

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

NOV 26 1990

ROBERT L. HOECKER
Clerk

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
MANUEL TIBERIO TORO,
Defendant-Appellant.

No. 90-2046
(D.C. No. CR 83-210 M)
(D. New Mexico)

ORDER AND JUDGMENT*

Before LOGAN, SEYMOUR, and TACHA, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Petitioner Manuel Tiberio Toro appeals from the district court order denying his motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255.

Petitioner pleaded guilty to the unlawful possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1)

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

and 18 U.S.C. § 2 in 1984. There was a plea agreement in which the maximum sentence was set out as ten years, but with a provision that there was no agreement with respect to any special parole term that the court might impose. I R. tab 11 at 1. At the hearing at which the plea was accepted, the court advised petitioner that the maximum penalty "would be fifteen years and a twenty-five thousand dollars [sic] fine with a special parole term of at least three years." Id. tab 23 at 5. The court then asked petitioner whether he had been advised what the maximum penalty could be, to which petitioner answered "Yes, sir." Id. Thereafter, the court sentenced petitioner to ten years plus the mandatory three-year parole term required by law. See 21 U.S.C. § 841(b)(1)(A) (imposing mandatory special parole term of at least three years) (amended 1986, 1988).

Several years after petitioner filed an unsuccessful motion for reduction of sentence pursuant to Fed. R. Crim. P. 35, he filed the instant motion to vacate, set aside or correct his sentence. The magistrate recommended denial; the district court accepted the recommendation, leading to the instant appeal. Petitioner here argues that his guilty plea was involuntary because he was not advised by his attorney, the prosecutor, or the court of the mandatory parole term and he states that he did not have actual knowledge of it. He argues, therefore, that his guilty plea was not voluntary and intelligent. On appeal, however, petitioner does not challenge the underlying conviction nor does he request that his plea be set aside. Rather, he asks this court to order specific performance, requesting that the

special parole term be deleted from the imposed ten-year sentence. See Brief of Appellant at 19.

It appears that since the filing of the instant motion petitioner has been released from prison and deported to Colombia. I R. tab 32 at 1. Thus he is no longer within the jurisdiction nor subject to the technical custody of the United States Parole Commission; he is not being supervised. Unless he re-enters the United States, the special parole term will have no effect upon him.

We are in agreement with the government that petitioner's appeal is moot. Under certain circumstances, deportation alone may moot a habeas petition. See, e.g., Quezada v. I.N.S., 898 F.2d 474, 476 (5th Cir. 1990) (deportation moots habeas petition challenging deportation itself); Terrado v. Moyer, 820 F.2d 920, 922 (7th Cir. 1987) (same). In Lane v. Williams, 455 U.S. 624 (1982), the Supreme Court held that a habeas petition seeking specific performance of a plea agreement is moot if the defendant already has served the underlying sentence. See id. at 630-31.¹ Although petitioner's three year special parole term has not yet expired, he essentially has served his entire sentence; he has been deported to Colombia and he is no longer under the

¹ The Lane Court noted that a habeas petition would not be moot in such a case if petitioner sought to eliminate all consequences flowing from the conviction by requesting an opportunity to plead anew. See Lane v. Williams, 455 U.S. at 630. Like the petitioners in Lane, however, the instant petitioner has not asked this court to set aside his guilty plea. See Brief of Appellant at 19 ("Petitioner Toro requests specific performance of his agreed upon plea-sentence agreement, specifically, that the special parole term be deleted from the imposed ten year sentence.").

supervision of the United States Parole Commission. Accordingly, we do not consider this to be a live controversy. Should petitioner return to the United States and become subject to the territorial jurisdiction of the Parole Commission, then he may renew his motion. The mandate shall issue forthwith.

Entered for the Court

James K. Logan
Circuit Judge