

UNITED STATES COURT OF APPEALS  
FIFTH CIRCUIT

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No. 92-7803

(Summary Calendar)

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

LARRY HOPSON,

Defendant-Appellant.

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Appeal from the United States District Court  
For the Southern District of Mississippi  
(CR J92 00023 (L)(C))

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( July 12, 1993)

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:\*

The defendant, Larry Hopson, appeals the district court's denial of his motion to withdraw his guilty plea. Finding no abuse of discretion, we affirm.

Fed. R. Crim. P. 32(d) permits withdrawal of a guilty plea prior to sentencing upon the showing of "any fair and just reason." When confronted with a motion to withdraw a guilty plea, the district court must consider seven factors:

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

- (1) Whether the defendant has asserted his innocence;
- (2) Whether withdrawal will 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 close assistance of counsel was available to the defendant;
- (6) Whether the plea was knowing and voluntary; and
- (7) Whether withdrawal would waste judicial resources; and as applicable, the reasons why defenses advanced later were not proffered at the time of the original pleading, or the reasons why a defendant delayed in making his withdrawal motion.

*United States v. Carr*, 740 F.2d 339, 343-44 (5th Cir. 1984), cert. denied, 471 U.S. 1004, 105 S. Ct. 1865, 85 L. Ed. 2d 159 (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." *United States v. Badger*, 925 F.2d 101, 104 (5th Cir. 1991) (citing *Carr*). "There is no absolute right to withdraw a guilty plea . . . . Instead the right to do so is within the sound discretion of the trial court which will be reversed by an appellate court only for an abuse of that discretion." *Carr*, 740 F.2d at 344.

Hopson argues that the district court abused its discretion by denying his motion to withdraw his guilty plea. Hopson's claim is premised on four assertions, dealing with the first, third, fifth and sixth *Carr* criteria, respectively.<sup>1</sup> Hopson contends that he is

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<sup>1</sup> Hopson baldly asserts that he satisfied all seven *Carr* criteria, but he offers no argument as to the second, fourth, or

entitled to withdraw his guilty plea because (1) he has asserted his innocence; (2) he did not delay unduly in filing his motion to withdraw; (3) he was not afforded the close assistance of counsel; and (4) his plea was not knowing and voluntary.

Hopson asserted his innocence, but he did so only after a substantial delay. Hopson pleaded guilty on April 27, 1992. At the hearing on his motion to withdraw, on November 19, 1992, Hopson asserted his innocence and testified that he had never done so before in a court of law. See Record on Appeal, vol. 2, at 18-19. Hopson testified at the hearing that he lied about being guilty when entering his plea because his counsel persuaded him to lie in order to receive a more favorable sentence. The district court found that Hopson's testimony was not credible, and that Hopson's counsel never urged him to mislead the court.<sup>2</sup> See *id.* at 47. *United States v. Hurtado*, 846 F.2d 995 (5th Cir.), *cert. denied*, 488 U.S. 863, 109 S. Ct. 163, 102 L. Ed. 2d 133 (1988), presented virtually identical circumstances. See *id.* at 997. There we found that the district court did not abuse its discretion by denying the motion to withdraw. See *id.* We stated that "Rule 32 . . . was not intended to allow a defendant to make a tactical decision to enter a plea, wait several weeks, and then obtain a withdrawal if he believes that he made a bad choice.'" See *id.* (quoting *Carr*). In

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seventh. See Brief for Hopson.

<sup>2</sup> The district court made this factual determination after hearing Hopson's testimony and the contrary testimony of Hopson's counsel. It was within the purview of the district court to judge the credibility of the two witnesses.

light of *Hurtado* we conclude that Hopson's assertion of innocence did not require the district court to grant the motion to withdraw. See also *Carr*, 740 F.2d at 344 (stating that an assertion of innocence "is far from being sufficient to overturn denial of a withdrawal motion").

Hopson contends that he was not afforded the close assistance of counsel because his attorney spent only fifteen minutes with him discussing his case before he pleaded guilty. Hopson's argument fails for lack of factual support. Hopson's counsel testified at the motion hearing that he spent six to eight hours discussing the case with Hopson. The district court apparently credited counsel's testimony, because it found that Hopson and his counsel "had extensive discussions . . . concerning the offense and the plea." See Record on Appeal, vol. 2, at 49. Because the district court is entitled to judge the credibility of witnesses appearing before it, we accept the district court's finding of fact and reject Hopson's argument.

We are also unpersuaded by Hopson's argument that his plea was not knowing and voluntary because his counsel misinformed him of the possible penalty which he might receive if he pleaded guilty. Although Hopson's counsel misadvised him of the possible term of imprisonment, in the final analysis Hopson was not misled. At the plea hearing the district court correctly informed Hopson that he faced a possible prison term of forty years, and Hopson stated that he understood that information. See *id.* vol. 3, at 15. Hopson asserted, at the hearing on his motion to withdraw, that he never

actually believed that he would be subject to a sentence of 40 years if he pleaded guilty. Hopson contended that he was merely following his counsel's instructions to go along with whatever the court said at the plea hearing, whether he understood it or not. However, the district court found that Hopson's counsel never advised Hopson to mislead the court, *see id.* vol. 2, at 47, and we accept the district court's finding of fact, based as it is on the district court's assessment of Hopson's credibility and that of his counsel.<sup>3</sup> We therefore credit Hopson's statement that he understood the district court's explanation of the possible sentence. We reject Hopson's claim that he was unaware of the possible sentence which he faced, and that his plea therefore was not knowing and voluntary.

Hopson correctly states that he did not delay unduly in filing his motion.<sup>4</sup> However, Hopson does not argue, and we do not believe, that the timeliness of his motion, in and of itself, entitled him to withdrawal of his guilty plea. Because Hopson knowingly and voluntarily pleaded guilty with the benefit of counsel, the district court did not abuse its discretion by denying Hopson's motion to withdraw his guilty plea.

For the foregoing reasons, we AFFIRM.

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<sup>3</sup> Both Hopson and his counsel testified at the hearing on Hopson's motion to withdraw his guilty plea.

<sup>4</sup> The district court found that "there was not undue delay in filing the motion." *See Record on Appeal, vol. 2, at 50.*