

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

2004 JAN 13 4 352

CENTRAL DIVISION

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JOSE MARTINEZ-MARTINEZ)	Case No. 2:04CV857 DS
)	
Petitioner,)	
)	
vs.)	MEMORANDUM DECISION
)	
UNITED STATES OF AMERICA)	
)	
Respondent.)	

* * * * *

Petitioner Jose Martinez-Martinez pleaded guilty on October 21, 2003, to a violation of 8 U.S.C. §1326 (Reentry of a Previously Removed Alien). On January 6, 2004, he was sentenced to 70 months imprisonment to be followed by 36 months supervised release. Martinez-Martinez has now filed a motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255.

Petitioner claims that he was denied effective assistance of counsel because his attorney told him he would “definitely get 46 months if [he] pleaded guilty.” He claims that his attorney never told him that he might receive a longer sentence than the 46 months.

The record reflects, however, that during Petitioner’s change of plea hearing, the maximum and minimum penalties were explained to him. He then signed and filed with the court his Statement in Advance of Plea of Guilty. ¶ 2 of that statement says, “I know that the maximum possible penalty provided by law for a violation of 8 U.S.C. § 1326 (Reentry of a Previously Removed Alien) as alleged in Count 1 of the Indictment is: 20 years imprisonment, a \$250,000 fine, or both.”

The signed statement also states, “I understand that the final calculation by the Court for sentencing purposes under the procedures applicable to [the Sentencing Reform Act of 1984] may

differ from any calculation the United States, my attorney, or I may have made, and I will not be able to withdraw my plea in spite of that fact” (Statement by Def. in Advance of Plea of Guilty at ¶ 3). The signed statement also represented to the Court that Petitioner had discussed the case and the plea with his lawyer, and that he was satisfied with his lawyer.

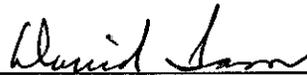
The burden on Petitioner to establish a claim of ineffective assistance of counsel is great. The Supreme Court has held that in cases presenting an ineffectiveness claim, the court’s review of counsel’s performance must be “highly deferential,” and the court “must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The Tenth Circuit has held that “an attorney may offer his client a prediction, based upon his experience or instinct, of the sentence possibilities the accused should weigh in determining upon a plea. An erroneous sentence estimate by defense counsel does not render a plea involuntary.” *Wellnitz v. Page*, 420 F.2d 935 (10th Cir. 1970). Even if the petitioner’s attorney in the present case did predict that the petitioner would receive a lesser sentence, this does not render his plea invalid. The record in this case shows that during the change of plea hearing, the Court found the petitioner to be fully competent, and the plea to be freely and voluntarily given.

For the foregoing reasons, Petitioner’s motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255 is **DENIED**.

IT IS SO ORDERED.

DATED this 29^F day of September, 2004.

BY THE COURT:



DAVID SAM
SENIOR JUDGE
UNITED STATES DISTRICT COURT

United States District Court
for the
District of Utah
September 30, 2004

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:04-cv-00857

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Jose Martinez-Martinez
CALIFORNIA CITY CORRECTIONAL CENTER
10781-081
PO BOX 3001-0001
CALIFORNIA CITY, CA 93504

Mr. William L Nixon, Esq.
US ATTORNEY'S OFFICE

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EMAIL