

UNITED STATES COURT OF APPEALS  
for the Fifth Circuit

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No. 92-7560  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JESUS CANTU, JR.,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
CR C89 162 1

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May 31, 1993

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:<sup>1</sup>

In this appeal from his conviction and sentence following a guilty plea, Cantu contends the district court erred in refusing to permit him to withdraw his plea. We affirm.

I.

Pursuant to a plea agreement, Jesus Cantu, Jr., pleaded guilty to possession with intent to distribute approximately two kilos of

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<sup>1</sup>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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

cocaine on May 30, 1989. On August 9, 1989, the court granted Cantu's motion to substitute counsel and rescheduled sentencing for August 16. On the morning of August 16, Cantu--through his second attorney--informed the court that he wished to withdraw his guilty plea, explaining that he was not aware of the facts and law surrounding his plea. Also on that date, Cantu filed a motion to withdraw his guilty plea pursuant to Fed. R. Crim. P. 32(d), alleging that, at the time he entered his plea, he did not understand its consequences and he had received ineffective assistance from his original attorney. The court informed the parties that it wanted to hear from Cantu's first attorney on this issue, and the case was reset for that afternoon. After Cantu failed to appear for the afternoon hearing, the court revoked his bond and issued a warrant for his arrest. The court also denied Cantu's motion to withdraw his guilty plea without prejudice.

On January 11, 1990, the court granted Cantu's second attorney's motion for leave to withdraw as counsel of record. Cantu was arrested on June 15, 1992. On August 10, 1992, Cantu was sentenced on the above count to 97 months of confinement, a four-year term of supervised release, and a \$500 fine.

## II.

The Government originally argued, among other things, that Cantu's appeal from his conviction should be dismissed because he was a fugitive from justice for over two years following his conviction. Pursuant to Fed. R. App. P. 28(j), the Government then alerted this Court to **Ortega-Rodriguez v. United States**, 113 S.Ct.

1199 (1993), which limits a court of appeals' authority to dismiss an appeal based on a defendant's fugitive status unless that status coincides with the pendency of the appeal. Because, for the reasons expressed below, the district court did not err in failing to grant Cantu's request to withdraw his guilty plea, we need not address whether Cantu's fugitive status warranted the dismissal of his appeal.

Cantu's present attorney on appeal argues that the court abused its discretion in not permitting Cantu to withdraw his guilty plea. Cantu does not have an absolute right to withdraw his plea. **United States v. Hurtado**, 846 F.2d 995, 997 (5th Cir.), **cert. denied**, 488 U.S. 863 (1988). Although Fed. R. Crim. P. 32(d) conditions the right to withdraw a guilty plea upon a showing of a "fair and just reason," the district court's ruling on a motion for withdrawal will not be disturbed absent an abuse of discretion. **Hurtado**, 846 F.2d at 997. The defendant bears the burden of establishing that withdrawal of the guilty plea is justified. **Id.**

In **United States v. Carr**, 740 F.2d 339, 343-44 (5th Cir. 1984), **cert. denied**, 471 U.S. 1004 (1985), this court enumerated several factors district courts must consider when deciding whether to allow withdrawal of a guilty plea. Among those factors is whether close assistance of counsel was available to the defendant and whether the plea was knowing and voluntary. The record reflects that the district court sought to develop the record with regard to these grounds, but could not because Cantu failed to appear for the rescheduled hearing on the motion for withdrawal.

The court then denied the motion without prejudice, stating that counsel could refile at a later time. There is no indication in the record that Cantu again urged his motion to withdraw his plea. Thus, as the court properly declined to grant the motion before hearing from Cantu's first attorney and the motion was not reurged after Cantu's recapture, Cantu cannot establish an abuse of discretion.

AFFIRMED.