

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-2450
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

GODFREDY OKE OBIZAR,

Defendant-Appellant.

Appeals from the United States District Court
for the Southern District of Texas
(CR-H-91-193-03)

(February 17, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

DAVIS, Circuit Judge:¹

Godfredy Oke Obizar appeals the district court's denial of his motion to withdraw his guilty plea to conspiracy to import heroin. Finding no abuse of discretion, we affirm.

I.

¹Local 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

In October 1991, Douglas Lee Mitchell was arrested for smuggling 5.18 kilograms of heroin into the United States from Amsterdam. After his arrest, Mitchell agreed to cooperate with law enforcement authorities. Mitchell placed a monitored telephone call to Exodus Elvis Nzerue to set up a controlled delivery of a suitcase containing the heroin. Later that day Nzerue and his cousin, appellant Godfrey Okechukwu Obizar, visited Mitchell at Mitchell's place of business to discuss the transfer of the suitcase and Mitchell's payment, but Nzerue and appellant left without the suitcase.

The next day Emmanuel Eperer Oporum visited Mitchell and told Mitchell that he would take the suitcase containing the heroin because Nzerue owed Oporum money; Oporum also promised to get Mitchell his money. Oporum was arrested after he took possession of the suitcase.

Oporum also agreed to cooperate with law enforcement authorities. He called Nzerue and attempted to set up a meeting. Nzerue told Oporum that he had to contact appellant, but agreed to meet Oporum at a Wendy's restaurant. Nzerue and appellant were arrested at Wendy's while waiting for Oporum. They too agreed to cooperate with authorities, but were unsuccessful in their attempt to make a controlled delivery of the suitcase to "Joe."

Police discovered that appellant had been arrested in August 1991 in Georgia for smuggling and trafficking in heroin. Although the charges were initially dismissed, the state of Georgia indicted appellant on the heroin charges in October 1991.

In February 1992, appellant pled guilty to one count of conspiracy to import heroin. In response to the district court's inquiry whether the facts as stated by the Government were substantially correct, appellant stated that "[h]alf of this is correct. Half isn't correct." He denied speaking to Mitchell before or during Mitchell's trip to Amsterdam and stated that his role in the transaction was limited to "going with my cousin, visiting his [Mitchell's] shop and then going with my cousin again, to the Wendy's." Appellant nevertheless informed the court that "the story is substantial enough for me to plead guilty," and the district court accepted his guilty plea.

During his interview with the probation officer who prepared the PSR in March 1992, appellant denied knowing that Nzerue was involved with drug smuggling and denied knowing the contents of the suitcase until after his arrest. He stated that he pled guilty because his attorney advised him that Nzerue and Oporum had agreed to testify against him at trial, and because "his ignorance was no excuse."

At his sentencing hearing in May 1992, appellant made an oral motion to withdraw his guilty plea alleging that he was not aware of state charges pending in Georgia until he received the PSR. He argued that he should be permitted to withdraw his guilty plea because he had been unable to negotiate a plea agreement with Georgia and because his federal conviction would prevent him from testifying at his state trial. The district court denied the

motion because appellant had not stated a valid basis for withdrawing his plea.

During his allocution appellant again denied knowing that Nzerue was involved in anything illegal, but also stated that "[e]verything that I've done in this case, is enough to plead guilty. And I'm guilty." The court sentenced appellant to 210 months imprisonment, 5 years supervised release, and a \$50 special assessment.

II.

Appellant argues that the district court's denial of his motion to withdraw his guilty plea amounted to an abuse of discretion. The relevant factors a court must consider in ruling on a motion to withdraw a guilty plea include:

(1) whether the defendant has asserted his innocence; (2) whether withdrawal would prejudice the Government; (3) whether the defendant delayed in filing the motion, and if so, the reason for the delay; (4) whether withdrawal would substantially inconvenience the court; (5) whether close assistance of counsel was available to the defendant; (6) whether the plea was knowing and voluntary; and (7) whether withdrawal would waste judicial resources.

United States v. Hurtado, 846 F.2d 995, 997 (5th Cir.), **cert. denied**, 488 U.S. 863 (1988) (citing **United States v. Carr**, 740 F.2d 339, 343-44 (5th Cir. 1984), **cert. denied**, 471 U.S. 1004 (1985)). Although appellant did not argue the **Carr** factors to the district court, he now argues for the first time on appeal that these factors supported his motion to withdraw his guilty plea.

The defendant has the burden of establishing that withdrawal of the guilty plea is justified. **United States v. Daniel**, 866 F.2d

749, 752 (5th Cir. 1989). In support of his motion, appellant asserted that the Texas conviction would prevent him from testifying in the Georgia state trial and that he did not learn of the Georgia charges until after the filing of the PSR. Appellant did not mention the **Carr** factors or even assert his innocence. **See United States v. Rinard**, 956 F.2d 85, 88-89 (5th Cir. 1992). The district court is not required to make specific findings on each **Carr** factor before denying a motion to withdraw a guilty plea. **United States v. Badger**, 925 F.2d 101, 104 (5th Cir. 1991). Appellant failed to articulate any valid reason to justify the withdrawal of his guilty plea. Consequently, the district court did not abuse its discretion in denying the motion.

Even if we assume that appellant's assertions of innocence at the plea hearing (he claimed that the facts upon which the government relied were half correct) should have been considered by the court at appellant's sentencing hearing, a claim of factual innocence does not mandate withdrawal of an otherwise voluntary guilty plea. **See Hurtado**, 846 F.2d at 997. "An individual accused of a crime may voluntarily, knowingly[,] and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." **United States v. Clark**, 931 F.2d 292, 294-95 (5th Cir. 1991) (quoting **North Carolina v. Alford**, 400 U.S. 25, 37 (1970)). Appellant concedes that the district court addressed the core concerns of Fed. R. Crim. P. 11 and that his plea was knowing and voluntary. The district court did not abuse its discretion by denying his motion to withdraw his guilty plea.

Finally, to the extent that appellant alleges that there was an insufficient factual basis to support his guilty plea, we review for harmless error. Fed. R. Crim. P. 11(h); **United States v. Adams**, 961 F.2d 505, 511-12 (5th Cir. 1992). After a review of the record as a whole, including the factual summary in the PSI that appellant has never disputed, we conclude that the record amply supports appellant's conviction and that any error was harmless. **See id.** at 512-13.

AFFIRMED.