

93 MAR 15 P2:37

IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN)
MARIANA ISLANDS,)
)
Plaintiff,)
)
v.)
)
JUAN M. CAMACHO,)
)
Defendant.)

CRIMINAL CASE NO. 88-136
OPINION AND ORDER

Defendant Juan Mendiola Camacho moves this Court to withdraw the guilty plea into which he entered on August 1, 1988. Defendant premises this motion on the Court's failure to comply with Rule 11 of the Commonwealth Rules of Criminal Procedure.¹

I. FACTUAL AND PROCEDURAL BACKGROUND

On July 22, 1988, the Government filed criminal Information, an arrest warrant, and an affidavit of probable cause. The Information charged the Defendant with the offense of distribution of marijuana, in violation of 6 C.M.C. § 2141(b)(2).

On July 29, 1988, Defendant Camacho appeared before the Court. At that time, the Defendant's arraignment was scheduled for August

¹ In light of the holding in the present case, the Court need not address the Defendant's other arguments. Also, it is essential to note that this opinion does not rely on the alleged ex parte communication made to this Court by the Government and does not address the Defendant's motion to strike the same.

1, 1988.

On August 1, 1988, the Defendant appeared for arraignment. At the outset of the hearing, the Government and the Defendant's counsel informed the Court that they had entered into a non-trial disposition. The Court then engaged in the following colloquy with the Defendant and the attorneys:

THE COURT: Mr. Camacho, would you stand up. How old are you?

MR. CAMACHO: 18.

THE COURT: 18?

MR. CAMACHO: Yes.

THE COURT: Do you understand English?

MR. CAMACHO: Yes.

THE COURT: The attorneys have indicated to the Court that you intend to enter a plea of guilty to the charge of distributing marijuana, is that your understanding?

MR. CAMACHO: (Inaudible reply).

THE COURT: Do you understand that you have a right to a trial in this case?

MR. CAMACHO: Yes.

THE COURT: If you go to trial, the Government has to prove beyond a reasonable doubt that you are guilty before the court can find you guilty, do you understand that?

MR. CAMACHO: (Inaudible reply).

THE COURT: The government may bring witnesses and you have the right to cross examine those witnesses and translation would be provided, if necessary. You also have the right to be represented by an attorney during the entire course of the trial, do you understand?

MR. CAMACHO: (Inaudible reply).

THE COURT: If, at the end of the trial, you disagree with the decision of the court, you have the right to appeal that decision, do you understand, to a higher court.

MR. CAMACHO: (Inaudible reply).

THE COURT: You have absolutely no obligation to make any statement or present any case but you also have the right to present a case, if you want to, and bring witnesses, do you understand that?

MR. CAMACHO: Yes.

THE COURT: Is anybody forcing you to enter a plea of guilty in this case?

MR. CAMACHO: No.

THE COURT: No. This is your own voluntary act? Yes?

MR. CAMACHO: Yes.

THE COURT: On May 26, 1988, were you in possession of marijuana?

MR. CAMACHO: Yes, sir.

THE COURT: The court finds that the defendant understands his constitutional rights, voluntarily and knowingly waive [sic] the same and that there is a factual basis for a plea of guilty.

MR. BUSO: Judge, on the factual basis, he made a hand-to-hand sale in the amount of \$50.00 to an undercover agent.

THE COURT: Okay. That will be taken as part of the factual basis. The Government is recommending that you be sentenced to six months in jail, all suspended for a period of one year; and that you be fined \$500.00 but you may argue for a lesser fine, do you understand that recommendation?

MR. CAMACHO: (Inaudible reply).

THE COURT: Do you still wish to plead guilty even though the Government is going to recommend that?

MR. CAMACHO: (Inaudible reply).

THE COURT: Do you still wish to plead guilty even though the government is going to recommend that?

MR. CAMACHO: Yes.

THE COURT: Do you still wish to plead guilty in this case?

MR. CAMACHO: Yes.

THE COURT: Yes. Okay. Now, with the charge of distributing marijuana, do you plead guilty or not guilty?

MR. CAMACHO: Plead guilty.

The Court then found the Defendant guilty of distribution of marijuana under 6 C.M.C. § 2141(b)(2). Defendant Camacho was sentenced in accordance with his plea agreement with the Government.

II. ISSUE PRESENTED

The Court will consider the issue of whether a motion to withdraw a guilty plea should be granted where the Court failed to adhere to the requirements of Com. R. Crim. Pro. 11(c) in accepting the Defendant's plea of guilty.

III. ANALYSIS:

Rule 11 Requires that Defendant Be Informed of the Nature of and the Penalties for the Offense

The Defendant argues that his guilty plea should be set aside because he did not understand the nature and the consequences of the charge of distribution of marijuana as required by Com. R. Crim. Pro. 11.

The Government asserts that the plea, when viewed in its

totality, was voluntary. This argument is premised on the Government's contention that the Defendant "clearly knew what was at stake and understood his guilty plea. . . . The fact that some of the defendant's initial responses were inaudible on the record is no basis for a negative inference." Office of the Attorney General's Memorandum in Opposition to Motion to Withdraw Guilty Plea, at 5 [hereinafter "Government's Opposition to Motion"].

Section (c)(1) of the Commonwealth Rules of Criminal Procedure states, in pertinent part, that:

Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and *inform him of, and determine that he understands the following:*

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law
. . . .

Com. R. Crim. Pro. 11(c) (emphasis added).

Subsection (h) of Rule 11 addresses the effect of a failure to comply with these requirements. Com. R. Crim. Pro. 11(h). The subsection provides that: "[a]ny variance from the procedure required by this rule which does not affect substantial rights shall be disregarded." *Id.*

The purposes underlying Rule 11 are two-fold. *McCarthy v. United States*, 394 U.S. 459, 465, 89 S.Ct. 1166, 1170 (1969). First, the rule is intended to help the judge ensure that the defendant's plea is voluntary. *Id.* Second, Rule 11 is "intended to produce a complete record at the time the plea is entered of the factors relevant to this voluntariness determination." *Id.*

In determining whether the original trial judge adhered to the Rule 11 requirements, the court cannot look beyond the transcript of the plea proceeding. *United States v. Graibe*, 946 F.2d 1428, 1434 (9th Cir. 1991); *United States v. Kamer*, 781 F.2d 1380, 1383 (9th Cir. 1986). Where the transcript is silent, it cannot be presumed that the defendant waived his constitutional rights. *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S.Ct. 1709, 1712 (1969).

In *United States v. Broce*, 488 U.S. 563, --, 109 S.Ct. 757, 762-63 (1989), the United States Supreme Court explained the principles underlying the requirements contained in Rule 11(c).

The *Broce* Court stated:

[A] guilty plea is an "admission that [the defendant] committed the crime charged against him." By entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime. That is why the defendant must be instructed in open court on "the nature of the charge to which the plea is offered," and why the plea "cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts."

Id. (citations omitted).

It is, therefore, essential that the judge not only explain the meaning of the charges but also "elicit responses from [the defendant] which demonstrate on the record that the defendant understands."² *Kamer*, 781 F.2d at 1385 (emphasis added); see also

² By following the requirements of Rule 11, the courts will dissuade post-sentencing collateral attacks on guilty pleas. *McCarthy*, 394 U.S. at 465, 89 S.Ct. at 1170. Thus, it is the failure to follow Rule 11 that undermines the judicial system's interest in finality. For an explanation of the need for finality in reviewing guilty pleas, see *United States v. Timmerick*, 441 U.S. 780, 99 S.Ct. 2085, 2087-88 (1979) (quoting *United States v. Smith*, 440 F.2d 521, 528-29 (7th Cir. 1971)).

Rule 11(c)(1). The extent to which the judge must engage in this procedure will vary according to the "complexity of the charges and the personal characteristics of the defendant . . . , and also whether [the defendant] is represented by counsel." *Kamer*, 781 F.2d at 1384 (quoting *United States v. Wetterlin*, 583 F.2d 346, 351 (7th Cir. 1978), *cert. denied*, 439 U.S. 1127, 99 S.Ct. 1044, 59 L.Ed.2d 88 (1979)).

In the present case, the Court rejects the Government's assertion that the plea was voluntary when "viewed in its totality." In essence, the Government is asking the Court to impose an obligation on the Defendant to prove a negative and to infer a response in the affirmative where the record actually reflects that the Defendant's response was inaudible. This contention contravenes not only the Ninth Circuit's approach, *United States v. Graibe*, 946 F.2d at 1434; *Kamer*, 781 F.2d at 1385 (must *demonstrate on the record* that defendant understands), but also that of the United States Supreme Court, *Boykin*, 395 U.S. at 243, 89 S.Ct. at 1711 (requirement of affirmative showing).

The colloquy, as evidenced by the transcript, does not meet the requirements of Rule 11 for two reasons. First, the judge accepted the Defendant's plea of guilty before he elicited responses from the Defendant that demonstrated the Defendant's understanding of the nature of the charges. The Information stated that, "[o]n May 26, 1988 in Saipan, . . . Juan Mendiola Camacho did knowingly or intentionally deliver or possess with intent to deliver marijuana, a Schedule 1 non-narcotic controlled substance

in violation of section 2141(b)(2) of Title 6 of the Commonwealth Code." The elements of the offense were not explained to the Defendant. See *Kamer*, 781 F.2d at 1384 (citing *Wetterlin*, 583 F.2d at 350-52); *United States v. Syal*, 963 F.2d 900, 905 (6th Cir. 1992) (failure to explain elements affects defendant's substantial rights). He was not asked whether he committed the acts charged. See *Guthrie v. United States*, 517 F.2d 416, 418 (9th Cir. 1975). The Defendant was only asked whether he was in possession of marijuana on May 26, 1988. Although he admitted that he possessed marijuana on that date, mere possession does not automatically give rise to distribution of the substance. Based on this admission alone, it cannot be said that the Defendant demonstrated his understanding of the relation between 6 C.M.C. § 2141 and his statement that he possessed marijuana.³ See *Broce*, 488 U.S. 563, 109 S.Ct. 757; *McCarthy*, 394 U.S. 459, 89 S.Ct. 1166. Furthermore, it does not appear that the judge caused the criminal Information

³ Admittedly, the original trial judge accepted another statement as part of the factual basis of the plea the statement that the Defendant "made a hand-to-hand sale in the amount of \$50.00 to an undercover agent." This statement does not change the Court's holding as to the voluntariness of the plea for two reasons. First, the Government informed the trial judge of the sale *after* the judge had found that the Defendant "[understood] his constitutional rights, [and] voluntarily and knowingly waive[d] the same" Furthermore, the judge did not *elicit* a response from the Defendant concerning the statement. This Court cannot presume from a silent record that the Defendant understood the import of the statement as it related to the charge against him and that he was waiving his constitutional rights. See *Boykin*, 395 U.S. at 243, 89 S.Ct. at 1712.

to be read to the Defendant.⁴ See *Kamer*, 781 F.2d at 1384 (citing *United States v. Punch*, 709 F.2d 889, 892-94 (5th Cir. 1983) (where charges are not complex, mere reading of indictment might meet Rule 11 requirements)); see also *United States v. Corbett*, 742 F.2d 173, 180 (5th Cir. 1984) ("at a bare minimum, the charging instrument must be read to the accused or he must otherwise be furnished the same information . . ."). The Defendant was merely asked whether he intended to plead guilty to the charge of distribution of marijuana. The transcript of the colloquy, therefore, does not demonstrate that the Defendant understood the nature of the charge of distribution of marijuana. Therefore, the Defendant's plea of guilty was not truly voluntary. See *Broce*, 488 U.S. at --, 109 S.Ct. at 763. For these reasons, the failure to comply with Rule 11(c)(1) affected the Defendant's substantial rights.⁵

Second, the Defendant was not informed of the maximum penalty provided by 6 C.M.C. § 2141.⁶ See, e.g., *Yothers v. United States*, 572 F.2d 1326, 1327 (9th Cir. 1978); see also *United States v. Hamilton*, 568 F.2d 1302, 1305 (9th Cir. 1978), cert. denied, 436 U.S. 944, 98 S.Ct. 2846 (1978) (sentencing consequences are

⁴ Additionally, the Defendant avers that his attorney never "[showed him] a copy of the Information." Affidavit of Juan M. Camacho, para. 10 (Oct. 13, 1992).

⁵ Given that the Court holds that substantial rights of the Defendant were affected, the Court does not reach the Government's assertion that the Court must consider several factors before vacating the guilty plea. Government's Opposition to Motion, at 3.

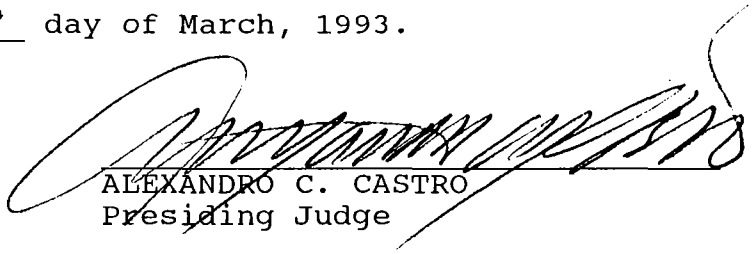
⁶ In 1988, the maximum penalty for violating this section was a term of imprisonment of five years and the imposition of a \$2,000 fine. 6 C.M.C. § 2141(b)(2).

"crucial consequences of entering a plea which must be explained"); *United States v. Harris*, 534 F.2d 141, 141-42 (9th Cir. 1976) (plea vacated where judge failed to advise of mandatory special parole term). Here, the Defendant was merely informed of the Government's *recommendations* concerning the penalty. In this regard, the transcript of the colloquy clearly fails to meet the requirements of Rule 11.

IV. CONCLUSION

For these reasons, the Defendant's motion to withdraw his plea of guilty is granted and the judgment of conviction is vacated. The Commonwealth is also ordered to return to the Defendant the fines that he was ordered to pay.

So ordered this 15 day of March, 1993.


ALEXANDRO C. CASTRO
Presiding Judge