IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8708
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PAUL SANDOVAL,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(EP-92-CR-239-9)

(December 21, 1993)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.[*]

PER CURIAM:

Appellant Paul Sandoval was charged with conspiracy to possess cocaine and marijuana but pleaded guilty to possession with intent to distribute more than 100 kilograms of marijuana in violation of 21 U.S.C. § 841(a)(1). Two months after the guilty plea and before sentencing, he moved to withdraw his plea, alleging that it was not knowing or voluntary. After a thorough hearing, part of which was held over a day to obtain additional testimony,

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

the district court denied his motion. Sandoval was sentenced to five years imprisonment and other penalties. He appeals the denial of his motion to withdraw his guilty plea. We affirm the conviction.

Sandoval argues that his plea was not knowing or voluntary because he expected the government to file a Guidelines section 5K1.1 motion to depart downward for his cooperation and in doing so, he relied on representations by his attorney Gary Hill. Hill stated in an affidavit that he had made such representations to Sandoval. Hill also acknowledged that he was unfamiliar with the practice in obtaining plea agreements that contained section 5K1.1 provisions; there was no such provision in the plea agreement he negotiated for Sandoval; and in essence, Hill conveyed a non-existent government promise to Sandoval upon which Sandoval relied. At the motion hearing, Sandoval's attorney Robert Ramos explained that his partner Mr. Hill understood the government had agreed to file a section 5K1.1 letter but, "in fact, the government had not agreed to do so."

In his brief on appeal, appellant first suggests that his guilty plea was induced by promises or threats or an unkept prosecutorial bargain that rendered it involuntary. Plainly, these arguments are misplaced, because it was not the government but his own attorney who erroneously assured him the government would file a section 5K1.1 letter. Appellant's attorney Ramos conceded that the government was never obliged to do so.

The relevant question is whether Hill's assurances to Sandoval that he would receive the section 5K1.1 letter rendered his guilty plea involuntary. Sandoval concedes that a defendant's reliance on the erroneous advice of counsel relative to a sentence to be assessed under the federal guidelines does not render a guilty plea un-knowing or involuntary. United States v. Santa Lucia, 991 F.2d 179, 180 (5th Cir. 1993); United States v. Gracia, 983 F.2d 625, 629 (5th Cir. 1993); United States v. Jones, 905 F.2d 867 (5th Cir. 1990).[1] The alleged erroneous advice in this case related only indirectly and contingently to the length of sentence that Sandoval might receive. Under the guidelines, the filing of a section 5K1.1 letter would neither guarantee Sandoval a reduction in sentence nor assure that he would be sentenced below the statutory minimum of five years. Sandoval was, however, properly informed by the court at the plea hearing of the minimum and maximum terms of imprisonment he faced. The district court also informed Sandoval that he alone would determine the final sentence, and he stated to Sandoval's codefendants at the same hearing that he would not be bound by § 5K1.1 letters submitted on their behalf. The district court did not err in finding that Sandoval was given enough information to make his plea voluntary notwithstanding the erroneous advice of counsel.

[1] Sandoval also cites § 2254 state habeas cases to support his position, but these cases are not controlling on a direct criminal appeal in which the plea colloquy complied scrupulously with Fed. R. Crim. Pro. 11.

We would add that Sandoval does not contend that any of the other Carr factors that bear on a district court's decision on a motion to withdraw guilty plea weigh in his favor.[2] Consequently, the district court did not abuse its discretion in denying Sandoval's motion to withdraw.

For these reasons, the conviction is **AFFIRMED**.

[2] The district court may permit a defendant to withdraw his guilty plea prior to sentencing upon a showing of "any fair and just reason." Fed. R. Crim. Pro. 32(d). The district court considers seven factors when ruling on this motion: (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 adequate assistance of counsel was available to 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). The court did not dispute that Sandoval received incorrect information from his lawyer, but the court concluded, and we agree, that this misadvice did not render the plea unknowing or involuntary. None of the other factors favored the granting of Sandoval's motion.