

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

MIGUEL CHAVEZ

v.

CA No. 98-297-T

UNITED STATES OF AMERICA

MEMORANDUM AND ORDER

ERNEST C. TORRES, Chief Judge.

Miguel Chavez (a/k/a Luis Quinones) has filed what he denominates a "Motion to Reconsider Sentence" and a "Motion for Deportation." Essentially, he seeks to vacate a 151-month sentence imposed in 1996 for conspiracy to possess cocaine with intent to distribute it on the ground that the calculation of his guideline range was based, in part, on a prior Pennsylvania conviction that has since been negated. In addition, he seeks to have his sentence recalculated in exchange for his post-sentencing concession of deportability. Finally, Chavez challenges the sentencing court's denial of the government's request for a downward departure pursuant to 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1.

For reasons stated below, both motions are denied.

Background

Prior to the imposition of his federal sentence, Chavez had pleaded guilty in a Pennsylvania state court to one count of theft of leased property. As a result of that conviction, Chavez's criminal history was raised from I to IV and his guideline sentencing range was increased accordingly.

Chavez filed a petition for post-conviction relief from his state court conviction in Pennsylvania. Approximately one year after his federal sentence was imposed, he withdrew that petition in exchange for permission to withdraw his guilty plea *nunc pro tunc* and the prosecutor's agreement to *nolle prosequi* the state charge.

Discussion

Chavez's argument for a downward departure on the grounds that he is now willing to concede deportability can be disposed of rather summarily. First, it is not properly before the Court in the instant § 2255 proceeding. Moreover, even if the issue were properly presented, concessions of deportability do not provide sufficient basis for a downward departure under § 5K2.0. United States v. Clase-Espinal, 115 F.3d 1054, 1057 (1st Cir. 1997).

Chavez's argument that his federal sentence should be recalculated in a way that excludes the criminal history points previously assessed for the Pennsylvania conviction is similarly unavailing. It hinges on the definition of "prior sentence" which is defined by § 4A1.2(a)(1) to mean "any sentence previously imposed" The commentary to § 4A1.2 identifies certain sentences that are to be excluded from the definition of "prior sentence" when the conviction has been overturned or set aside. Thus, application note 6 provides:

6. Reversed, Vacated, or Invalidated Convictions. Sentences resulting from convictions that (A) have been reversed or vacated because of errors of law or because of subsequently discovered evidence exonerating the

defendant, or (B) have been ruled constitutionally invalid in a prior case are not to be counted.

In addition, application note 10 states:

10. Convictions Set Aside or Defendant Pardoned. A number of jurisdictions have various procedures pursuant to which previous convictions may be set aside or the defendant may be pardoned for reasons unrelated to innocence or errors of law, e.g., in order to restore civil rights or to remove the stigma associated with a criminal conviction. Sentences resulting from such convictions are to be counted. However, expunged convictions are not counted.

However, those exceptions are limited and neither applies in this case. Chavez's Pennsylvania sentences were not reversed or vacated due to errors of law or evidence exonerating him. Nor were those convictions ruled constitutionally invalid. Moreover, Chavez's sentence was not set aside. Even if it had been, application note 10 expressly states that it should be counted.

Finally, Chavez attempts to revisit the sentencing court's refusal to depart downward pursuant to 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1. At sentencing, the court, although recognizing its authority to depart downward, determined that such an exercise of discretion was not warranted in Chavez's case. The court's refusal to exercise its discretion cannot be reviewed in the instant proceeding. See Knight v. United States, 37 F.3d 769 (1st Cir. 1994).

Conclusion

For all the foregoing reasons, Chavez's motions are denied.

IT IS SO ORDERED,

Ernest C. Torres
Chief Judge

Date: _____, 2000