

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4440

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT LEE POOLE, a/k/a,
Robert Lee Hart,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(1-91-CR-72-1)

(January 19, 1993)

Before KING, DAVIS, and WIENER, Circuit Judges.

PER CURIAM:*

Robert Lee Poole appeals the district court's denial of his motion to withdraw his guilty plea. Poole asserts his innocence of the crime charged in one count of the indictment. He also states that as a result of incorrect advice by his lawyer, he

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

misunderstood the effect the Sentencing Guidelines would have on his sentence. We affirm.

Poole was charged in a sixteen-count indictment alleging that he and his co-defendant Matthew Burton conspired to and did rob the Super 8 Motel in Beaumont, Texas, on May 29 and 30, 1991, and the Bank One Texas, N.A., also in Beaumont, on May 29, 1991, using force, violence, and intimidation. Poole pleaded guilty to armed robbery of a bank (Count 3), obstruction of commerce by armed robbery of a motel clerk (Count 4), using and carrying a firearm during a crime of violence (Count 6), being a felon in possession of a firearm (Count 7), and making a false written statement in the acquisition of a firearm (Count 10).

After reviewing his Presentence Investigation Report (PSR), Poole filed a motion to withdraw his plea. At the hearing on the motion, Poole argued that the PSR's range of punishment exceeded the range that his attorney had advised him he would receive prior to entering his plea and that he was not guilty of the bank robbery and putting the victim's life in jeopardy by using a weapon. The court issued a memorandum denying Poole's motion to withdraw, and sentenced him to a total of 248 months of imprisonment, with five years of supervised release.

The Plea Hearing

The record reflects that, at the plea hearing, the court established that Poole's ability to understand the proceedings was not affected by medication, alcoholic beverages, or drugs. Poole affirmed that he had received a copy of the indictment

against him, understood the charges, and was satisfied with his attorney's representation. The court ascertained that Poole understood the maximum terms of imprisonment that he could receive for the counts to which he was pleading guilty. The court further established that Poole's plea was not coerced and that no promises outside the agreement had been made.

The court confirmed that Poole had discussed with his attorney how the Sentencing Guidelines might apply to his case. The court also assured that Poole understood that the court could not calculate his sentence until the PSR had been prepared and that the court could make an upward departure from the sentence called for by the Guidelines. Poole acknowledged he understood that if the sentence was more than what he expected, he would have no right to withdraw his guilty plea.

The court recited the allegations of all the counts to which Poole was pleading guilty, including Count 3, which stated that in connection with his robbery of Bank One, Poole put the life of Glenda Lou Jacker in danger by the use of a dangerous firearm. Poole established that he understood that unless the Government proved each of the elements of the offenses beyond a reasonable doubt, he would be acquitted. Poole responded affirmatively that he committed the acts in the five counts recited to him. The Government then recited the proof that it would offer. Poole pleaded guilty to the five counts recited by the court, and the court accepted his plea.

Factors to be Considered

In U.S. v. Carr, this court enumerated seven factors for district courts to consider when ruling on a motion to withdraw a guilty plea: (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 adequate assistance of counsel was available to the defendant; (6) whether the plea was knowing and voluntary; and (7) whether withdrawal would waste judicial resources. 740 F.2d 339, 343-44 (5th Cir. 1984), cert. denied, 471 U.S. 1004 (1985). No single factor or combination of factors mandates a particular result. Instead, the district court should make its determination based on the totality of the circumstances. Id. at 344. The defendant bears the burden of establishing a fair and just reason for withdrawing the guilty plea. U.S. v. Hurtado, 846 F.2d 995, 997 (5th Cir.), cert. denied, 488 U.S. 863 (1988). The district court's ruling will not be reversed absent an abuse of discretion. Id.

As to the first factor, at the motion to withdraw his guilty plea, Poole asserted that he was not guilty of robbery of the bank and putting the victim's life in jeopardy by using a weapon. On appeal, Poole argues his innocence on the basis that he did not have a firearm, and, therefore, could not have exhibited a dangerous weapon or device. Poole, therefore, asserted his innocence. However, as the Government notes, while Poole now contests his possession of the gun in Count 3, he does not

contest his possession of the gun in Count 6, which is the same possession charged under a different statute.

As to the second factor, the Government asserted in its response to Poole's motion to withdraw his guilty plea that it was prepared to try the case on the day that the plea was entered, but that should Poole be allowed to withdraw his plea, the Government would be prejudiced by its inability to locate a material witness who had moved and not left a forwarding address. As to the delay in filing the motion, Poole waited seven weeks after entering his plea and filed the motion after a lengthy PSR was prepared. As to the fourth factor, in denying Poole's motion to withdraw, the court noted that with the increase of criminal filings, a full trial would substantially inconvenience the court and delay the trials of other defendants.

As to the fifth factor, although Poole asserts that he received erroneous advice from his attorney, he has not alleged an ineffective assistance of counsel claim. The Supreme Court held in Parker v. North Carolina that although an accused's counsel gave erroneous advice resulting in his guilty plea, the error was not sufficient to render the plea unintelligent where the defendant had admitted in open court that he committed the offense with which he was charged. 397 U.S. 790, 797-98 (1970). Likewise, as noted above, Poole admitted committing the offenses as alleged in the indictment, including Count 3, which stated that Poole had put his victim's life in jeopardy by the use of a firearm.

As to the sixth factor, Poole asserts that because he misunderstood the application of the Sentencing Guidelines to his case, his plea was not knowing and voluntary. This court has held that for a plea to be knowing and voluntary, the defendant must understand the consequences of his plea. U.S. v. Gaitan, 954 F.2d 1005, 1011 (5th Cir. 1992).

The consequences of a guilty plea, with respect to sentencing, mean only that the defendant must know the maximum prison term and fine for the offense charged. As long as [the defendant] understood the length of the time he might possibly receive, he was fully aware of his plea's consequences.

Id. (quoting U.S. v. Pearson, 910 F.2d 221, 223 (5th Cir. 1990), cert. denied, 111 S.Ct. 977 (1991)). As discussed above, the district court carefully explained the maximum prison terms that Poole could receive. Therefore, Poole's plea was knowing and voluntary.

As to the last factor, the court noted that given Poole's adequate counsel and his knowing and voluntary plea, withdrawal would waste judicial resources.

Based on the "totality of the circumstances," Poole has failed to meet his burden of establishing a fair and just reason for withdrawing his guilty plea. The district court did not abuse its discretion by denying Poole's motion to withdraw his guilty plea.

AFFIRMED.