

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-2025  
(Summary Calendar)

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JEFFREY LEE LANDON,

Defendant-Appellant.

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Appeal from the United States District Court  
For the Southern District of Texas

(CR H 90 0428 08)

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(January 27, 1992)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:\*

Defendant-Appellant Jeffrey Lee Landon appeals the sentence he received for various drug related convictions following his plea of guilty to four of the five counts for which he was indicted. Specifically, he claims reversible error by the trial court in its

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\*Local Rule 47.5 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

acceptance of his plea without advising him of the correct minimum mandatory sentence. For the reasons set forth below, we find no reversible error and therefore affirm.

I

FACTS AND PROCEEDINGS

The facts of this case are not in dispute. Landon was charged with various drug-related offenses in five counts of a 14-count second superseding indictment. On March 13, 1991, the government filed a notice of intent to prove a prior conviction with the appropriate attachments pursuant to 21 U.S.C. § 851 for enhancement of punishment. Three months later Landon entered a guilty plea to four counts; the remaining count, conspiracy to launder money, was dismissed pursuant to the plea agreement. The plea agreement signed by the parties did not mention enhancement, and it listed the minimum sentences on counts 1, 12, and 13 as ten years.

During the re-arraignment proceedings, the court advised Landon that count one, conspiracy to possess with the intent to distribute 5 kilograms of cocaine, "carrie[d] a possible penalty of no less than ten years and no more than life imprisonment. . . . In addition, there is a required period of supervised release of at least five years . . ." Regarding count 7, money laundering, the court informed Landon that the "possible penalty of up to 20 years imprisonment, . . . and a period of supervised release of up to three years may be imposed." As to count 12, possession with the intent to distribute cocaine within 1,000 feet of a private or public school, the court stated, "[t]his count carries a minimum

penalty of ten years, up to life imprisonment, . . . and a supervised period of release of at least ten years." Finally, the court stated that count 13, distribution of cocaine in excess of five kilograms, had a "possible penalty [of] a minimum of ten years, a maximum of life imprisonment, . . . and a supervised release of five years." Under 21 U.S.C. § 841(b)(1)(A), however, the mandatory minimum is 20 years for one against whom a § 851 enhancement is proved. Such enhancement applies to Landon's conspiracy and distribution counts, and perhaps to the distribution near a school count as well. (21 U.S.C. § 845, now § 859, adopts § 841(b) mandatory minimum sentences.)

Based on a 2 point firearms increase and another 2 point obstruction of justice increase, the Presentence Investigation Report (PSR) calculated a total offense level of 46. Given an offense level 46 and a criminal history category of III, the PSR recommended a guideline sentence of life imprisonment. Landon filed and was denied a motion to withdraw his guilty plea. The court imposed three concurrent life imprisonment sentences on counts 1, 12, and 13, and 240 months' incarceration on count 7. Landon was further sentenced to concurrent 5-year supervised release terms on counts 1 and 13, 3 years on count 7, and 10 years on count 12 were imposed.

## II

### ANALYSIS

Landon asserts that during the Rule 11 proceeding the district court failed to inform him fully of the effect of the notice to

prove prior conviction on the possible mandatory minimum penalty. Landon contends the court violated a core concern of Rule 11 by not advising him of the 20-year mandatory minimum. On the other hand, the government argues that it "abandoned" the enhancement provision when it agreed to the plea agreement that failed to include it. The government also points out that if the court had in fact enhanced Landon's sentence his supervised release terms of five years would be incorrect, as those periods are set at ten years for an enhanced conviction. See § 841(b)(1)(A). The government also argues that, even if the enhancement remained viable, we should affirm.

Rule 11 mandates that the court address three core concerns during a guilty plea proceeding: 1) whether the guilty plea was coerced; 2) whether the defendant understands the nature of the charges; and 3) whether the defendant understands the consequences of the plea. United States v. Martirosian, 967 F.2d 1036, 1039 (5th Cir. 1992). Federal Rule of Criminal Procedure 11(c)(1) requires that the court give certain advice to a defendant before accepting a guilty plea. Rule 11(c)(1) specifically requires that the court ensure that the defendant is informed of the nature of the charge, 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. United States v. Bachynsky, 934 F.2d 1349, 1354 (5th Cir.) (en banc), cert. denied, 112 S.Ct. 402 (1991). A total failure of a court to address a core concern of Rule 11 during the plea colloquy requires

vacating the sentence and remanding the case to the district court in order for the defendant to enter a new plea if he so desires. Martirosian, 967 F.2d at 1039. A partial failure to address a core concern, however, does not require automatic reversal. If the failure is only partial, the error may be found to be harmless. Bachynsky, 934 F.2d at 1355. An error is harmless if it may not "reasonably be viewed as having been a material factor" affecting the decision to plead guilty. Id. at 1360.

During the re-arraignment proceeding, the court advised Landon that the mandatory minimum sentence for three of the counts to which he pleaded guilty was 10 years. No mention was made by the court of the enhancement provisions of 21 U.S.C. § 841(b)(1)(A). Landon relies primarily on Martirosian. In Martirosian, we reversed the defendant's conviction and remanded the case, ruling the district court's complete failure to inform Martirosian of the 5-year mandatory minimum sentence "went to the heart of [the Rule 11] requirement" and was "a complete failure to address a Rule 11 core concern." Id. at 1039. Because of the sentencing court's total failure to address the mandatory minimum, we did not address whether the error was harmless under Rule 11(h). Id.

This case may be distinguished from Martirosian because the failure was only partial. The district court did not absolutely fail to inform Landon of the possible mandatory minimum statutory punishment, but incorrectly addressed the mandatory minimum sentence by not advising Landon of the possible effect of the enhancement statute. Landon was adequately placed on notice that

the government would seek an enhancement of his punishment by its notice under 21 U.S.C. § 851, he was correctly advised at his plea hearing of the statutory minimum sentences in the absence of enhancement, and of the correct maximum sentences, and he received the harsher punishment by virtue of his criminal history and the PSR recommendation, not by virtue of the government's request for enhancement. Neither can Landon now argue that the failure to advise him of the appropriate mandatory minimum affected his decision to plead guilty. Landon failed to raise this point in his objections to the PSR or in his motion to withdraw his plea. The plea agreement acknowledges Landon's understanding that he was subject to the maximum sentence, life on counts 1, 12, and 13, and 20 years on count 7, and that a promise of a particular sentence would not be binding on the court.

As advice about the mandatory minimum under the enhancement statute could not reasonably have been a "material factor" in Landon's decision to plead guilty, see Bachynsky, 934 F.2d at 1360, any error was harmless. His sentence is, therefore, AFFIRMED.