleges that his plea was not knowingly and intelligently made because, when he entered the plea, he believed that he was admitting to being part of a conspiracy that existed in the years 2004 and 2005. It would be remarkable had Nicksion believed anything else.

Although the plea agreement recites that Nicksion was pleading guilty to the "third superseding indictment", the recitation of the indictment that is contained in the plea agreement refers to a conspiracy that existed in 2004 and 2005. As if this were not enough, the factual basis for the plea contained in Attachment A sets forth conduct that occurred primarily in 2005. When the court examined Nicksion concerning what Nicksion did to make him part of the conspiracy, Nicksion told the court that he conspired to deliver cocaine in 2005. Finally, the fact that Nicksion disputed the weight of the drugs attributable to him for sentencing purposes is set forth plainly in the plea agreement.

The confusion at the guilty plea hearing over the temporal scope of the conspiracy makes a monumental difference. The government seeks to apply the murder cross-reference for the death of Earl Benion. Benion died in 2002- more than two years prior to the originally-alleged existence of the conspiracy. Moreover, concerning the weight of the drugs attributable to Nicksion, the government appears to

rely upon the testimony of informants[3] who claim to have bought cocaine from Nicksion in the summer of 2003- again, a year before this conspiracy was alleged in the first indictment to have existed.

The difference, according to Nicksion, is a deal-breaker. Had he known that the government expected him to admit that this conspiracy existed as early as 2002 he would not have pleaded guilty. As Nicksion argued at the hearing on his motion to dismiss the third superseding indictment, he lived in Florida for most of 2002, 2003, and 2004.

There can be little doubt that Nicksion was genuinely mistaken about the temporal scope of the conspiracy at the time pleaded guilty. Nicksion's professed confusion over the temporal scope of the conspiracy is hardly the sort of "buyer's regret"- dressed up as ignorance of some minor bit of information- that the court frequently encounters in motions to withdraw guilty pleas. Here, the confusion makes a difference.

Conclusion

For these reasons it is respectfully requested that the court permit Nicksion to withdraw his guilty plea to the third superseding indictment.

Dated at Milwaukee, Wisconsin, this 20th day of November, 2008.

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