

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8532

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ODDIS EUGENE PEOPLES,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(W-92-CR-64)

June 11, 1993

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Oddis Eugene Peoples was charged with three counts of distribution of crack cocaine. The government filed a notice of intent to seek a sentence enhancement because Peoples distributed more than 50 grams of crack cocaine and had a prior felony drug offense conviction. Under the enhancement provisions Peoples was subject to a prison term of not less than 20 years and not more than life, and a minimum supervised release term of ten years. 21

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

U.S.C. § 841(b)(1)(A). Peoples pleaded guilty to all three counts of the indictment.

Subsequently Peoples retained new counsel and filed a motion to withdraw his guilty plea. The district court denied the motion and sentenced Peoples to concurrent terms of 260 months imprisonment and ten years supervised release on each count, a \$6,000 fine, and a \$150 special assessment.

I.

Peoples argues that his guilty plea is invalid because the district court failed to inform him that he was subject to a ten year supervised release term under the enhancement provision of § 841(b)(1)(A) when he pleaded guilty. The district court initially informed Peoples that he was subject to a maximum of 20 years imprisonment, followed by a minimum of three years and maximum of five years supervised release on each count. The government then informed the court that it was seeking an enhancement under § 841(b)(1)(A), and the district court informed Peoples that he was subject to a minimum term of imprisonment of 20 years and a maximum term of life imprisonment. The district court, however, failed to inform Peoples that the minimum supervised release term under the enhancement was ten years.

The district court's failure to properly inform a defendant of the potential supervised release term and its effect is subject to the harmless error analysis if the aggregate maximum period of incarceration under the actual sentence of imprisonment and supervised release cannot exceed the statutory maximum explained to

the defendant. United States v. Bachynsky, 934 F.2d 1349, 1360 (5th Cir. 1991) (en banc), cert. denied, 112 S.Ct. 402 (1991). The district court's failure to properly inform Peoples of the potential supervised release term is subject to the harmless error analysis because even if Peoples served his entire prison term, violated his supervised release on the last day, and was returned to prison for the full ten years, the maximum aggregate term of incarceration would be within the life-term statutory maximum explained to him.

The error was harmless. Although Peoples filed extensive objections to the Presentence Report, he did not object to the inclusion of the ten year minimum supervised release term and Peoples has never alleged that the error affected his decision to plead guilty. There is no evidence to suggest that Peoples would have not have pleaded guilty if the district court had informed him of the correct minimum term of supervised release, and therefore any error was harmless. See Bachynsky, 934 F.2d at 1360-61; United States v. Hall, No. 91-1166 (5th Cir. Oct. 9, 1991), cert. denied, 112 S.Ct. 1236 (1992).

II.

Peoples also argues that the district court abused its discretion by denying his motion to withdraw his guilty plea. The district court may permit a defendant to withdraw his guilty plea before sentencing for any fair and just reason. Fed. R. Crim. P. 32(d). This court reviews the denial of a motion to withdraw for an abuse of discretion. United States v. Bounds, 943 F.2d 541, 543

(5th Cir. 1991). The defendant has the burden of establishing that withdrawal of the guilty plea is justified. United States v. Daniel, 866 F.2d 749, 752 (5th Cir. 1989). When determining whether to permit a defendant to withdraw his guilty plea the court considers:

(1) whether the defendant has asserted his innocence; (2) whether withdrawal would 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.

United States v. Carr, 740 F.2d 339, 343-44 (5th Cir. 1984), cert. denied, 471 U.S. 1004 (1985).

In his motion to withdraw his guilty plea Peoples alleged that he did not fully understand the advice of his first attorney when he pleaded guilty, and that he pleaded guilty "because of his fear of being found guilty by a jury of a crime he did not commit." At the hearing on the motion Peoples presented no evidence in support of his motion, but stated that although his first attorney did not force him to plead guilty, the attorney told him he would get life imprisonment if he did not plead guilty.

In denying the motion the district court found that all of the Carr factors mitigated against permitting Peoples to withdraw his plea, especially the fact that Peoples never unequivocally asserted his innocence, and the fact that he waited two months to file the motion to withdraw his plea. The court also noted that the desire to withdraw his guilty plea appeared to be based on the calculations in the PSR and the sentence they compelled.

At the guilty plea hearing Peoples indicated that he had discussed the charges with his attorney and understood the charges; that he agreed with the government's factual basis for the offense; that he had adequate time to discuss his case with his attorney; that he was pleading guilty because he was guilty; and that his plea was voluntary. Additionally, Peoples has not presented any credible evidence to refute the facts in the PSR which established that Peoples negotiated and completed the three crack cocaine sales at his home. Peoples does contend that he did not delay in filing the motion because he filed it within one week after retaining new counsel. However, Peoples has not provided an explanation for his failure to retain new counsel sooner. The district court did not abuse its discretion by denying Peoples's motion to withdraw his guilty plea.

For the first time on appeal Peoples argues that he should be permitted to withdraw his guilty plea because he was denied effective assistance of counsel when he entered his plea. Generally, an ineffective-assistance-of-counsel claim cannot be raised on direct appeal unless the record provides sufficient details about the attorney's conduct to permit review. United States v. Renard, 956 F.2d 85, 87 (5th Cir 1992); Bounds, 943 at 544. Because the record does not contain sufficient details about his first attorney's representation, this court should decline to address the issue without prejudice to Peoples's right to raise it in a proper proceeding under 28 U.S.C. § 2255. United States v.

Higdon, 832 F.2d 312, 313-14 (5th Cir. 1987), cert. denied, 484 U.S. 1075 (1988); Rinard, 956 F.2d at 87.

III.

Finally, Peoples argues that the district court's finding that he was an organizer, leader, manager, or supervisor of a criminal activity is clearly erroneous. He contends that the information relied on by the district court was not sufficiently reliable to support the district court's findings.

The district court's finding that Peoples had an aggravating role in the offense is a factual finding reviewed under the "clearly erroneous" standard. United States v. Mueller, 902 F.2d 336, 345 (5th Cir. 1990). Under this standard, "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." Anderson v. City of Bessemer City, 470 U.S. 564, 573-74, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985).

A defendant's base offense level may be increased two levels if the defendant "was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b)." U.S.S.G. § 3B1.1(c). The evidence established that Peoples conducted his narcotics transactions through an intermediary who physically handed the crack to the undercover agent and received the money; that Peoples had the authority to negotiate the price of the crack; that Peoples admitted having made other crack sales over

a twelve month period; that Peoples had the ability to obtain crack on short notice; and that a drug supplier from Houston, Dunston Marshall, admitted supplying Peoples with crack on several occasions. This evidence is sufficient to support the district court's finding, and Peoples has not provided any credible evidence to refute it.

To the extent that Peoples contends that the testimony of Officer Alvarado that Peoples was "known" to have a number of individuals selling crack for him and was receiving large quantities of crack from Houston on a weekly basis was unreliable because it was based on unsubstantiated claims of confidential informants, the court need not address his argument. There is sufficient reliable evidence to support the district court's finding.

AFFIRMED.