IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-9121

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LOVEDAY ENOGWE,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:92-CR-158-G-05)

(February 14, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

I.

Loveday Enogwe pleaded guilty to conspiring to import more than 100 grams of heroin in violation of 21 U.S.C. §§ 963 and 960(b)(2). Jens Bakker, Enogwe's counsel, wanted to withdraw from the case because Enogwe felt that Bakker had forced him to plead despite his innocence. A magistrate granted Bakker's motion to

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

withdraw and appointed Roswald Shrull to replace him. At sentencing, the district court asked Enogwe whether he wanted to withdraw his plea. Enogwe said that he did. The court denied Enogwe's motion and sentenced him to 236 months imprisonment and 5 years supervised release, and fined him $2,000. Enogwe appealed.

II.

Enogwe argues that the district court violated Fed. R. Crim. P. 11 by not informing him that five years was the mandatory minimum sentence and that $2 million was the statutory maximum fine. The statute under which the court sentenced Enogwe states in pertinent part:

> (2) In the case of a violation of subsection (a) of this section involving--(A) 100 grams or more of a mixture or substance containing a detectable amount of heroin; . . . the person committing such violation shall be sentenced to a term of imprisonment of not less than 5 years and not more than 40 years . . . a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual . . .

21 U.S.C. § 960(b)(2)(A). Fed. R. Crim. P. 11 states in pertinent part:

> (c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:
>
> (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law . . .

Fed. R. Crim. P. 11(c). The court and Enogwe had this exchange at his plea colloquy:

> The court: . . . Do you understand that the maximum penalty for a conviction of this offense is a fine of two million dollars and a prison term of five years to forty years?
>
> Mr. Enogwe: Yes, sir.
>
> The court: And do you understand that in some circumstances the fine might be larger than two million dollars in that alternatively it can be computed as twice the amount of monetary gain to yourself from this offense or twice the amount of monetary loss to any victim from this offense if that would produce a larger fine amount than two million dollars?
>
> Mr. Enogwe: Yes, your Honor.

In reviewing Rule 11 challenges, we determine whether the sentencing court varied from Rule 11 procedures. United States v. Johnson, 1 F.3d 296, 298 (5th Cir. 1993) (en banc). If the sentencing court did so, we ascertain whether the variance materially affected the defendant's decision to plead guilty. Id.

Any judicial deviation from Rule 11 procedures could not have materially impacted Enogwe's plea. First of all, the plea agreement identified the minimum prison term. In addition, the court told Enogwe that he faced a sentence of five to 40 years, implying a minimum of five years. Moreover, the PSR stated that the minimum prison term should not be less than five years and the maximum fine should not exceed $2 million. At the sentencing hearing, Enogwe did not allege that he had been misled about the minimum sentence or maximum fine.

As well, Enogwe stated during the plea colloquy that he had discussed with his counsel how the Sentencing Guidelines applied to his case. Enogwe pleaded guilty to importing more than 100 grams

of heroin, which, under the Guidelines, corresponds to an offense level of 26. U.S.S.G. § 2D1.1(c)(9). An offense level of 26, combined with a criminal history category of I, the lowest possible, results in a minimum sentence of 63 months, more than the five year minimum.

More than that, the court's statement about the maximum fine could not possibly have affected Enogwe's plea. The court suggested that the fine would exceed $2 million only if Enogwe gained more than $1 million or caused someone to lose more than $1 million. There is no evidence that Enogwe's offense involved this much money. Even if we assumed that the sentencing court strayed from Rule 11 procedures, it would not have materially affected Enogwe's decision to plead guilty.

III.

Enogwe alleges that the district court erred in preventing him from withdrawing his guilty plea under Fed. R. Crim. P. 32(d), which provides for the withdrawal of a plea for any fair and just reason. Enogwe, however, has no absolute right to withdraw his plea. United States v. Badger, 925 F.2d 101, 103 (5th Cir. 1991). We review the court's resolution of a Rule 32(d) motion for abuse of discretion. United States v. Gaitan, 954 F.2d 1005, 1011 (5th Cir. 1992).

The court should have weighed seven factors in determining whether to permit Enogwe to withdraw his plea:

> (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 the defendant; (6) whether the plea was knowing and voluntary; and (7) whether withdrawal would waste judicial resources.

Badger, 925 F.2d at 104. As "[n]o single factor or combination of factors mandates a particular result," the court should have based its decision on the totality of the circumstances. Id.

The court concluded that only Enogwe's claim of innocence weighed in his favor, though not enough to permit withdrawal of the plea, as Enogwe had delayed in asserting it. In addition, the court found that the pressure to plead guilty experienced by Enogwe was no different than that influencing any defendant who wants to avoid the vagaries of trial. Moreover, the court saw arrayed against Enogwe's claim of innocence the substantial time and money already spent by the government and the court. The court did not abuse its discretion in making this determination.

IV.

Enogwe claims that the district court erred in accepting his plea because there was insufficient evidence to support the plea as required by Fed. R. Crim. P. 11(f). We review the court's acceptance of Enogwe's plea for clear error. United States v. Adams, 961 F.2d 505, 508 (5th Cir. 1992).

The court had to ascertain specific facts supporting each element of the offense. Id. To prove conspiracy to import heroin, the government had to demonstrate (1) an agreement to import; (2) the defendant's knowledge of the agreement; and (3) the defendant's

voluntary participation in the agreement. United States v. Ojebode, 957 F.2d 1218, 1223 (5th Cir. 1992), cert. denied, 113 S.Ct. 1291 (1993). As the record established the elements of the offense, the court did not violate Rule 11(f) or commit clear error in accepting Enogwe's plea.

V.

Enogwe argues that he was denied effective assistance of counsel because Bakker ignored his request to file a motion to withdraw his plea, had no time to prepare for trial, and forced him to plead. Enogwe, however, made this argument to the district court when he challenged the voluntariness of his plea. Given the way Enogwe presented this issue, the court did not compile a record on the ineffective assistance of counsel claim. As there is no record adequate to test the merits of Enogwe's assertion, we decline to consider it on direct appeal. United States v. Navejar, 963 F.2d 732, 735 (5th Cir. 1992); United States v. Higdon, 832 F.2d 312, 313-14 (5th Cir. 1987), cert. denied, 484 U.S. 1075 (1988).

VI.

Enogwe alleges that the district court erred by adopting the PSR, which stated that his offense involved 7.28 kilograms of heroin, an amount corresponding to an offense level of 34. U.S.S.G. § 2D1.1(c)(5). Enogwe thinks that he should have received an offense level of 26, based on the amount of heroin detailed in the superseding information. We review the court's determination

of the amount of drugs involved in the offense for clear error. United States v. Byrd, 898 F.2d 450, 452 (5th Cir. 1990).

The court had to calculate the base offense level using drugs not specified in a count of conviction if they related to the same conduct as the count of conviction. U.S.S.G. § 1B1.3; Byrd, 898 F.2d at 452. The factual record established Enogwe's involvement in three smuggling efforts that appear to be part of the same conduct. Enogwe had to demonstrate that the information forming the basis for his sentence was materially untrue, inaccurate, or unreliable. United States v. Angulo, 927 F.2d 202, 205 (5th Cir. 1991). He has not cast doubt on the amount of drugs that the court factored into the sentence.

Although the PSR suggests that the smuggling effort involved 5.28 kilograms of heroin rather than 7.28 kilograms, this fact is harmless error. The offense level of 34, which the court assigned, corresponds to at least three kilograms but less than ten kilograms of heroin, U.S.S.G. § 2D1.1(c)(5), so even if the court had taken 5.28 kilograms as the amount involved, Enogwe would still have been within the same sentencing range. The court did not clearly err in determining the amount of drugs involved in the offense.

VII.

Enogwe claims that the district court failed to specify that his federal sentence should run concurrently with his state sentence for the same offense. A defendant may be prosecuted and sentenced by both federal and state governments if he violated the law of each sovereign. United States v. Brown, 920 F.2d 1212, 1217

(5th Cir. 1991). This holding harkens back to 18 U.S.C. § 3584(a), which provides in pertinent part:

> (a) Imposition of concurrent or consecutive terms. If multiple terms of imprisonment are imposed on a Defendant at the same time, or if a term of imprisonment is imposed on a Defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively . . . . Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

18 U.S.C. § 3584(a). Whether the sentence should be concurrent or consecutive rests with the sound discretion of the court, subject to 18 U.S.C. § 3553(a), which provides in pertinent part:

> The court, in determining the particular sentence to be imposed, shall consider--
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed--
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;
>
> (4) the kinds of sentence and sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing

> Commission pursuant to 28 U.S.C. 994(a)(1) that are in effect on the date the defendant is sentenced;
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> (5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> (7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a). If the court considered these factors and found sufficient reason to impose a consecutive sentence, then it could have done so, Brown, 920 F.2d at 1217, though the Sentencing Guidelines might cabin its discretion somewhat. U.S.S.G. §§ 5G1.3(b), 5G1.3(c).

Enogwe thinks that he should not receive a consecutive sentence because the federal offense resulted from the same conduct that led to the state sentence. Unfortunately, neither the record nor the court clearly discussed the relationship between the federal and state penalties. In addition, the court did not explain whether Enogwe's federal sentence should run concurrently or consecutively to the state sentence. Finally, the court did not consider the effect of § 5G1.3 on the federal sanction. We vacate and remand the sentence so the court can provide the information needed to ascertain the propriety of a concurrent or consecutive sentence.

AFFIRMED IN PART and VACATED AND REMANDED IN PART.