UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4957

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

FRANK A. KECK,

Defendant-Appellant.

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No. 92-4958

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

HARVEY BARNES,

Defendant-Appellant.

****

No. 92-4959

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

VIRGIL BARNES,

Defendant-Appellant.

Appeals from the United States District Court
for the Western District of Louisiana
(CR-91-30043-03)
(CR-91-30043-02)
(CR-91-30043-07)

(August 12, 1993)

Before REAVLEY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

In these consolidated appeals from guilty pleas to drug trafficking offenses, Harvey and Virgil Barnes and Franklin Keck contest their sentences, and Harvey Barnes also challenges not being allowed to withdraw his plea. Finding no reversible error, we **AFFIRM**.

I.

In early November 1991, several law enforcement agencies conducted an undercover operation in Monroe, Louisiana, as part of an ongoing investigation of a drug trafficking organization based in Houston, Texas. It was suspected that this organization was directed by appellant Harvey Barnes of Houston, and that he imported illegal drugs and then transported them across state lines into Louisiana.

A confidential informant (CI) arranged to purchase over 100 pounds of marijuana from Harvey Barnes for $110,000. It was to be

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 Pursuant to that rule, the court has determined that this opinion should not be published.

delivered to a Monroe hotel room on November 6 by Shirley Carter, and appellant Franklin Keck was to collect the payment and return it to Barnes. Carter travelled from Houston to Monroe on November 6 with approximately 115 pounds of marijuana. The additional 15 pounds were to be sold later that day in Monroe to Algean Caldwell in a separate transaction.

After Carter delivered the marijuana to the CI as planned, the CI showed Carter the payment money; but Carter did not take it, waiting instead for Keck. When Keck arrived, he took the money; and when he and Carter left, they were arrested by police officers who had been monitoring the transaction. After Carter agreed to cooperate with the officers, she called Harvey Barnes to report the successful completion of the first transaction, and he gave her instructions for the delivery to Caldwell. She was placed under surveillance, and made the delivery as instructed. Caldwell, accompanied by Dorothy Norwood, paid Carter only a service fee, as he had made private arrangements with Harvey Barnes regarding payment for the marijuana. Caldwell and Norwood were arrested shortly thereafter.[2]

The next day, the undercover operation shifted to Houston, where a controlled payment to Harvey Barnes was planned. Harvey Barnes's source for the marijuana, later identified as Jose Cantu, was in Houston awaiting payment; and Barnes contacted the CI, trying to locate Keck and the $110,000. The CI called Barnes, and told him that partial payment was on the way. Barnes's house was

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[2] *See* ***United States v. Caldwell***, 985 F.2d 763 (5th Cir. 1993).

placed under surveillance, and he was observed leaving it. His nephew, appellant Virgil Barnes, remained at the house and handled several calls from the CI.[3] Virgil Barnes said that they were concerned about getting the money for Cantu. After Harvey Barnes returned, he, Virgil Barnes and Cantu were arrested; Harvey Barnes and Cantu for the marijuana transaction in Monroe, and Virgil Barnes for distribution of 1/2 kilogram of cocaine the prior February.

Later in November, Harvey Barnes, Keck, Cantu, Carter, Caldwell and Norwood were indicted. Harvey Barnes and Keck were charged for conspiracy to distribute over 100 pounds of marijuana (count 1) and the corresponding substantive offense (count 2). In a superseding indictment against Harvey and Virgil Barnes, Keck and Caldwell in February, Harvey and Virgil Barnes and Keck were charged with conspiracy to distribute 100 kilograms (*instead of the earlier 100 pounds*) or more of marijuana (count 1) and possession of an unspecified amount of marijuana with intent to distribute (count 2).

Having pled not guilty,[4] Harvey and Virgil Barnes and Keck pled guilty, signing plea agreements and affidavits of

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[3] Virgil Barnes had been taken into custody in July 1991, after helping deliver one kilogram of cocaine from Shreveport to Monroe. He was not arrested then, because he agreed to cooperate with law enforcement authorities. He was released and paid $750 to maintain the appearance that the transaction had gone as planned.

[4] Harvey Barnes and Keck pled not guilty to the original indictment in December 1991. Virgil Barnes, named only in the superseding indictment, entered his not guilty plea in March 1992, along with Keck. Harvey Barnes pled not guilty to the superseding indictment in April 1992.

understanding of their maximum penalties and constitutional rights in June 1992. Harvey Barnes pled guilty to count 1 of the superseding indictment; Keck, to count 1 of the original indictment. The superseding indictment was dismissed as to Virgil Barnes; and, pursuant to a bill of information, he pled guilty to distribution of an unspecified amount of cocaine.

In August, represented by new counsel, Harvey Barnes moved to withdraw his guilty plea. The motion was denied at the sentencing hearing on September 1, 1992; and he was sentenced, along with Virgil Barnes and Keck. Harvey and Virgil Barnes and Keck were sentenced, *inter alia*, to 235, 63, and 69 months in prison, respectively.

II.

Harvey Barnes contests not being allowed to withdraw his plea; each appellant challenges his sentence.

A.

1.

Harvey Barnes pled guilty to conspiracy to distribute 100 or more kilograms of marijuana. A district court may allow a defendant to withdraw a guilty plea at any time before sentencing "upon a showing ... of any fair and just reason". Fed. R. Crim. P. 32(d). The defendant bears the burden of proving justification for the withdrawal, and the district court is given broad discretion in ruling on the motion. ***United States v. Carr***, 740 F.2d 339, 344 (5th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985). We review

only for abuse of discretion. ***United States v. Hurtado***, 846 F.2d 995 (5th Cir.), *cert. denied*, 488 U.S. 863 (1988).

Seven factors must be considered in determining whether the defendant has established any fair and just reason for the withdrawal: (1) whether the defendant has asserted his innocence; (2) whether the government would be prejudiced by withdrawal; (3) whether the defendant delayed in filing the motion; (4) whether withdrawal would substantially inconvenience the court; (5) whether close assistance of counsel was available to the defendant; (6) whether the original plea was knowing and voluntary; and (7) whether withdrawal would waste judicial resources. ***United States v. Carr***, 740 F.2d at 343-44. The district court should look at the totality of the circumstances; no single factor is determinative. Indeed, it need not make a specific finding regarding each factor. ***United States v. Badger***, 925 F.2d 101, 104 (5th Cir. 1991). Because, as stated, the defendant has the burden of establishing justification for withdrawal, it is Harvey Barnes's duty to identify those factors he considers applicable. ***Id***.

Barnes pled guilty on June 12, 1992. On July 31, he dismissed his attorney and retained new counsel that week. With the assistance of that lawyer (who is counsel on appeal), Barnes moved on August 21 to withdraw his plea. In that motion, he stated why each ***Carr*** factor weighed in his favor, but primarily relied on the fifth and sixth factors, claiming that his prior counsel had not

been helpful and his plea neither knowing nor voluntary.[5] He follows that quickly narrowed approach here.[6]

Harvey Barnes requested an evidentiary hearing on his motion; but, instead, the district court discussed the motion with Barnes and his new lawyer at the sentencing hearing. In denying the motion, the court noted that its discussion with the defendant at the plea hearing was unusually detailed and that it would have yielded a knowing plea, even in the absence of competent counsel. Based upon our review of the record, as discussed below, we do not find an abuse of discretion.

At his plea hearing, Harvey Barnes twice answered affirmatively when asked if he was satisfied with his lawyer's representation. His lawyer stated that he and Barnes had spoken by telephone "on several occasions" and had met that morning. When asked if he had had all the time he needed to discuss the case with his lawyer, Barnes initially answered, "I haven't had it, but I just have to go along with it." The court counseled Barnes that he did not have to "go along with it"; that he had "an absolute right to a reasonable call on [his lawyer's] time". The court asked

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[5] As further support for the contention that his counsel had been ineffective, Harvey Barnes also asserted that the court lacked jurisdiction and venue to hear his case because only 115 pounds of marijuana were to be distributed in the western district of Louisiana and that his prior attorney was ineffective because he failed to point out these problems. This issue, however, was not discussed when the court ruled on the motion (at sentencing) and has not been pursued on appeal.

[6] Harvey Barnes states summarily in his brief why each ***Carr*** factor compels permitting withdrawal. Even considering all seven, there was no abuse of discretion. *See infra*.

Barnes at least four times if he would like more time to discuss the matter with his lawyer. He declined, stating that he would "just like to go on and get it over with". The court persisted, explaining Barnes's rights and telling him that he should not plead guilty just because he is "giving up". But Barnes assured the court, "I'm giving up because I am guilty of the crime".

The court also asked if Barnes had discussed Guidelines sentencing with his lawyer. He said that he had. The court went on, "Okay. Y'all talked about Guidelines sentencing. Do you understand that until we get a presentence investigation no one can tell you which guideline applies?" Barnes answered, "Yes, sir." Yet, in his motion to withdraw, and here, Barnes contends that he did not understand the maximum possible sentence, because he lacked a working knowledge of the Sentencing Guidelines. However, no such understanding of the technical application of the Guidelines was required to grasp the court's clear explanation: "[y]ou are going to jail for five years at the very least ... [a]nd it could go all the way up to forty years". Barnes said he understood.

Now, however, Barnes asserts that informing a defendant of the maximum possible sentence is simply not enough; that a "knowing" plea is not possible under the Guidelines, unless the defendant understands how they work. We disagree. Prior to enactment of the Guidelines, our court concluded that a guilty plea was knowing and voluntary, even though a defendant, although aware of the maximum possible sentence, was unaware of the plea agreement negotiated between the prosecutor and defense counsel. ***Bradbury v.***

Wainwright, 658 F.2d 1083 (5th Cir. 1981), *cert. denied*, 456 U.S. 992 (1982). "As long as Bradbury understood the length of time he might possibly receive, he was fully aware of his plea's consequences." ***Id***. at 1087. Because he was aware of those consequences, our court concluded that the plea must stand, unless it had been induced by misrepresentation. Barnes points to no authority for his position that this standard has been usurped by the Guidelines.[7] It has not.

Finally, the district court asked Barnes if he "conspire[d] ... to distribute one hundred kilograms or more of marijuana". He answered, "Yes, sir."[8] An FBI agent then testified that Harvey Barnes had provided the facility for offloading a two to three thousand pound shipment of marijuana, keeping approximately 260 pounds. Barnes testified that he agreed with the agent's version.

It is difficult to imagine how the court could have more thoroughly questioned Harvey Barnes about the adequacy of his legal representation or his understanding of the plea he was entering.

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[7] In fact, he relied on this very discussion from ***Bradbury*** in his motion to withdraw.

[8] At oral argument before us, Barnes's counsel stated that the district judge should have advised Barnes that one kilogram is the equivalent of 2.2 pounds. He has not cited any authority which might even imply that such instruction is required. Surely, the district court need not ask every defendant charged with an amount of drugs measured by the metric system whether he has mastered that system. The mere suggestion borders on the absurd.

In any event, Harvey Barnes certainly understood that his plea offense involved more than 100 pounds. For example, as discussed in the text, he conceded that he kept 260 pounds of marijuana from a several thousand pound shipment. (We note that 260 pounds is significantly more than 100 kilograms (approximately 220 pounds).)

2.

Harvey Barnes challenges his sentence on several bases.

a.

Barnes claims a denial of due process, because the district court required that relevant conduct be proved only by a preponderance of the evidence. At sentencing, Barnes's attorney conceded that the preponderance standard so applied; but, he now asserts that he was wrong, that the clear and convincing standard should apply when relevant conduct substantially increases the sentence.[9]

Because this issue is raised for the first time on appeal, we review it only for plain error. ***United States v. Lopez***, 923 F.2d 47, 49 (5th Cir.), *cert. denied*, __ U.S. __, 111 S. Ct. 2032 (1991). Plain error is that which, "when examined in the context of the entire case, is so obvious and substantial that failure to notice and correct it would affect the fairness, integrity or public reputation of judicial proceedings"; "a mistake so fundamental that it constitutes a `miscarriage of justice'". ***Id***. at 50 (citations omitted). The standard of proof agreed to by Barnes at sentencing having then been applied, it is far too late in the day for him to urge a new one. There is no plain error.

[9] As noted, Harvey Barnes's counsel on appeal also represented him at sentencing.

b.

Barnes contends that the district court also erred in using his uncorroborated statements as proof of relevant conduct, noting that "a conviction must rest upon firmer ground than the uncorroborated admission or confession of the accused". ***Wong Sun v. United States***, 371 U.S. 471, 488-89 (1963). But, the issue is not whether he can be *convicted* on that basis. The issue is whether his statements may be the sole basis for the findings on relevant conduct. We conclude that they may.

After being arrested, Barnes stated that he had expected a 400 pound shipment of marijuana on November 8, and that he had negotiated for 100 kilograms of cocaine. These amounts were used as part of his relevant conduct in calculating the base offense level. He does not assert that he did not make the statements. He contends only that they are an insufficient basis for the finding. Of course, we review findings under the clearly erroneous standard. ***United States v. Ponce***, 917 F.2d 841 (5th Cir. 1990), *cert. denied*, __ U.S. __, 111 S. Ct. 1398 (1991).

In sentencing, the district court may consider any information "with sufficient indicia of reliability to support its probable accuracy". ***United States v. Rodriguez***, 897 F.2d 1324, 1326 (5th Cir.), *cert. denied*, 498 U.S. 857 (1990) (quotations omitted). Barnes offers no evidence which contradicts his statements, nor does he argue that they are inherently unreliable. In short, there was no clear error.

c.

Finally, Harvey Barnes asserts that the two foregoing facts regarding relevant conduct, as well as two others, were simply not established under any standard of proof; and, even if established, are not relevant, because they are not part of a common scheme or plan as contemplated by Sentencing Guidelines § 1B1.3(a)(2).[10]

As stated, the findings regarding the 400 pounds of marijuana and 100 kilograms of cocaine were not clearly erroneous. Barnes also challenges the findings that he sold at least 300 pounds of marijuana to Caldwell between 1988 and 1991, and that he was responsible for Virgil Barnes's February 1991 sale of 1/2 kilogram of cocaine. As discussed below, based on our review of the record, we conclude, again, that the district court did not clearly err.

In his post-arrest statement, Keck admitted that he had made about 15 trips to Monroe in the approximate two prior years to deliver marijuana for Harvey Barnes, transporting between 20 and 30 pounds on each occasion. In a post-arrest interview in December 1991, Harvey Barnes stated that he had sold approximately 200 pounds of marijuana to Caldwell between 1988 and 1991. Both statements support a finding that such transactions took place.

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[10] Section 1B1.3(a)(2) provides:

> solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, [relevant conduct includes] all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction.

U.S.S.G. § 1B1.3(a)(2).

Although there is some difference regarding amount, this does not make the finding clearly erroneous. The district court might well have found Keck's version more reliable than Barnes's; and a finding that Harvey Barnes was responsible for the sale of at least 300 pounds of marijuana to Caldwell is most plausible. It is equally plausible that Virgil Barnes's February 1991 delivery of 1/2 kilogram of cocaine was made on behalf of Harvey Barnes, his uncle. At his plea hearing, Virgil Barnes agreed with an FBI agent's statement that he made the delivery for Harvey Barnes. The finding is not clearly erroneous.

Harvey Barnes ran an extensive and ongoing drug distribution operation. Each transaction discussed *supra* was part of that operation and was appropriately included as relevant conduct in formulating his base offense level.

B.

Virgil Barnes challenges the relevant conduct used in calculating his base offense level, and claims the benefit of two post-sentencing amendments to the Guidelines.

1.

Virgil Barnes pled guilty to distribution of an unspecified amount of cocaine. His base offense level was increased because his involvement in the conspiracy to distribute more than 100 kilograms of marijuana was considered relevant conduct. This finding is not clearly erroneous.

In a post-arrest statement, Virgil Barnes admitted that he was present when the 260 pounds of marijuana were delivered to Harvey

Barnes's residence. He said that he was fully aware of the scope of that transaction, but denied participating in it. However, his involvement is further evidenced by his presence at Harvey Barnes's home on November 7. While Harvey Barnes was away from the house, Virgil Barnes remained to handle telephone calls from the CI. He urged the CI to deliver the money from the Monroe transaction because the source was waiting for it.

Virgil Barnes does not deny either his presence at his uncle's (Harvey Barnes's) house or his knowledge of the transactions. He contends, rather, that his actions in February (distribution of cocaine) and on November 7 are not part of a common plan or scheme. The district court summarily overruled this objection.

We agree that Virgil Barnes's distribution of cocaine in February and his involvement in the distribution of marijuana in November were part of a common plan or scheme. The PSR for Virgil Barnes states that, on February 14, Harvey Barnes met with a confidential informant (CI) and offered to sell 1/2 kilogram of cocaine. Three days later, the CI received a telephone call from Harvey Barnes, notifying him that Virgil Barnes was on his way to deliver the cocaine. At Virgil Barnes's plea hearing, an FBI agent testified that Barnes had delivered the cocaine in consummation of a deal negotiated between Harvey Barnes and an undercover agent. Virgil Barnes agreed with this version.

Virgil Barnes's February cocaine delivery was made on behalf of his uncle, Harvey Barnes. The marijuana transactions on November 6 and 7 took place under Harvey Barnes's direction. In

short, both transactions were part of Harvey Barnes's ongoing drug distribution.

2.

Virgil Barnes also contends that two amendments to the Sentencing Guidelines, effective November 1, 1992, should be applied to his sentence, imposed that September. Of course, a defendant is generally sentenced according to the Guidelines then in effect. ***United States v. Ainsworth***, 932 F.2d 358, 362 (5th Cir.), *cert. denied*, __ U.S. __, 112 S. Ct. 346 (1991). There are two limited exceptions; neither are applicable.

First, when a sentence is increased by an amendment effective after the commission of the offense, and that increase affects substantial rights, its applicability to the defendant would be an *ex post facto* violation. *See* ***United States v. Canales***, 960 F.2d 1311, 1314 (5th Cir. 1992). That is not the case here.

Second, the Guidelines give retroactive effect to certain amendments. Section 1B1.10 states, in pertinent part:

> (a) Where a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the guidelines listed in subsection (d) below, a reduction in the defendant's term of imprisonment may be considered.... If none of the amendments listed in subsection (d) is applicable, a reduction ... is not consistent with this policy statement.

Subsection (d) lists amendments by the number they are assigned in Appendix C to the Guidelines. Virgil Barnes seeks the benefit of subsequent amendments to § 1B1.3 (number 439) and § 3E1.1 (number

459); but neither is listed in subsection (d). Accordingly, they are not applied retroactively.

C.

Franklin Keck pled guilty to conspiracy to distribute over 100 pounds of marijuana. After his arrest, he signed a proffer agreement and gave an extensive statement. He contends that, in violation of the proffer agreement, information from his statement was used as relevant conduct to increase his base offense level. Moreover, he asserts that his uncorroborated statement lacked sufficient reliability and specificity to form the basis for a finding on relevant conduct.

1.

The proffer agreement states, in part, that

> neither statements nor information provided during the proffer will be used directly against Franklin A. Keck in any criminal case, excepting use as impeachment of rebuttal evidence.... The United States reserves the right to make derivative use of and to pursue any investigative leads suggested by any statements made or information provided during the proffer.

As discussed earlier, Keck admitted in his statement that, over the prior approximate two years, he had made about 15 trips to Monroe for Harvey Barnes, each time delivering 20 to 30 pounds of marijuana to Caldwell. In calculating Keck's base offense level, the probation officer conservatively assumed that Keck had delivered 300 pounds of marijuana during this period. Using this as relevant conduct, the estimate was converted to 136 kilograms and added to the 52.16 kilograms involved in the offense of conviction. This yielded a total of 188.16 kilograms. Guideline

§ 2D1.1(c)(9) assigns a base offense level of 26 when the applicable amount of marijuana is between 100 and 400 kilograms.

The government contends that it did not use Keck's statement directly against him, because that information was corroborated at his sentencing by other witnesses. It also asserts that any possible error is immaterial, because there was sufficient evidence that Keck was involved in the entire 260 pound shipment received by Harvey Barnes, and that amount, although not used as relevant conduct against Keck, could have been so used, and would have yielded an identical base offense level.

The corroboration is a statement by an FBI agent that several of the other defendants confirmed that Keck had been transporting marijuana into Louisiana "approximately that many number of times". But, this does not corroborate the amount transported. And, there was no attempt at sentencing to hold Keck responsible for the 260 pound shipment received by Harvey Barnes.

The information used to calculate Keck's relevant conduct came from his statement. Indeed, the PSR included 300 pounds of marijuana as relevant conduct on the basis of what "Keck advised". The district court concluded that use of Keck's statement was not violative of the proffer agreement, because it was being used only for sentencing. Assuming, without deciding, that such use violates the agreement, we conclude that the error is harmless, because it would not affect Keck's base offense level.

The proffer agreement specifically reserves to the government the right to follow investigative leads suggested by Keck's

statement. It was, therefore, well within the parameters of that agreement to discuss the alleged transactions with Caldwell, the recipient of the deliveries. Caldwell stated in his post-arrest interview that there had been approximately 12 such deliveries and that each involved approximately 10 pounds of marijuana.[11] This partially corroborates Keck's statement, but not as to the larger amount. Therefore, it would have been appropriate for the PSR to include these transactions as relevant conduct, but the amount would be 120, rather than 300, pounds. The lesser amount converts to approximately 54.5 kilograms. Added to the offense of conviction amount of 52.16 kilograms, Keck should have been held accountable for 106.66 kilograms of marijuana. As noted, § 2D1.1(c)(9) assigns a base offense level of 26 for amounts between 100 and 400 pounds of marijuana. Therefore, the same base offense level applies. Accordingly, it is not necessary to remand for resentencing.

2.

In the alternative, Keck contends that his statement was uncorroborated, and, therefore, lacked reliability for a finding on relevant conduct. Assuming that Keck's statement could have been used against him, it was corroborated in part by at least two other witnesses. Therefore, the relevant conduct finding was erroneous only as to the amount. We have already concluded that any error did not affect Keck's substantial rights.

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[11] A transcript of this recorded interview was filed in the district court on April 20, 1992, in response to a discovery request from Keck.

III.

For the foregoing reasons, the conviction and sentence for Harvey Barnes are **AFFIRMED**, as are the sentences for Franklin Keck and Virgil Barnes.

AFFIRMED.