United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 15, 1997 Decided November 25, 1997

No. 96-3157

UNITED STATES OF AMERICA,
APPELLEE

v.

DOMENICK WILLIAMS, *A/K/A* EDWARD MILTON,
A/K/A DOMENICK MILLER WILLIAMS,
APPELLANT

Consolidated with
No. 96-3175

Appeals from the United States District Court
for the District of Columbia
(91cr00612-02)

James M. Johnstone, appointed by the court, argued the cause and filed the briefs for appellant.

Elizabeth H. Danello, Assistant U.S. Attorney, argued the cause for appellee. With her on the brief were *Eric H. Holder, Jr.,* U.S. Attorney at the time the brief was filed, *John R. Fisher* and *Kenneth C. Kohl,* Assistant U.S. Attorneys.

Before: SILBERMAN, RANDOLPH, and GARLAND, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* RANDOLPH.

RANDOLPH, *Circuit Judge*: Pursuant to an agreement with the government, Domenick Williams pleaded guilty to a conspiracy to distribute crack cocaine in violation of 21 U.S.C. § 846. He was sentenced to 210 months of imprisonment, the maximum term within his Guideline range. We have consolidated his appeal from the sentence with his appeal from the district court's order denying his motion under 28 U.S.C. § 2255.

Only two of the issues Williams raises need concern us. The first is whether the sentencing court should have held an evidentiary hearing, and made more specific findings, regarding the quantity of crack within the scope of the conspiracy. The second is whether the government's failure to fulfill the plea agreement entitles Williams to withdraw his plea.

I

During the hearing immediately preceding Williams' plea of guilty, the government described a series of transactions in which Williams sold approximately 83 grams of crack to undercover officers. Although Williams admitted making the sales, he hedged about whether each transaction was part of the conspiracy to which he was pleading guilty. When sentencing took place, the district court used U.S.S.G. § 2D1.1(c)(6)—distribution of at least 50 grams but less than 150 grams of cocaine base—to set Williams' base offense level.

Williams now contends that his statements during the plea proceedings did not provide a sufficient factual basis for his base offense level. He claims that rather than particularized findings, *see, e.g., United States v. Thomas,* 114 F.3d 228,

254-55 (D.C. Cir. 1997); *United States v. Childress,* 58 F.3d 693, 721-24 (D.C. Cir. 1995), the sentencing court gave only general conclusions regarding the scope of Williams' agreement with his coconspirator and the relationship to that agreement of each of the transactions in which Williams participated. He therefore requests that any remand be accompanied by an order for an evidentiary hearing to determine if his conspiracy encompassed 50 or more grams of crack.

An evidentiary hearing is unnecessary. To the extent the sentencing court's findings fell short, the error was harmless. The quantity of drugs was not an element of the conspiracy. *See United States v. Lam Kwong-Wah,* 966 F.2d 682, 685 (D.C. Cir. 1992); *United States v. Garrett,* 959 F.2d 1005, 1006 n.1 (D.C. Cir. 1992). It had importance only for sentencing. During the period beginning with and including the first and last sales involving both Williams and his coconspirator, Williams was personally involved in at least five separate drug sales. The total amount of crack exchanged in the sales exceeded 80 grams. This established that Williams was in fact responsible for distributing more than 50 grams of crack. Even if the sales were not part of the conspiracy, they qualify as relevant conduct—conduct Williams admitted—within the meaning of U.S.S.G. § 1B1.3(a)(2), and hence bring Williams' base offense level up to the level used by the sentencing court. *See* U.S.S.G. § 1B1.3(a)(2) & Application Note 9(B) (Nov. 1993); *id.* §§ 2D1.1(c)(6), 3D1.2(d); *United States v. Pinnick,* 47 F.3d 434, 437-39 (D.C. Cir. 1995); *United States v. Wishnefsky,* 7 F.3d 254, 256-57 (D.C. Cir. 1993); *United States v. Salmon,* 948 F.2d 776, 778 & n.* (D.C. Cir. 1991).

II

As to the plea agreement, the government promised to "bring to the Court's attention ... the nature *and extent* of [Williams'] cooperation." Plea Agreement ¶ 9 (italics added). After pleading guilty, but before his sentencing, Williams made four purchases of drugs at the government's instigation. When sentencing came, the prosecutor neglected to inform

the court of the full extent of Williams' assistance. The prosecutor said only that "[t]he *one buy* that [Williams] did make for us—and he did provide some cooperation ..., he wasn't able to identify who the two participants ... were. He identified one, but ... [w]hen we ... tried to push him into helping us identify the other ..., he was either unable or unwilling ...." Motion Hearing Tr. at 12 (italics added).

The government concedes that the prosecutor erred in mentioning only one purchase, that the error left the court with a misimpression, that the misimpression "could have affected the sentence," Brief for Appellee at 23, and that Williams is therefore entitled to resentencing. The government nevertheless resists the conclusion that it "breached" the plea agreement, as if the label matters. The only thing one might say in the government's favor is that Williams should have corrected the prosecutor by telling the sentencing judge about the other three drug deals, or immediately objecting to the prosecutor's omission. But the government does not offer these arguments to forestall a remand. In any event, the plea agreement placed the duty of exposition squarely on the prosecutor, doubtless in the hope it would carry more weight.

That the prosecutor denied Williams his due is clear enough. That Williams might have received a lesser sentence absent the breach is also apparent. The only serious question deals with the remedy. Williams thinks resentencing is not sufficient recompense. He alleges other defects. His counsel was ineffective; there were factual inaccuracies in the Presentence Report; the government made false statements; the district judge relied on legally irrelevant factors. Put all of this together, add the breach of the plea agreement, and, Williams claims, it follows that he should be entitled to withdraw his plea.

We do not think it follows at all. At the time of the breach, Williams had already entered his plea and provided his assistance to the government. If the sentencing is redone, and the government fulfills its obligations to Williams, he will receive everything to which he was entitled, and no more. *See, e.g., United States v. Kurkculer,* 918 F.2d 295, 300 (1st

Cir. 1990); *United States v. Brody,* 808 F.2d 944, 948 (2d Cir. 1986). To allow him to withdraw his plea would be to turn back the clock further than necessary. The prosecutor's failure to reveal the entirety of Williams' cooperation neither deprived his plea of its voluntary character nor cast doubt on Williams' acknowledged guilt of the crime to which he pleaded guilty. *See United States v. Hyde,* 117 S. Ct. 1630, 1634 (1997); *United States v. Tobon-Hernandez,* 845 F.2d 277, 281 (11th Cir. 1988). Things might be different if the plea had rested on an unfulfillable promise, *see United States v. Cooper,* 70 F.3d 563, 567 (10th Cir. 1995); or if specific performance would be meaningless, *see Kingsley v. United States,* 968 F.2d 109, 113-14 (1st Cir. 1992); or if the government's breach had been deliberate or egregious, *see* 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 20.2, at 598 (1984). But the government's promise to Williams was not unfulfillable; specific performance will be meaningful; and the breach was neither deliberate nor egregious. *See People v. Santobello,* 331 N.Y.S.2d 776, 777-78 (N.Y. App. Div. 1972), on remand from *Santobello v. New York,* 404 U.S. 257, 263 (1971). Because the original sentencing judge is no longer available to preside at resentencing, the problem posed in *United States v. Wolff,* No. 96-3145, slip op. (D.C. Cir. Oct. 21, 1997), is not present.

Our judgment that specific performance is the proper remedy is not affected by the other alleged defects Williams identifies. Nothing Williams tells us calls into question his admission of guilt or the validity of his plea. Nothing else, in other words, entitles him to proceed to trial or to plead anew. *See, e.g., Hyde,* 117 S. Ct. at 1634; *United States v. Broce,* 488 U.S. 563, 569, 571-74 (1989); *Brady v. United States,* 397 U.S. 742, 750-58 (1970).

We therefore remand the case for resentencing, at which time Williams and the government shall be given an opportunity to object to the original or any new presentence report pursuant to Federal Rule of Criminal Procedure 32(b)(6), and shall be entitled to the sentencing court's ruling on "any unresolved objections" to the report, *see id.* Rule 32(c)(1).

Vacated and remanded for resentencing.