UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-7234
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ELMER EUGENE BYRD,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
(J89 00058(L))

(March 17, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:[1]

Elmer Eugene Byrd (Byrd) was convicted, pursuant to a plea agreement, of interstate transportation of a stolen motor vehicle, in violation of 18 U.S.C. § 2313. He received a sentence of twenty-seven months imprisonment to be followed by three years supervised release. He appeals his conviction and sentence.

I.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Elmer Eugene Byrd was charged with selling a stolen tractor that had moved across state lines. He pleaded guilty in open court on December 2, 1991, and the sentencing hearing was set for January 30, 1992. In a letter dated January 20, 1992, Byrd requested withdrawing his guilty plea. His attorney, however, did not learn of this request until the date of the sentencing hearing. At this hearing the district court concluded that the attorney-client relationship had been severed, relieved Byrd's attorney of further representation, and postponed sentencing.

Byrd's new attorney later filed a formal motion to withdraw the guilty plea. The district court, however, denied the motion. Byrd subsequently received a prison sentence of twenty-seven months to be followed by supervised release for three years.

II.

A district court may allow a defendant to withdraw his guilty plea if the defendant establishes a "fair and just" reason. FED. R. CRIM. P. 32(d); **United States v. Hurtado**, 846 F.2d 995, 997 (5th Cir.), **cert. denied**, 488 U.S. 863 (1988). This Court will not overturn the district court's decision absent an abuse of discretion. **United States v. Gaitan**, 954 F.2d 1005, 1011 (5th Cir. 1992).

In determining whether to grant a defendant's motion to withdraw a guilty plea, a district court should consider: (1) whether the defendant has asserted his innocence; (2) whether withdrawal would prejudice the Government; (3) whether the

defendant delayed in filing the motion; (4) whether withdrawal would substantially inconvenience the court; (5) whether adequate assistance of counsel was available; (6) whether the original plea was knowing and voluntary; and (7) whether withdrawal would waste judicial resources. **Id.** The district court, moreover, should make its determination based on the totality of the circumstances. **Id.**

The district court's primary reason for denying Byrd's motion was that Byrd began expressing dissatisfaction with his plea only after he realized that the guideline range was higher than he had anticipated. It also relied on the fact that at the arraignment Byrd unequivocally admitted under oath that he was guilty. Byrd, moreover, had received warnings at the arraignment that if he did not tell the truth, he would be or could be subject to prosecution for perjury. In addition, Byrd indicated during the arraignment that he made all his decisions and that the plea was voluntary.

The district court also relied on the fact that Byrd had had close assistance of counsel available to him. Byrd, moreover, had informed the court during the arraignment that he had been "extremely satisfied" with the representation of his original attorney.

The record reflects that the district court did not abuse its discretion in refusing to allow Byrd to withdraw his guilty plea. Byrd's argument, therefore, lacks merit.

III.

The applicable guideline section for the offense of possessing stolen property is section 2B1.2. That section provides in part that if the offense was committed by a person "in the business of receiving and selling stolen property," the offense level increases by four. § 2B1.2(b)(4)(A). The presentence report (PSR) states that Byrd was "in the business of selling stolen property," and, accordingly, the offense level was raised by four. Byrd objected.

Byrd contends that the offense characteristic in question applies only to defendants who are in a "fencing" or "black market" operation. He further contends that there was no testimony that he was in such an operation. Although he concedes that there was evidence that he and an associate stole equipment, he argues that stealing equipment and then selling the same equipment is not what the guideline enhancement focuses on.

This Court will review a sentencing court's legal conclusions de novo. **United States v. Alfaro**, 919 F.2d 962, 965-66 (5th Cir. 1990). Factual findings, however, are reviewed for clear error. **Id.** at 966. In making findings relevant to sentencing, the district court may rely on any information having a minimal indicium of reliability. **United States v. Galvan**, 949 F.2d 777, 784 (5th Cir. 1991). A PSR generally bears that type of reliability. **Alfaro**, 919 F.2d at 966.

The PSR indicates that Byrd told Michael Vaughn, an unindicted participant, that he had made "big money" for years by stealing heavy equipment and reselling it at auctions in

Mississippi and other states. Vaughn, moreover, admitted to agents that he had participated in the theft of numerous items of equipment, had assisted Byrd in removing ownership decals from these items, and had transported these items with Byrd to Mississippi. The PSR, however, does not reflect that Byrd had ever purchased property stolen by someone else.

Nevertheless, Robert X. Louys, an FBI agent, testified during the sentencing hearing that he had determined that Byrd "appeared to be in the business of selling stolen heavy equipment." Louys based his determination on the fact that an FBI contact had indicated to the FBI that Byrd "was well known . . . for his past criminal records in buying and selling." Louys further testified that "we determined that [Byrd] was in the business of buying and selling on one instance specifically a trailer home." No more evidence was presented regarding this issue.

In **United States v. Braslawsky**, 913 F.2d 466, 467 (7th Cir. 1990), the defendant had burglarized businesses and sold the stolen property to third persons. The defendant argued on appeal that former section 2B1.2(b)(3)(A) should not apply because he sold property he had stolen himself. **Id.** at 467-68. The Seventh Circuit agreed, finding that "[t]he common understanding of a person in the business of receiving and selling stolen property is a professional fence and not a person who sells property that he has already stolen." **Id.** at 468. This Court approved of the Seventh Circuit's understanding of this section in **United States**

v. Esquivel, 919 F.2d 957 (5th Cir. 1990) (interpreting section 2B1.2(b)(3)(A), which was later renumbered as section 2B1.2(b)(4)(A)). In **Esquivel**, the defendant, who normally ran a back-hoe business, set up an operation to sell 350 cases of athletic shoes on consignment for two men who had stolen 1013 cases of the shoes. **Id.** at 959. No evidence was ever presented that the defendant had acted as a fence prior to the initiation of his shoe-selling business. **Id.**

This Court indicated that the phrase "a person in the business of receiving and selling stolen property" refers to "a person engaged in what are generally known as fencing operations, that is, the receiving and selling of stolen goods." **Id.** It further indicated that the increase could apply only if someone else had stolen the property in question. **Id.** at 960. We said:

> It is because someone else stole the shoes sold by Esquivel that the commission of other crimes was encouraged and that the fencing operation falls within the intended purview of the background to and text of § 2B1.2(b)(4)(A).

Id. at 960 (emphasis in original).

This Court concluded that to make the four-level increase, it was not necessary to have a finding that the defendant had previously engaged in fencing activities. **Id.** at 961.

In **United States v. Salin**, No. 92-1747 (5th Cir. 1993) (unpublished), we held that § 2B1.2(b)(4)(A) did not apply to a defendant who acquired credit cards through false identifications and used the cards to fraudulently obtain money and property. In doing so, we emphasized: "The record is void of any evidence

that [the defendant] sold the credit cards or any other property he received." **Salin**, No. 92-1747 at 2.

There is no indication in the record that Byrd sold equipment that someone else had stolen. Therefore, the four-level sentence enhancement in § 2B1.2(b)(4)(A) applies. Our disposition of this appeal leaves open the possibility that the alternative two-level enhancement for more than minimal planning, § 2B1.2(b)(4)(B), applies. We therefore vacate Byrd's sentence and remand for resentencing.

IV.

For the reasons stated above, we affirm Byrd's conviction. However, we vacate his sentence and remand for resentencing.

AFFIRMED in part, VACATED in part and REMANDED.