

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSE DE HORTA GARCIA,

Defendant.

ORDER

06-CR-0185-C-1

Defendant José De Horta Garcia has filed objections to the report and recommendation entered by the United States Magistrate Judge on February 13, 2007, in which the magistrate judge recommended the denial of defendant's motion to dismiss the indictment. I am not persuaded that the recommendation was wrong. Accordingly, I will adopt the magistrate judge's recommendation and deny defendant's motion to dismiss.

Defendant based his motion on his contention that before the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) was enacted, illegal aliens convicted of drug crimes had the opportunity to petition the Attorney General of the United States for discretionary relief from deportation under 8 U.S.C. § 1181(c). Defendant was arrested in late 1995 on a state drug charge. In April, the AEDPA was adopted; on June 17, 1996,

defendant entered into a plea agreement with the state to plead guilty to a felony count of attempted misconduct involving a controlled substance in the second degree. On August 14, 1996, immigration proceedings were initiated against him; on September 13, 1996, he was sentenced to 48 months in prison, with 18 months suspended; on December 12, 1996, he appeared before an immigration judge for a group deportation hearing at which he was ordered deported to Mexico. The immigration judge did not inform defendant that he could apply for a waiver of deportation. The next day, he was returned to Mexico.

When defendant returned to the United States the next year, he was arrested and charged in federal court with illegal entry. He moved to dismiss the charge on the ground that his due process rights had been violated when the immigration judge had failed to advise him of his right to seek a discretionary waiver of his deportation order. The district court granted his motion but later vacated the order on the basis of new circuit law. Defendant never appealed the district court's denial of his motion to dismiss. The Immigration and Naturalization Service denied his request to reopen his case to allow him to seek discretionary relief. He was convicted of the federal charge, sentenced to 57 months in custody and then removed to Mexico in June 2002. On September 4, 2006, he was found in this district and charged with illegal re-entry.

Defendant asks that the record include two additional findings: that he waived his right to a speedy trial in 1995, shortly after being charged with the state drug crime, and that

if he had not done so, the criminal charges against him would have been resolved before the AEDPA's enactment. That request must be denied because I can find nothing in the record to suggest that defendant ever asserted these "facts" and gave the government an opportunity to respond to them. This decision does not hurt defendant because the inclusion of these facts would not change the outcome of the motion.

The magistrate judge failed to find that defendant had demonstrated detrimental reliance on the availability of discretionary relief. The magistrate judge concluded that defendant had not shown that he entered his plea of guilty in reliance on the availability of the discretionary relief provided under § 1181. Defendant contends that this finding was erroneous. Again, I can find nothing in the record that support defendant's version of the facts. Defendant did not enter into the state plea agreement until almost two months after the AEDPA had amended § 1181 to eliminate the opportunity for discretionary relief. The mere fact that defendant waived his right to a speedy trial (if I were to find that this was a fact) does not demonstrate detrimental reliance in the absence of any information about why he did so.

The governing law in this circuit is LaGuerre v. Reno, 164 F.3d 1035 (7th Cir. 1998), cert. denied, 528 U.S. 1153 (2000), in which the court of appeals held that the AEDPA's bar against discretionary waivers had retroactive application. The court took the position that "[i]t would border on the absurd to argue that these aliens might have decided not to

commit drug crimes, or might have resisted conviction more vigorously, had they known that if they were not only imprisoned but also, when their prison term ended, ordered deported, they could not ask for a discretionary waiver of deportation.” Id. at 1041. Defendant did not adduce any evidence to show that he relied to his detriment on the possibility of a discretionary review of his deportation. Accordingly, the magistrate judge reached the right conclusion in this case.

ORDER

IT IS ORDERED that the recommendation of the United States Magistrate Judge to dismiss defendant José De Horta Garcia’s motion to dismiss the indictment is ADOPTED. FURTHER, IT IS ORDERED that defendant’s motion to dismiss the indictment is DENIED on the ground that defendant has failed to show that he was deprived illegally of the opportunity to seek discretionary review of the order for his deportation issued in December 1996.

Entered this 20th day of February, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge