

NO. 2002-1574

United States of America
First Circuit Court of Appeals

UNITED STATES OF AMERICA,

Appellee,

v.

OMAY FORD

Defendant/Appellant

BRIEF OF APPELLANT

APPEAL FROM CONVICTION IN THE MASSACHUSETTS DISTRICT COURT

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STATEMENT OF JURISDICTION

The First Circuit Court of Appeals has jurisdiction of this case pursuant to 28 U.S.C. § 1291.

The defendant was charged in the Massachusetts District Court with criminal violations of 21 U.S.C. § § 846(a)(1).

Omay Ford plead guilty on January 24, 2002, and was sentenced on April 24, 2002, to 10 years imprisonment, and 5 years supervised release, in the United States District Court for the District of Massachusetts (*Joseph L. Tauro, J.*).

STATEMENT OF ISSUES

1. Did the Government improperly manipulate Omay Ford's sentence by appriizing the court of conduct with which he was not involved?
2. Did Omay Ford's counsel render him ineffective assistance when she failed to appriize him that his plea of guilty was to a quantity in excess of 50 grams?
3. Does Omay Ford's sentence – 10 years loss of liberty for selling cocaine – violate the 8th Amendment?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

In late 2000, two unnamed conspirators were arrested for importation of cocaine. They agreed to cooperate and ultimately met with one Curtis Strickland, from whom they bought cocaine on several occasions.

In July 2001, the two undercover buyers pressed Mr. Strickland to set up another drug buy. Government agents followed Mr. Strickland to a meeting with a man later identified by Mr. Strickland after *his* arrest as the defendant, Omay Ford.

Mr. Ford was subsequently indicted with conspiracy to possess with intent to distribute, and possession with intent to distribute crack cocaine. He plead guilty in the District Court in Boston, Massachusetts (*Joseph L. Tauro, J.*), and was sentenced to 10 years imprisonment followed by 5 years of supervised release. This appeal followed.

SUMMARY OF ARGUMENT

Omay Ford first argues that the Government manipulated his sentence by bringing to the court's attention a course of conduct with which he was not involved, and that therefore his sentence is invalid.

He then argues that his trial counsel was ineffective in failing to apprise him that he was pleading guilty to a quantity of crack cocaine in excess of 50 grams, and that therefore his plea was invalid.

Finally, he argues that a 10 year loss of liberty for selling cocaine is a violation of the 8th Amendment.

ARGUMENT

I. Government Improperly Manipulated Omay Ford's Sentence

In *United States v. Montoya*, 62 F.3d 1 (1st Cir. 1995), this Court found that when the government improperly enlarges the scope or scale of the crime and thereby deliberately manipulates the circumstances so that a greater penalty is required under the sentencing guidelines, the sentence is invalid.

In Omay Ford's case, he was connected with, at most, a single transaction in December 2001. The facts stated to the District Court, however, went far beyond that. The Government purported to implicate Mr. Ford in a string of four additional prior sales in December 2000, February 2001, March 2001, and May 2001. The Government had no proof, however, of Mr. Ford's involvement in any of those prior sales.

Although the sentencing court eventually recognized the ruse and refused to consider the quantities of drugs involved in those prior sales, *Sentencing Transcript* at 12, the Government's attempt to associate Mr. Ford with them is the sort of "extreme or outrageous conduct" this Court addressed in *Montoya*, 62 F.3d at 7. Accordingly, this Court should remand this case for re-sentencing with the requirement that the Government not allude to prior sales with which Mr. Ford had no involvement.

II. Ineffective Assistance of Counsel for Failing to Apprize Mr. Ford of the Quantity to Which he Plead Guilty

Omay Ford plead to a quantity of “50 grams or more of cocaine base.”

Sentencing Agreement at 2. He claims, however, that he was not adequately apprized by his lawyer that he was pleading to that quantity.

A defendant is denied his right to counsel when his attorney’s performance falls below an objective standard of reasonableness resulting in prejudice to the defendant. *Strickland v. Washington*, 466 U.S. 668 (1984); *Scarpa v. Dubois*, 38 F.3d 1, 8 (1st Cir. 1994), *cert. denied*, 513 U.S. 1129. There is prejudice when the outcome may have been different. *Nix v. Whiteside*, 475 U.S. 157 (1986).

Had Mr. Ford been apprized that he was pleading to a quantity of over 50 grams of crack cocaine, he would not have plead guilty, thus resulting in a different outcome.

Accordingly, this Court should remand this case for re-sentencing.

III. Ten Years Loss of Liberty for a Victimless Crime is Unconstitutional

Omay Ford was sentenced to a term of 10 years incarceration for selling more than 50 grams of cocaine. It has been conceded that the crime has no victim. *Pre-Sentence Report* at 4. Loss of liberty is indeed a cruel punishment. Although long sentences for victimless crimes are not now unusual, it has become so only because of – like prohibition – Congress’s attempt to ban substances that are patently desired by apparently vast segments of society.

A review of the history of the 8th Amendment does not reveal any justification for the absurd drug sentencing laws now in effect. *See Harmelin v. Michigan*, 501 U.S. 957 (1991).

A ten-year sentence for a relatively small amount of cocaine is not altogether different from the Supreme Court’s example of a life sentence for overtime parking as an example of an unconstitutional sentence. *Rummel v. Estelle*, 445 U.S. 263, 274 n.11 (1980). Both overtime parking and selling cocaine have no identifiable victim, both are exceedingly common, and both are unlikely to be effectively controlled.

Accordingly, Omay Ford’s 10 year loss of his liberty violates the 8th Amendment and this court should remand for imposition of a more reasonable sentence.

CONCLUSION

In light of the foregoing, Omay Ford requests that this honorable court remand his case for re-sentencing.

Mr. Ford requests that his attorney be allowed to present oral argument.

Respectfully submitted,
Omay Ford,
By his Attorney,
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Dated: January 17, 2003

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I hereby certify that on January 17, 2003, two copies of the foregoing, as well as a computer disk containing the foregoing, formatted by WordPerfect 8, will be forwarded to Dickens Mathieu, Esq., Assistant United States Attorney.

Dated: January 3, 2003

Joshua L. Gordon, Esq.

I hereby certify that this brief complies with the type-volume limitations contained in F.R.A.P. 32(a)(7)(B) and that it contains no more than 1284 words.

Dated: January 3, 2003

Joshua L. Gordon, Esq.