

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1501
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROLAND JACK HENDERSON,
a/k/a David Arthur Stern,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(CR4-90-125-K)

(September 30, 1993)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:¹

Having pleaded guilty to conspiracy and bank larceny, Roland Jack Henderson appeals his conviction and sentence, contending that the district court did not have jurisdiction, that its failure to comply with Fed. R. Crim. P. 11 affected his substantial rights, that the Government breached the plea agreement, and that his sentence was based on unconstitutional prior convictions. We

AFFIRM.

¹ Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Henderson stole registered and bearer bonds worth over \$2 million from a safety deposit box in the Summit National Bank in Fort Worth, Texas. In November 1990, he was indicted, along with two others. On March 1, 1991, Henderson pleaded guilty to a superseding information charging him with conspiracy and bank larceny. He agreed to cooperate with the Government and was released on a personal recognizance bond pending sentencing. His cooperation was short-lived; and he failed to appear at the sentencing hearing scheduled for mid-May.

Henderson was arrested that October; and that December, the Government moved for upward departure from the Sentencing Guidelines. In February 1992, he filed a motion to withdraw his plea of guilty, asserting as grounds "the Government's misrepresentations concerning the real and legitimate possibility of a downward departure, the Government's use of continued threats to increase the recommendation for punishment as an intimidation tactic, and the Government's breach of the agreement effectuated by the filing of its motion to depart upwardly".

At the sentencing hearing that May, the district court denied Henderson's motion to withdraw his plea, and granted the Government's motion for upward departure. Henderson was sentenced to the statutory maximum on both counts (60 months on Count I and 120 months on Count II, to run consecutively for a total of 180

months), and two concurrent three-year terms of supervised release.

II.

A.

We quickly dispose of the first issue; the contention that the theft of bonds from a safe deposit box located in Summit National Bank was not a theft of property covered by 18 U.S.C. § 2113, because the bonds were not in the "care, custody, control, management, or possession" of the bank. This contention is meritless. "[S]afety deposit boxes are within the 'care, custody, control, management, or possession' of a bank". **United States v. Van**, 814 F.2d 1004, 1006 (5th Cir. 1987).

B.

Henderson asserts that his guilty plea is invalid because the district court failed to ascertain on the record at the plea hearing that his plea was made knowingly and voluntarily, by failing (1) to advise him personally that the federally insured status of a financial institution is an essential element of the federal offenses of conspiracy and bank larceny; (2) to make a record that it was satisfied that there was a factual basis for the plea; (3) to advise him adequately concerning supervised release; and (4) to advise him about the Sentencing Guidelines, including the power to depart, and that he would not be permitted to withdraw his plea if the court did not impose the bargained-for sentence.

Before accepting a guilty plea from a criminal defendant, the district court must address the defendant in open court, and inform

the defendant of, and determine that the defendant understands, among other things,

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, including the effect of any special parole or supervised release term, [and] the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances

Fed. R. Crim. P. 11(c)(1).

In reviewing a claim that a district court has failed to comply with Rule 11, we consider whether there was a variance from the procedures required by the Rule and, if so, whether such variance affected the substantial rights of the defendant. **United States v. Johnson**, ___ F.2d ___, ___, 1993 WL 323163, *1 (5th Cir. 1993) (*en banc*).

To determine whether a Rule 11 error is harmless (*i.e.* whether the error affects substantial rights), we focus on whether his knowledge and comprehension of the full and correct information would have been likely to affect the defendant's willingness to plead guilty. Stated another way, we "examine the facts and circumstances of the ... case to see if the district court's flawed compliance with ... Rule 11 ... may reasonably be viewed as having been a material factor affecting [defendant]'s decision to plead guilty."

Id. at ___, 1993 WL 323163 at *5 (quoting **United States v. Bachynsky**, 934 F.2d 1349 (5th Cir.) (*en banc*), *cert. denied*, ___ U.S. ___, 112 S. Ct. 402 (1991)).

1.

Although the district court did not advise Henderson that the federally insured status of the Summit National Bank is an essential element of the charges, the record establishes his awareness of that element. The information to which Henderson pleaded guilty states that the bank was federally insured at the time of the offenses. At the Rule 11 hearing, Henderson waived the reading of the information, but testified that he had read it and discussed the charges with his attorney. Henderson does not contend that the bank is not federally insured, nor does he contend that the district court's failure to advise him of this element of the charges was a material factor affecting his decision to plead guilty. Accordingly, this omission did not affect his substantial rights, and any error in this respect was harmless. Fed. R. Crim. P. 11(h).

2.

Henderson next contends that there was an inadequate factual basis for his plea because the Government produced no evidence that the bank was federally insured. He acknowledges that our court has held that, "[i]f sufficiently specific, an indictment or information can be used as the sole source of the factual basis for a guilty plea". *United States v. Adams*, 961 F.2d 505, 509 (5th Cir. 1992). Henderson asserts that the information, which alleges that the bank was federally insured, is not sufficiently specific to serve as the factual basis for that element, because it does not specify how or when the bank became federally insured. We

disagree. There was no need for the Government to establish a factual basis regarding *how* the bank obtained federal insurance. The information specifically alleges that, at the time of Henderson's offenses, the accounts of Summit National Bank were "then insured by the Federal Deposit Insurance Corporation".

Henderson also contends that the information cannot serve as the factual basis for this element because it was not read on the record. This contention is specious. As noted, he waived the reading of the information at the Rule 11 hearing, and stated that he had received a copy of it, had read it, had discussed the charges with his lawyer, and understood them. Henderson cannot now complain, through new counsel on appeal, that his substantial rights were affected because the information was not read on the record.

3.

At the Rule 11 hearing, the district court did not mention the effects of supervised release, the fact that Henderson would be sentenced according to the Guidelines, or that the court had the power to depart from the Guidelines. The only mention of the Guidelines at the plea hearing was by the prosecutor, who stated that the Government would advise the court if Henderson "meets the substantial assistance level within the Sentencing Guidelines". Henderson contends that these omissions affected his substantial rights.

The transcript of the Rule 11 hearing establishes that Henderson was informed, and understood, that the maximum penalty he

could receive was 15 years imprisonment, a \$500,000 fine, a \$100 mandatory special assessment, and six years of supervised release. The factual resume, which was signed by both Henderson and his attorney, also sets forth the penalty, under the caption "SENTENCING GUIDELINES CASE". At the Rule 11 hearing, the district court informed Henderson that

[t]he federal court, that is the judge, determines the penalty if a Defendant is convicted, whether it's on a verdict of a jury or on a plea of guilty.... You should never depend or rely upon any statement or promise by anybody, whether connected with a law enforcement agency or the Government, either one, as to what penalty will be assessed against you.

Henderson responded under oath that he understood, and specifically acknowledged that no one had made any promises to him regarding the sentence he would receive.

With full knowledge that he could be sentenced to 15 years imprisonment, a \$500,000 fine, a \$100 mandatory special assessment, and six years supervised release, and that the district court alone had the power to determine what his sentence would be, Henderson pleaded guilty. Under these circumstances, we cannot conclude that the district court's failure to explain the Guidelines, the power to depart, and the effects of supervised release materially affected Henderson's decision to plead guilty. Although Henderson no doubt hoped that his sentence would be considerably less than the maximum penalty explained to him before he entered his plea, his unilateral expectation is insufficient to establish that his plea was unintelligent or involuntary.

C.

Henderson contends next that the district court abused its discretion in refusing to permit him to withdraw his plea. Pursuant to Fed. R. Crim. P. 32(d), a district court "may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason". Fed. R. Crim. P. 32(d). "Although Rule 32(d) should be construed and applied liberally, there is no absolute right to withdraw a guilty plea." **United States v. Badger**, 925 F.2d 101, 103 (5th Cir. 1991); see also **United States v. Young**, 981 F.2d 180, 182-83 (5th Cir.), cert. denied, ___ U.S. ___, 113 S. Ct. 2454, and ___ U.S. ___, 113 S. Ct. 2983 (1993). "We will reverse a lower court's denial of a motion to withdraw a guilty plea only for abuse of discretion." **Badger**, 925 F.2d at 103.

Henderson asserts that he was entitled to withdraw his plea because the Government, by moving for upward departure to the statutory maximum sentences, violated its agreement not to make any sentencing recommendation. The Government asserts that Henderson's numerous, blatant violations of the plea agreement relieved it of any obligation to avoid making a sentencing recommendation.

"[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." **Santobello v. New York**, 404 U.S. 257, 262 (1971). In deciding whether there has been a breach of a plea agreement, we "must determine whether the government's conduct is consistent with the defendant's reasonable understanding of the agreement." **United**

States v. Valencia, 985 F.2d 758, 761 (5th Cir. 1993). "Whether the government's conduct violated the terms of the plea agreement is a question of law." **United States v. Watson**, 988 F.2d 544, 548 (5th Cir. 1993). "[Henderson] bore the burden of proving the underlying facts establishing a breach by a preponderance of the evidence." **Id.**

In the plea agreement, Henderson agreed to "cooperate fully with the United States and its agents". The agreement contained examples of actions which would constitute a breach by Henderson, including:

- (c) violation of any, federal, state, or local law by the Defendant following the execution of this Agreement but prior to the Defendant's surrender or being taken into custody to serve any sentence imposed in this case; or
- (d) failing or refusing to cooperate with the Government[,] her agents, or any law enforcement agency designated by the Government in the course of its continuing investigation; or
- (e) failing or refusing to meet with agents of the Government when requested to do so; or
- (f) violation of any condition of release imposed by the Court....

Immediately after entering his guilty plea on March 1, 1991, Henderson was released from custody on personal recognizance, subject to certain conditions, including the following:

- (1) The defendant shall not commit any offense in violation of federal, state or local law while on release in this case....
- (4) The defendant promises to appear at all proceedings as required and to surrender for service of any sentence imposed....

(7) The defendant shall:

....

(e) report on a regular basis to the following agency: Pretrial Services Officer, Houston[,] Texas.

....

(p) Defendant will wear a pager supplied by the FBI at all times. Defendant will have 30 minutes to return the page by FBI agents.

Paragraph X of the plea agreement provided:

If the Defendant fulfills all terms and conditions set forth above in this plea agreement, the United States Attorney for the Northern District of Texas will, at sentencing, move to dismiss the indictment returned in this case as it pertains to ROLAND JACK HENDERSON. It is expressly understood that the United States Attorney will not make a recommendation to the Court for a specific sentence that the Court should impose.

On April 18, 1991, the pretrial services officer filed a petition alleging that Henderson had failed to report as directed on April 15 and 16, and had failed to return pages from FBI agents from April 9 through 16. On May 17, Henderson failed to appear before the district court for sentencing. On May 31, Henderson avoided arrest by federal agents who attempted to stop a stolen vehicle he was driving. Henderson was arrested on October 17, 1991, at a motel in Odessa, Texas, in possession of stock certificates that had been stolen from a safe deposit box at a bank in Austin, Texas, sometime after October 11; Henderson had rented a safe deposit box at that bank and entered the vault area twice on October 11.

The Government's obligation to avoid making a sentencing recommendation was conditioned upon Henderson's fulfillment of the terms of the plea agreement. Henderson did not deny that he had violated the plea agreement; instead, he asserted that he had tried to cooperate, but was unable to do so because an FBI agent had endangered his life by telephoning him at a car lot. Henderson offered no explanation for his failure to contact the pretrial services officer, his failure to appear at the sentencing hearing, or his continued criminal conduct. The record contains overwhelming evidence that Henderson did not uphold his end of the bargain, and breached the plea agreement by failing to report as directed, failing to appear for sentencing, and committing other crimes following his release from custody.

Henderson's conduct relieved the Government of any obligation to refrain from making a sentencing recommendation. See **United States v. Watson**, 988 F.2d at 548-49. Because the Government did not breach the plea agreement, the district court did not abuse its discretion by refusing to permit Henderson to withdraw his guilty plea.

D.

Finally, Henderson asserts that the district court erred in imposing a sentence based on convictions that had been previously ruled invalid.

We "will uphold a sentence unless it was imposed in violation of law; imposed as a result of an incorrect application of the sentencing guidelines; or outside the range of the applicable

sentencing guideline and is unreasonable". **United States v. Howard**, 991 F.2d 195, 199 (5th Cir. 1993). "[W]hether a prior conviction is covered under the sentencing guidelines is ... reviewed *de novo*, while factual matters concerning the prior conviction are reviewed for clear error." **Id.** Application note 6 to U.S.S.G. § 4A1.2 states that "sentences resulting from convictions that a defendant shows to have been previously ruled constitutionally invalid are not to be counted" in computing the defendant's criminal history score. U.S.S.G. § 4A1.2, comment. (n.6). Application note 6 "allows a district court, in its discretion, to inquire into the validity of prior convictions at sentencing hearings". **United States v. Canales**, 960 F.2d 1311, 1315 (5th Cir. 1992).

Henderson's criminal history score was calculated on the basis of numerous prior convictions. Henderson objected to the inclusion of six of them on the ground that they were constitutionally invalid because they were obtained in violation of his right to the effective assistance of counsel and were based on "broken plea bargains". He asserted that the challenged convictions previously had been ruled invalid by the United States District Court for the Southern District of Texas. At the sentencing hearing, the Government quoted from an unpublished opinion in which our court construed the Southern District of Texas' decision as a ruling that the convictions would be disregarded for purposes of sentencing,

and not as a ruling that the convictions were constitutionally invalid.²

We conclude that Henderson did not satisfy his burden of showing that the prior convictions were constitutionally invalid. Other than his assertion that our court was mistaken in its 1986 unpublished opinion, Henderson offered no evidence to support his assertion that the prior convictions were obtained in violation of his right to counsel or were based on broken plea bargains. Accordingly, the district court did not err in using those prior convictions to calculate Henderson's criminal history score.

III.

The judgment of the district court is

AFFIRMED.

² As noted, at the sentencing hearing, the Government quoted the relevant portion of our court's unpublished opinion. Although the record reflects that the Government provided a copy of that opinion to the district court at the sentencing hearing, it is not contained in the record. And, although both the Government and Henderson cited that opinion, neither party attached a copy to its brief, as required by Local Rule 47.5.3.