

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

Nos. 99-2412/3264

United States of America,

Appellee,

v.

Jose C. Tapia, also known as Pops,

Appellant.

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Appeals from the United States
District Court for the
District of Nebraska.

[UNPUBLISHED]

Submitted: February 1, 2000

Filed: February 8, 2000

Before BEAM, HEANEY, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

PER CURIAM.

Jose Tapia pleaded guilty to conspiring to distribute and possess with intent to distribute cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 846, and the district court¹ sentenced him to 151 months imprisonment and 5 years supervised release. Tapia's counsel filed a notice of appeal, and Tapia requested that his counsel be dismissed and that he be permitted to proceed pro se on appeal. The district court denied his request, Tapia appealed that denial, and we consolidated the appeals.

¹The Honorable Richard G. Kopf, United States District Judge for the District of Nebraska.

Tapia's counsel has filed a brief (which we understand to argue that the district court erred by failing to sua sponte grant Tapia a downward departure based on his diminished mental capacity), and has moved to withdraw pursuant to Anders v. California, 386 U.S. 738 (1967). In his pro se supplemental brief, Tapia contends that the government failed to prove that the drug attributed to him was actually crack cocaine, that the penalty disparity between crack and powder cocaine violates the Equal Protection Clause, and that his counsel was ineffective.

None of these arguments were raised below. We conclude that the district court did not plainly err by not granting Tapia an unrequested downward departure, and did not plainly err in determining that the drug attributed to Tapia was crack cocaine. See United States v. Montanye, 996 F.2d 190, 192 (8th Cir. 1993) (en banc) (standard of review). We have consistently rejected the disparity argument Tapia raises, see United States v. Clary, 34 F.3d 709, 712 (8th Cir. 1994) (collecting cases), cert. denied, 513 U.S. 1182 (1995), and his ineffective-assistance-of-counsel claim would be more appropriately raised in 28 U.S.C. § 2255 proceedings, see United States v. Martin, 59 F.3d 767, 771 (8th Cir. 1995). Finally, because Tapia has now had the opportunity to present his pro se arguments on appeal, we conclude that his appeal of the denial of his request to proceed pro se on appeal is moot.

After review of counsel's Anders brief, along with our independent review of the record in accordance with Penson v. Ohio, 488 U.S. 75 (1988), we find no nonfrivolous issues. Accordingly, we affirm the judgment of the district court, and we grant counsel's motion to withdraw.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.