IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7593
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BILLY RAY SHOWS, II,

Defendant-Appellant.

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Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. CR-E92-00004(B)

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March 16, 1993

Before KING, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:*

Billy Ray Shows II asserts that the district court erred in denying his motion to withdraw his plea. He argues that the enhancements to his sentence in the presentence report constitute a breach of the plea agreement and establish a "fair and just reason" for withdrawing his plea. Further, he contends that the Government did not carry its burden of showing prejudice.

There is no absolute right to withdraw a plea; however, "[a] district court may permit a defendant to withdraw a guilty plea at any time prior to sentencing upon a showing [by the defendant]

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

of a fair and just reason." United States v. Daniel, 866 F.2d 749, 751-52 (5th Cir. 1989) (internal quotations and citations omitted); Fed. R. Crim. P. 32(d).

Shows was assisted by counsel and entered a knowing and voluntary plea of guilty. Given that Shows has not asserted his innocence, to permit withdrawal of the plea would "substantially inconvenience the court" and "would waste judicial resources." See Daniel, 866 F.2d at 751 (citations omitted). The lack of prejudice to the Government does not mandate permission to withdraw the plea. Id. at 752. The district court did not abuse its discretion in finding that Shows failed to present a "fair and just reason" for withdrawing his plea. Id.

Shows contends that the district court misapplied the guidelines in sentencing him. He argues that U.S.S.G. § 2A2.2 relating to aggravated assault should not apply because he did not "intend" to do bodily harm to his sister or her husband.

This Court reviews de novo applications of the sentencing guidelines for errors of law. United States v. Otero, 868 F.2d 1412, 1414 (5th Cir. 1989). A district court's findings of fact regarding sentencing factors are disturbed only if they are clearly erroneous. United States v. Franco-Torres, 869 F.2d 797, 800 (5th Cir. 1989).

Section 2K2.1(c)(1)(A) provides that § 2X1.1 applies when a defendant used or possessed a firearm in connection with another offense. When the other offense is expressly covered by another guideline section, § 2X1.1(c) includes a cross-reference to that section--in this case, aggravated assault in § 2A2.2. The

application note to § 2A2.2 defines aggravated assault as "a felonious assault that involved (a) a dangerous weapon with intent to do bodily harm (i.e., not merely to frighten), or (b) serious bodily injury, or (c) an intent to commit another felony." U.S.S.G. § 2A2.2, comment. (n.1). This Court has found that the assault offense of § 2A2.2 is "akin to the federal offense of assault with a dangerous weapon with intent to do bodily harm." United States v. Perez, 897 F.2d 751, 753 (5th Cir.), cert. denied, 111 S.Ct. 177 (1990). The actor must be judged not by his undisclosed purpose to frighten, but from his visible conduct and "what one in the position of the victim might reasonably conclude." Id.

The district court found that firing a deadly weapon at Mr. and Mrs. Purvis' moving automobile and shooting the tires evinced a clear intent to do bodily harm Mr. and Mrs. Purvis understood Shows's ability to do harm. The finding of the district court is plausible in light of the record and, therefore, not clearly erroneous. Accordingly, there was no error in applying § 2A2.2.

AFFIRMED.