

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8602
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

KENT B. BALES,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(EP 90 CR 345 B (2))

September 7, 1993

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

Kent Bales appeals his sentence for aiding and abetting the making of false entries in the reports and statements of the Western Bank of Texas with the intent to deceive the examiners of the Texas Department of Banking and the FDIC, in violation of 18 U.S.C. §§ 1005 and 2. Finding only harmless error, we affirm.

* 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Bales entered into a plea agreement with the government in which he agreed to plead guilty to the offense in exchange for certain promises by the government. The plea agreement stated that "I understand that the maximum penalty is a fine of \$5,000, or imprisonment of five years, or both. Additionally, the Court may order me to pay restitution."

During the plea colloquy, there was no mention of the possibility that the district court might order restitution. When asked by the district court what the punishment for the offense was, Bales stated,

BALES: Isn't it a maximum of five years?

COURT: Yes, sir. And up to)) I believe)) Is it just the \$5,000?

GOVERNMENT: Yes, your Honor, just \$5,000.

COURT: \$5,000 fine, but there will be a \$50 assessment for the Crime Victims Fund, and)) I don't know if there's a supervised release on this or not, is there?

After the district court asked for an explanation of the plea agreement, the government gave the particulars of the agreement but did not mention restitution. The court then asked Bales whether he agreed to the plea agreement, to which Bales responded that he did.

The district court sentenced Bales to three years' imprisonment and ordered him to pay restitution of \$575,000, jointly and severally, with his co-defendants. Bales appeals his sentence based upon the district court's failure to make findings concerning his objections to certain information in the presentence investigation report ("PSR"); Bales further argues that, in violation of

FED. R. CRIM. P. 11(c)(1), the district court failed to advise him that it might order him to pay restitution.

II.

A.

Bales made numerous objections to information contained in the PSR. Bales contends that resentencing is required because the district court violated FED. R. CRIM. P. 32(c)(3)(D) by failing to make findings concerning the challenged information. Rule 32(c)(3)(D) provides, in relevant part, as follows:

If the . . . defendant . . . allege[s] any factual inaccuracy in the presentence investigation report . . . the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing.

FED. R. CRIM. P. 32(c)(3)(D). A failure of the district court to comply with the rule may be raised for the first time on appeal and requires resentencing. United States v. Manotas-Mejia, 824 F.2d 360, 368 (5th Cir.), cert. denied, 484 U.S. 957 (1987).

Rule 32(c)(3)(D) does not obligate a district court to make a finding or determination unless the defendant asserts "with specificity and clarity each factual mistake" of which he complains. United States v. Rodriguez, 897 F.2d 1324, 1327-28 (5th Cir.), cert. denied, 498 U.S. 857 (1990) (quoting United States v. Hurtado, 846 F.2d 995, 998 (5th Cir.), cert. denied, 488 U.S. 863 (1988)). Thus, where the defendant disputes facts contained in the PSR but offers no rebuttal evidence, the district court has

discretion to adopt the PSR's facts without further inquiry or explanation. Id.

Each of Bales's objections to the information contained in the PSR either failed to meet the "specificity" requirement of Rodriguez and Hurtado, or was contradicted by his later statements made at sentencing. The district court therefore was not required to make a finding regarding them. Furthermore, Bales has not shown that, as a matter of law, the sentences of his co-defendants can be compared to his sentence; the district court was not obligated to consider the co-defendants' sentences when imposing a sentence on Bales. United States v. Lauga, 762 F.2d 1288 (5th Cir.), cert. denied, 474 U.S. 860 (1985).

B.

Before accepting a plea of guilty, the court must address the defendant personally in open court and, when applicable, inform him that the court may order restitution to any victim. FED. R. CRIM. P. 11(c)(1). We no longer examine whether the plea colloquy can be categorized as a failure to comply with one or more of the three "core concerns" of rule 11 or whether such failure was total or partial. See United States v. Johnson, No. 92-8057, 1993 U.S. App. LEXIS 21633, at *10 (5th Cir. Aug. 26, 1993) (en banc). Instead, a "harmless error" standard is applied. Id. at *17.

A failure in a plea colloquy mandates reversal only when it affects substantial rights, i.e., when the defendant's "knowledge and comprehension of the full and correct information would have

been likely to affect the defendant's willingness to plead guilty." Id. at *18. The issue "`must be resolved solely on the basis of the Rule 11 transcript' and the other portions (e.g., sentencing hearing) of the limited record made in such cases." Id. at *19 (citing FED. R. CRIM. P. 11 (advisory committee notes to 1983 amendment) (quoting United States v. Coronado, 554 F.2d 166, 170 n.5 (5th Cir.), cert. denied, 434 U.S. 870 (1977))).

Applying this standard to the instant case, we find that the district court's failure to mention restitution during the plea colloquy was harmless error. The record indicates that Bales is a sophisticated businessman with some college experience. He had read and signed the plea agreement, which mentioned that the court could order restitution. Furthermore, he knew from the PSR that he had caused a loss amounting to \$575,000. It cannot therefore be said that the court's failure to warn him about possible restitution would have affected his decision to plead guilty. As the error did not affect his substantial rights, it was harmless.

AFFIRMED.