

APR 25 2005

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

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- For Publication on Court's Web Site -

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

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

Criminal No. 03-00042
Civil Case No. 05-0012 ¹

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

¹

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*² 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.
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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.
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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
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20 On or about March 28, 2005, the court received by facsimile from a law
21 firm a 28 U.S.C. § 2255 motion purportedly filed on Ke's behalf. For the
22 reasons stated in its order of that date, the court struck the purported motion
23 from the record. See this file and Civil Action No. 05-0011. However,
24 unbeknownst to the court, Ke had prepared, signed, and had notarized on March
25 10, 2005, the instant *pro se* motion. This motion was mailed March 15, 2005, and
26 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.
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8 Ke's next argument is that his attorney provided ineffective assistance of
9 counsel by failing to request "the two (2) levels downward departure 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*).
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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
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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).
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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.
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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.
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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
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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).
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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.
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22 At the 45-minute long change of plea hearing on December 24, 2003, the
23 court first established Ke’s satisfaction with his legal representation:
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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?

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