IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-4150

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DEVON ROY WHYTE,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana
(CR 90 20048 01)

(December 30, 1992)

Before GARWOOD, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

Devon Whyte pled guilty in a plea agreement to possession of cocaine with intent to distribute, 21 U.S.C. §§ 841 (a) (1) and 841 (b) (1) (A). The plea agreement stated that Whyte was subject to a minimum term of five years and a maximum term of twenty years imprisonment, a minimum term of four years supervised release, and

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

a fine of up to $2,000,000. During the sentencing colloquy required by Fed. R. Crim. P. 11, the district court informed Whyte of these terms. The penalties stated in the agreement and by the court during the plea colloquy, however, were incorrect. In truth, Whyte was subject to a mandatory minimum term of ten years, not five, a possible maximum term of life, not twenty years, a supervised release term of five, not four years, and a fine of $4,000,000, not $2,000,000.

A sentencing hearing took place approximately one year after the plea colloquy.[1] The district court at this time considered a motion by Whyte to withdraw his guilty plea on grounds of incompetence and the district court's failure to fulfill the requirements of Rule 11 during the colloquy. The court rejected the competency claim, but reserved decision on Whyte's Rule 11 claim. After sentencing Whyte to a fourteen-year term of imprisonment plus five years of supervised release, the district court denied his motion to withdraw the guilty plea. The district court held that its failure to inform Whyte of the correct mandatory minimum and maximum terms was harmless error under United States v. Bachynsky, 934 F.2d 1349 (5th Cir.) (en banc), cert. denied, 112 S.Ct. 402 (1991), for the total number of years in Whyte's sentence (nineteen) was less than the possible maximum sentence of twenty years stated by the district court in the plea colloquy. Whyte has appealed to this Court.

[1] Shortly after the colloquy, the district court granted Whyte's motion to have Whyte committed for psychiatric evaluation.

The district court failed to inform Whyte of the correct mandatory minimum penalty, maximum penalty, and the term of supervised release. We have held that a district court's omission of the minimum and maximum penalties during the plea colloquy requires automatic reversal; harmless error review is inapplicable. United States v. Pierce, 893 F.2d 669, 678-79 (5th Cir. 1990); United States v. Martirosian, 967 F.2d 1036, 1039 (5th Cir. 1992) (district court's omission of the mandatory minimum penalty). In addition, there is nothing in the record that firmly suggests that Whyte, despite the district court's misstatements, had knowledge of the true terms of his plea. We therefore VACATE Whyte's conviction and sentence and REMAND in order that he may replead.