

APR 25 2005

For The Northern Mariana Islands  
By \_\_\_\_\_  
(Deputy Clerk) *[Signature]*

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19

- For Publication on Court's Web Site -  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN MARIANA ISLANDS

UNITED STATES OF AMERICA, )  
 )  
 ) Plaintiff )  
 )  
 ) v. )  
 )  
 ) KE, Shi Cheng, also known as )  
 ) "KC," )  
 )  
 ) Defendant )  
 )

Criminal No. 03-00042  
Civil Case No. 05-0012 <sup>1</sup>

ORDER DENYING MOTION  
TO VACATE, SET ASIDE, OR  
CORRECT SENTENCE  
(28 U.S.C. § 2255)

\_\_\_\_\_

<sup>1</sup>

For statistical purposes the Clerk of Court is required to open a civil case docket for motions brought pursuant to 28 U.S.C. § 2255. *See* Volume 11 (Statistics Manual), Chapter V, Part 3.c. However, Rule 3(b) of the "Rules Governing Section 2255 Proceedings for the United States District Courts," specifies that "the clerk must file the motion and enter it on the criminal docket of the case in which the challenged judgment was entered." In hopes of creating consistency, the court will deem the underlying criminal case to be the primary file and use the caption from that case, but also direct that dispositive orders it issues in regard to this matter will also be filed in the civil file, No. 05-0012.

1 Defendant-movant Ke has timely filed a *pro se*<sup>2</sup> petition to vacate, set  
2 aside, or correct his sentence, pursuant to 28 U.S.C. § 2255. On December 24,  
3 2003, Ke entered a guilty plea to Conspiracy to Distribute and Possess with  
4 Intent to Distribute a Controlled Substance, in violation of 21 U.S.C. §§  
5 841(a)(1), 841(b)(1)(B), and 846. He was sentenced March 26, 2004.  
6

7  
8 The court has reviewed Ke's motion and the files and record in this case  
9 and it appears conclusively that Ke is not entitled to any relief. 28 U.S.C. §  
10 2255; "Rules Governing Section 2255 Proceedings for the United States District  
11 Courts," Rule 4(b). Accordingly, the motion is denied.  
12  
13

14 Ke moves the court to vacate, set aside, or correct his sentence for two  
15 reasons. First, that his guilty plea was unlawfully induced or not made  
16 voluntarily or with understanding of the charge and the consequences of the  
17

18  
19 \_\_\_\_\_  
20 2

21 On or about March 28, 2005, the court received by facsimile from a law  
22 firm a 28 U.S.C. § 2255 motion purportedly filed on Ke's behalf. For the  
23 reasons stated in its order of that date, the court struck the purported motion  
24 from the record. *See* this file and Civil Action No. 05-0011. However,  
25 unbeknownst to the court, Ke had prepared, signed, and had notarized on March  
26 10, 2005, the instant *pro se* motion. This motion was mailed March 15, 2005, and  
received by the court on April 1, 2005, three days after it had stricken the other  
motion. To remove any confusion which might exist, and in order not to  
prejudice Ke, the court deems the instant motion Ke's first under 28 U.S.C. §  
2255.

1 plea. This, because neither the interpreter employed by his attorney (Mr. Yen)  
2 nor the government's interpreter (Mr. Tse) was "certified," and the former failed  
3 to translate the complete contents of the plea agreement and details at the change  
4 of plea hearing and the latter during the interview with the Probation Officer  
5 and at the sentencing.  
6  
7

8 Ke's next argument is that his attorney provided ineffective assistance of  
9 counsel by failing to request "the two (2) levels downdeparture for non-citizens  
10 under 5K2. The petitioner is a citizen of the People's Republic of China." (*Sic*).  
11 Ke also asserts that his attorney failed to object to a miscalculation of the base  
12 offense level (arguing it should have been 28, rather than 30) and failed to argue  
13 "the quantity of drug (39.10 grams) that was between Mr. Toda and Mr. Jacinto  
14 Maranan, and have nothing to do with me, it was a controlled purchase." (*Sic*).  
15  
16  
17

18 The court's first ground for denying Ke's motion is that it is brought in  
19 violation of the specific terms of his plea agreement. Ke's plea agreement states  
20 in relevant part that he "will neither appeal, nor otherwise litigate under Title  
21 28, United States Code, Section 2255 and/or Section 2241, any sentence within  
22 or below the stipulated Sentencing range set forth above.... Furthermore, it is  
23 agreed that any appeal as to the defendant's sentence that is not foreclosed by  
24  
25  
26

1 this provision will be limited to that portion of the sentencing calculation that is  
2 inconsistent with (or not addressed by) the above stipulation.” Plea Agreement,  
3 Page 6, ¶ 15 (Dec. 24, 2003).  
4

5 The court specifically revisited this portion of the plea agreement during  
6 the change of plea hearing and Ke confirmed that he had reviewed it with his  
7 attorney, that he had no questions, and that he understood it. Waiver provisions  
8 of plea agreements are enforceable. *See e.g. United States v. Mezzanatto*, 513 U.S.  
9 196, 115 S.Ct. 797 (1995). This provision is enforceable and Ke’s motion is  
10 denied on the ground that he validly waived his right to appeal or file the instant  
11 motion.  
12  
13  
14

15 To the extent that Ke argues that he did not knowingly and voluntarily  
16 enter into his plea agreement, his motion is denied for the following reasons, as  
17 well.  
18

19 Ke’s first ground for relief is based solely on the lack of certification of the  
20 two interpreters and it fails. Title 28 U.S.C. § 1827 requires only that a certified  
21 interpreter be provided if one is “reasonably available.” There are no Mandarin  
22 interpreters, certified by the Administrative Office of the U.S. Courts, within  
23 the Commonwealth of the Northern Mariana Islands. Thus, no certified  
24  
25  
26

1 interpreter was reasonably available. Further, Ke in his plea agreement  
2 acknowledged that he had a qualified interpreter. Plea Agreement, Page 5, ¶  
3 12(b) (Dec. 24, 2003). As to both Mr. Anthony Yen and Mr. Dennis Tse  
4 (below), the court was and is satisfied that they are “otherwise qualified” to serve  
5 as interpreters. 28 U.S.C. § 1827(2).  
6  
7

8 The court can never know if the interpreter employed by defense counsel  
9 accurately translated the conversations between Ke and his attorney. The court  
10 notes that Ke’s attorney filed substantive objections to the presentence report,  
11 most of which are based on *facts* in the report that Ke disputed. If the  
12 interpreter was deficient, it is difficult to imagine how these fact-specific  
13 objections could have been successfully communicated by Ke to his attorney.  
14 Whatever the truthfulness of Ke’s claim, the court was and is satisfied, as  
15 explained below, that by the court’s own efforts it ascertained that Ke fully  
16 understood what was happening and all the consequences of his decision to enter  
17 into the plea agreement and plead guilty.  
18  
19  
20  
21  
22

23 At the 45-minute long change of plea hearing on December 24, 2003, the  
24 court first established Ke’s satisfaction with his legal representation:

25 Court: Mr. Ke, are you satisfied with the counsel, representation, and  
26 advice given to you in this case by Mr. Long as your attorney?

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

Ke: Yes.

The court continued, with Ke responding affirmatively to each of these questions:

Court: Before you signed this plea agreement, did you have it translated to you into your native language?

Court: And, before you signed this plea agreement, did you discuss every aspect of this agreement with [your defense counsel] Mr. Long?

Court: Do you understand all of the terms of the plea agreement?

Ke stated that there were no mistakes in the plea agreement, that nothing was omitted which he thought would be in it or included which he thought would not be included. He confirmed that no promises or assurances were made to him to induce him to plead guilty which were not addressed by the plea agreement. Ke confirmed that he and his attorney had discussed the Sentencing Guidelines and how they might apply.

Throughout the court's colloquy with Ke at the change of plea hearing, Ke was repeatedly asked if he understood the agreement and the day's proceedings and if he had any questions. Each time Ke stated that he did understand the proceedings and had no questions. The court reviewed the

1 possible effects on Ke that a guilty plea might have on any future immigration  
2 steps he might take. The court cautioned him to “pay close attention” while it  
3 reviewed with him all his constitutional rights. Ke confirmed that he had also  
4 discussed them with his attorney, that he understood them, and that he had no  
5 questions about them.  
6  
7

8 Ke stated on the record that he was willing to accept responsibility for his  
9 actions and advised the court of the factual basis for his plea.  
10

11 Throughout the entire change of plea hearing, the translator, Mr. Yen, can  
12 be heard simultaneously translating the court’s comments and defendant’s  
13 responses. On at least two occasions Ke asked the court to repeat something it  
14 had said, and he then confirmed that he understood.  
15  
16

17 At the conclusion of the hearing, the court accepted Ke’s change of plea,  
18 finding that it had been made intelligently, knowingly, and voluntarily, and with  
19 a full understanding of the rights he was surrendering and the possible  
20 consequences of his plea.  
21

22 As to the translations done in open court by Mr. Anthony Yen (change of  
23 plea hearing) and Mr. Dennis Tse (sentencing), the court can only say that both  
24 men have translated in court many times and the court has never experienced  
25  
26

1 any pangs of doubt as to either man's veracity or language skills; no Chinese  
2 defendant has ever indicated that he or she did not understand Mr. Yen or Mr.  
3 Tse or that their translations were confusing or seemed incomplete.  
4

5 Further, the court has reviewed the presentence report. Mr. Tse, with  
6 Ke's attorney present, translated during Ke's entire interview with the Probation  
7 Officer. The report is filled with voluminous, precise, detailed personal  
8 information, which would have been impossible to obtain from Ke if there had  
9 been problems with Tse's translation.  
10  
11

12 The court has reviewed its colloquies with Ke at his change of plea hearing  
13 and at sentencing. As is the court's practice (and as is set out above), at the  
14 change of plea hearing, and in accordance with Fed.R.Crim.P. 11(d) and the case  
15 law, the court exhaustively and painstakingly reviewed with defendant all his  
16 constitutional rights and appellate rights and elicited from him the factual basis  
17 for each and every element of the crime to which he intended to plead guilty.  
18 Also, the court, in accordance with Fed.R.Crim.P. 11(e) - (g) and the case law,  
19 reviewed with Ke the entire contents of his plea agreement. The transcript  
20 reflects that defendant repeatedly expressed, under oath, that he fully understood  
21 what he was doing and was entering his plea of guilty intelligently, knowingly,  
22  
23  
24  
25  
26



1 and voluntarily, with a full understanding of it and the consequences of his  
2 choices. Defendant's unsupported assertion that he did not understand the  
3 proceedings is belied by the overwhelming objective indicia that he did fully  
4 understand, appreciate, and participate in all phases of his defense, up to and  
5 including his decision to plead guilty.  
6  
7

8 The court can find nothing in § 5K2 of the 2003 Sentencing Guidelines to  
9 support Ke's argument that he was entitled to a two-level downward departure  
10 simply because he is a non-citizen. Under the Sentencing Guidelines as they  
11 were at the time of Ke's sentencing, the court was *prohibited* from departing  
12 from the applicable guideline range based, *inter alia*, on a defendant's race or  
13 national origin. See Guidelines Manual § 5K2.0(d) (2003). No mention is made  
14 of citizenship as a basis for a departure. It is Ke's responsibility to "specify all  
15 the grounds for relief available" to him. "Rules Governing Section 2255  
16 Proceedings for the United States District Courts," Rule 2(b). He has failed to  
17 do this.  
18  
19  
20  
21  
22  
23  
24  
25  
26

1           As to Ke’s argument that his base offense level should have been 28, rather  
2 than 30, the plea agreement specifies the amount of “ice” involved, and Ke  
3 confirmed the accuracy of the agreement in open court at the change of plea  
4 hearing. The base offense level was properly set at 30. Plea Agreement, at p. 2,  
5 lines 14 - 15 (Dec. 24, 2003); *see also* U.S. Sentencing Guidelines § 2D1.1  
6 (a)(3)(c)(5) (an amount of “ice” that is at least 35 grams but less than 50 grams  
7 corresponds to a base offense level of 30). As noted above, the court reviewed  
8 the plea agreement with Ke before accepting his plea of guilty and the court was  
9 and is satisfied that he fully understood the terms and provisions of the  
10 agreement.  
11

12           Finally, the court simply does not understand the essence of Ke’s  
13 argument that his attorney failed to argue the quantity of drugs. Again, Ke has  
14 failed to specify the basis for this aspect of his motion. However, whatever the  
15 nature of the argument, the court remains satisfied that at the change of plea  
16 hearing Ke admitted all essential facts—including the quantities of “ice” involved  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

--which led to his sentence.

FOR THE FOREGOING REASONS, Ke's first 28 U.S.C. § 2255  
motion to vacate, set aside, or correct his sentence is denied.

IT IS SO ORDERED.

DATED this 25th day of April, 2005.



---

ALEX R. MUNSON

Judge