UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 92-2698 & 92-2699
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

LEONARD E. SZUCKO,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-H-78-58-1 & CR-H-78-161)

(November 3, 1993)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

In issue is whether the district court erred in accepting Leonard E. Szucko's guilty pleas, in applying the Sentencing Guidelines to one of the offenses, in not departing downward for acceptance of responsibility, and in relying on the information in

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[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 Pursuant to that rule, the court has determined that this opinion should not be published.

the Presentence Report (PSR).[2] We **AFFIRM** in part and **VACATE** and **REMAND** in part.

I.

Szucko was indicted in April 1978 on six counts: count one for mail fraud, in violation of 18 U.S.C. § 1341; counts two-five for false statements to a federally-insured financial institution, in violation of 18 U.S.C. § 1014; and, count six, for interstate transportation of stolen money, in violation of 18 U.S.C. § 2314. He failed to appear at trial. In October 1978, Szucko was indicted for bond jumping, in violation of 18 U.S.C. § 3146. He was declared a fugitive, and was arrested in 1992.[3]

At his arraignment, Szucko entered an ***Alford*** guilty plea to all six counts of the first indictment,[4] and entered a guilty plea

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[2] Szucko also raises, for the first time on this appeal, an ineffective assistance of counsel claim, based on counsel advising him to enter the plea to the first indictment and not advising the court that it had erred in accepting the plea to the second indictment. Under most circumstances, a claim of ineffective assistance of counsel "cannot be resolved on direct appeal when the claim has not been raised before the district court," because "no opportunity existed to develop the record on the merits of the allegations." ***United States v. Higdon***, 832 F.2d 312, 313-14 (5th Cir. 1987), *cert. denied*, 484 U.S. 1075 (1988). Accordingly, we decline to address this issue, without prejudice to it being raised in a 28 U.S.C. § 2255 proceeding. ***Id.*** (citing ***United States v. McClure***, 786 F.2d 1286, 1291 (5th Cir. 1986)).

[3] The cases were consolidated on motion of the government.

[4] An "***Alford*** guilty plea" refers to one entered by a defendant who pleads guilty "`even if he is unwilling or unable to admit his participation in the acts constituting the crime.'" ***United States v. Montoya-Camacho***, 644 F.2d 480, 487 (5th Cir. 1981) (quoting ***North Carolina v. Alford***, 400 U.S. 25 (1970)). In accordance with ***Alford***, we have held that a defendant under these circumstances nevertheless may "`voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence'", pursuant to the requirements of Fed. R. Crim. P. 11. ***Id.***

to the bond jumping charge under the second. Following these pleas, the district court sentenced Szucko in part as follows: (1) 24 months imprisonment on counts two-five (false statements), to run concurrently to 120 months imprisonment on count six (interstate transportation of stolen money); (2) 27 months imprisonment for bond jumping, to run consecutive to the above sentences, followed by three years supervised release; and (3) five years imprisonment for count one (mail fraud), suspended for five years probation, to run consecutive to the prison terms, and concurrent with the supervised release term.

II.

A.

Szucko contends that the district court erred in accepting his ***Alford*** plea to the first indictment, and in misinforming him of the possible penalties for interstate transportation of stolen money. We disagree with the former contention, but agree with the latter.

1.

Szucko contends that his ***Alford*** plea was not voluntary unless he received a lesser sentence in exchange for his plea. An ***Alford*** plea is constitutionally valid (*i.e.*, voluntary and the result of a knowing and intelligent choice by the defendant), so long as there is a factual basis for the plea, and the court inquires into the conflict between the defendant's pleading guilty, yet maintaining innocence. ***North Carolina v. Alford***, 400 U.S. 25, 38 n.10 (1970); ***United States v. Jack***, 686 F.2d 226, 230 (5th Cir. 1982). The court may find the plea to have been knowing and

intelligent, if the evidence presented substantially negates the claim of innocence. ***Alford***, 400 U.S. at 37-38.

The government presented a detailed factual basis supporting Szucko's guilt, which Szucko did not challenge after having reviewed it. Further, he explained to the court that he understood that the government's case was a "very strong case ... it's a very complex case, it happened a long time ago, and it's an advantage for me to just have that end as soon as possible [] and go[] back to my normal life." Based on the record, Szucko apparently felt that it was advantageous to make an ***Alford*** plea even without an accompanying reduction in his sentence. The district court did not err in accepting the plea to counts one-five.

2.

As for the plea to count six (interstate transportation of stolen money), the district court informed Szucko that the penalty was a fine of not more than $5,000 or imprisonment for not more than two years, or both. In fact, the penalty is a fine of not more than $10,000, or imprisonment for not more than ten years, or both. Szucko was sentenced to 120 months imprisonment for this offense.

The district court must address a defendant in open court before accepting a guilty plea and determine that the defendant understands, *inter alia*, the nature of the charges, and any mandatory minimum and maximum possible penalties. ***United States v. Johnson***, 1 F.3d 296, 299, (5th Cir. 1993) (en banc), 1993 WL 323163

at *2-3. We review for harmless error. ***Id.*** at 301-02, 1993 WL 323163 at *3-5.

The district court's error was not harmless; the government concedes this. It was precisely the type error that would be likely to make Szucko underestimate significantly the sentence he would receive after pleading guilty. *See* ***United States v. Whyte***, ___ F.3d ___ (5th Cir. Sept. 21, 1993), No. 92-4150, 1993 WL 364940 at *1-2 (holding court's error in stating penalties during plea colloquy not to be harmless). And, the record does not indicate that Szucko was informed otherwise about the correct penalty, *e.g.*, via a plea agreement. *Cf.* ***id.*** at *1 (vacating conviction and sentence, and remanding, despite fact that defendant's counsel informed him of correct sentence).

B.

Szucko also appeals the conviction and sentence he received under 18 U.S.C. § 3146 (bond jumping), contending that he was misinformed regarding the minimum and maximum sentences. Again, we review for harmless error.

When the indictment issued in 1987, the applicable statute was 18 U.S.C. § 3150 (failure to appear). When Szucko was arrested, entered his plea, and was sentenced, however, the statute in effect was § 3146. The Guidelines apply to § 3146; they were not in effect when Szucko was indicted under § 3150.

Szucko pleaded guilty to a violation of § 3150; and the district court told him that the Guidelines did not apply, and that the maximum penalty for an offense under § 3150 was a fine of not

more than $5,000 or imprisonment for not more than five years, or both. Szucko was not advised that supervised release could be imposed. When Szucko was sentenced, however, he was sentenced under the Guidelines, for a violation of § 3146, and given a 27-month term of imprisonment, followed by a three-year term of supervised release.

Rule 11 requires that a defendant be advised when the Guidelines apply. ***United States v. Hekimain***, 975 F.2d 1098, 1103-04 (5th Cir. 1992). Szucko was not so advised; and again, the information he received is likely to have caused him to underestimate the sentence he would receive upon entering a guilty plea. *See* ***United States v. Whyte***, ___ F.3d at ___, 1993 WL 264940 at *3. The government again concedes, and we agree, that the error in misinforming Szucko as to the possible penalties and the applicability of the Guidelines was not harmless.[5]

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[5] In any case, the sentence Szucko received under § 3146 was 27 months imprisonment followed by 36 months supervised release. This exceeds five years, the statutory maximum sentence, *see* 18 U.S.C. § 3146; ***United States v. Garcia-Garcia***, 939 F.2d 230, 232-33 (5th Cir. 1991) (vacating sentence of 27-months imprisonment, followed by 36-months supervised release, because it exceeded statutory maximum of five years).

Szucko also contends that the conviction and sentence violate the constitutional provision against *ex post facto* punishment, because § 3146 provides that any prison term will run consecutive to imprisonment for other offenses, whereas the predecessor statute, § 3150, had no such requirement. *See* 18 U.S.C.A. § 3150 (1985), Historical Note; 18 U.S.C. § 3150 (Supp. 1982); 18 U.S.C. § 3146(b)(2) (Supp. 1993). Further, he contends that application of the Guidelines was erroneous. We address these points to assist the district court on remand.

The Guidelines were not in effect when Szucko was indicted under § 3150. They may be applied, however, to a continuing offense (*i.e.*, one which began before the Guidelines were

III.

For the foregoing reasons, Szucko's sentences and convictions for mail fraud and making false statements to a federally-insured financial institution (counts one-five of the first indictment) are **AFFIRMED.** His convictions and sentences for interstate transportation of stolen money and bond jumping are **VACATED**, and this matter is remanded for further proceedings.

AFFIRMED in part and VACATED and REMANDED in part

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applicable, but was concluded after the Guidelines went into effect). ***United States v. White***, 869 F.2d 822, 826 (5th Cir. 1989), *cert. denied*, 490 U.S. 1112 (1990). We have held that bond jumping is a continuous offense, and certain other circuits agree. ***United States v. Saenz***, No. 91-2043 (5th Cir. August 13, 1991) (unpublished) (offense of failure to appear continues from time of initial failure to appear until fugitive is in custody); *see also* ***United States v. Gray***, 876 F.2d 1411, 1418-19 (9th Cir. 1989) (bond jumping is continuing offense; Guidelines § 1B1.1 requires their application where defendant was arrested after their effective date (Nov. 1, 1987)), *cert. denied*, 495 U.S. 930 (1990); ***United States v. Lopez***, 961 F.2d 1058, 1060 (2d Cir. 1992) (same).

As Szucko points out, however, we have also, in a similar case, applied the version of the bond-jumping statute in effect when the offense began, rather than the one in effect either when the indictment issued or the fugitive was taken into custody. ***United States v. Iddeen***, 854 F.2d 52 (5th Cir. 1988) (defendant jumped bail November 1987, before amendments to § 3146; amendments to § 3146 took effect December 1987; then indictment issued, and defendant was later arrested; defendant was sentenced under pre-amendment version of § 3146). We need not resolve at present the tension between ***Saenz*** and ***Iddeen***.

For the bond-jumping offense, Szucko also contests the district court's not departing downward for acceptance of responsibility. Because we vacate the conviction and sentence on this charge, we need not reach this issue. Similarly, we need not decide Szucko's last issue -- whether the district court improperly relied on information in the PSR.