UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-1019
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ANEZ SUTHERLAND ROBINSON,
a/k/a "Dave",

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

(3:91-CV-2709-H(3:89-CR-365-H))

(June 2, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.

PER CURIAM:[*]

BACKGROUND

Anez Sutherland Robinson pleaded guilty to Count 1 of a 28-count indictment charging him with conspiracy to distribute cocaine

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

and cocaine base. Robinson was sentenced to a term of imprisonment of 320 months.

According to the factual resume generated in connection with the plea agreement, Robinson "was involved with several other persons who were involved in the distribution of cocaine base" in Dallas. Additionally, the factual resume indicated "Robinson knew these persons were involved in the distribution of cocaine base and performed acts which aided them in furtherance of these activities." Robinson obtained apartments in Dallas in his name or in the names of friends for use by members of the conspiracy in operating their drug distribution business. The apartments were used by the co-conspirators to prepare drugs for distribution, to store cocaine, and to collect, count, and store money received from drug sales. Robinson also secured utilities service, including telephone service, in his name or in the name of friends. Robinson was the owner of an apartment complex in Dallas which was the location of one of the principal crack houses used by the co-conspirators for distributing cocaine base.

At the rearraignment, the district court refused to accept a plea of nolo contendere. Robinson denied that he was involved in the distribution of drugs and stated that he had been unaware that his activities were illegal. The district court then asked Robinson whether he had agreed with other persons to distribute cocaine and crack. Robinson said "no." The district court recessed the hearing to give Robinson an opportunity to confer with his attorney. After the recess and before accepting Robinson's

guilty plea, Robinson admitted when questioned by the district court that he had performed acts which aided persons involved in the distribution of cocaine base. The district court directed the Assistant United States Attorney ("AUSA") to read each paragraph of the factual resume into the record and Robinson agreed that each paragraph was factually correct.

Robinson immigrated from Jamaica and has a third-grade education. Robinson's attorney advised the district court that, notwithstanding Robinson's lack of sophistication, he was satisfied that Robinson understood the charge against him and the consequences of his guilty plea.

Robinson sought to set aside his guilty plea pursuant to 28 U.S.C. § 2255. Robinson's § 2255 motion was denied by the district court. This Court previously granted Robinson's application for leave to proceed in forma pauperis on appeal.

OPINION

Robinson contends that he is innocent and that he should be permitted to enter a new plea because the district court failed to ascertain whether he understood the nature of the charge to which he pleaded guilty in violation of Fed. R. Crim. P. 11(c).[1] Under

[1]Ordinarily, if a defendant alleges a fundamental constitutional error, he may not raise the issue for the first time in a § 2255 motion without showing both "cause" for his procedural default and that "actual prejudice" resulted from the error." U.S. v. Shaid, 937 F.2d 228, 232 (5th Cir. 1991), cert. denied, 112 S. Ct. 978 (1992). In this case, however, the Government has not invoked the procedural bar. See U.S. v. Drobny, 955 F.2d 990, 995 (5th Cir. 1992). Although the Government's motion to dismiss is not part of the record on appeal, the magistrate judge recommended dismissal on the merits and did not address the cause and prejudice issue. Presumably,

Rule 11(c)(1), "[b]efore 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 . . . ." Fed. R. Crim. P. 11(c)(1). With respect to this requirement, the Court has refused to "state a simple or mechanical rule." United States v. Dayton, 604 F.2d 931, 937-38 (5th Cir. 1979) (en banc), cert. denied, 445 U.S. 904, and cert. denied, 445 U.S. 971 (1980). Instead, the application of this aspect of Rule 11 is committed to the "good judgment" of the district court, based upon the complexity of the charges and the sophistication of the defendant.

Although the district court was careful to ascertain whether Robinson admitted to the facts set forth in the factual resume, it did not question Robinson adequately regarding the application of those facts to the charge of conspiracy. If the case had gone to trial, the Government would have been required to prove the existence of an agreement between two or more persons to violate the drug laws, and Robinson's knowledge of, intention to join, and voluntary participation in the agreement. United States v. Pruneda-Gonzalez, 953 F.2d 190, 194 (5th Cir.), cert. denied, 112 S. Ct. 2952 (1992). For Robinson to admit that he knowingly committed acts which aided others in the distribution of cocaine base is not the same as admitting that knowingly and voluntarily participated in an agreement to distribute cocaine base.

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therefore, the Government did not invoke the procedural bar.

> [M]ere knowledge of the illegal activities of another is not enough to support an inference of an agreement to join a conspiracy. Even active assistance is not always sufficient. One may know of, and assist (even intentionally), a substantive crime without joining a conspiracy to commit the crime--witness the landlord who rents to an illegal gambling den, and the retailer who sells sugar to one he knows will use it to make bootleg whiskey.

United States v. Pedigo, 12 F.3d 618, 625 (7th Cir. 1993) (emphasis supplied, internal quotations and citations omitted); see also United States v. Hitsman, 604 F.2d 443, 446 (5th Cir. 1979) (evidence that landlord rented garage to tenant with knowledge that tenant intended to use garage to manufacture methamphetamine and that landlord received drug from tenant, used, and sold it to a third-person, was sufficient to support landlord's conspiracy conviction).

Claims that a district court has failed to comply with Rule 11 are reviewed for harmless error. United States v. Johnson, 1 F.3d 296, 298 (5th Cir. 1993) (en banc).

> To determine whether a Rule 11 error is harmless (i.e., whether the error affects substantial rights), we focus on whether the defendant's knowledge and comprehension of the full and correct information would have been likely to affect his willingness to plead guilty. Stated another way, we "examine the facts and circumstances of the . . . case to see if the district court's flawed compliance with . . . Rule 11 . . . may reasonably be viewed as having been a material factor affecting [defendant]'s decision to plead guilty."

Id. at 302 (citation omitted). "Relief from a formal or technical violation of Rule 11 is not available under a § 2255 collateral attack." United States v. Armstrong, 951 F.2d 626, 629 (5th Cir. 1992). In this Circuit, "§ 2255 relief for a violation of Rule 11 is available only upon a showing of prejudice by the defendant."

Id. Robinson was prejudiced "if he entered a plea of guilty to a crime which, based on the facts developed in the record, he did not actually commit." Id. (citing United States v. Briggs, 939 F.2d 222, 227-28 (5th Cir. 1991) (en banc)). If Robinson pleaded guilty to a crime which he did not actually commit, then the failure of the district court to ascertain whether Robinson understood the nature of the charge should not be regarded as harmless.

The probation officer reported that Robinson delivered crack cocaine with Roy Plummer from a stash house or storage house during a three month period in 1988. PSR ¶ 10. In response to Robinson's objection to paragraph 10, the probation officer stated that the information was obtained from the government and investigative agents. Agents were prepared to testify regarding Robinson's activities and provide statements supplied by codefendants regarding Robinson. PSR Addendum, 2.

The probation officer also reported that Robinson purchased ounce quantities of powder cocaine and distributed several hundred dollars worth of crack cocaine after February 1989. PSR ¶ 11. Patricia Polk accompanied Robinson when he purchased quantities of cocaine and when he delivered cocaine to the crack houses. Robinson and Polk were arrested in September 1989 when Robinson attempted to purchase one kilogram of cocaine for $19,000. In an earlier meeting, Robinson had agreed to purchase two kilograms of cocaine for $40,000. Id. Robinson objected to paragraph 11 and argued that he had been "set up" and "entrapped" by investigating agents. The probation officer stated that investigating agents

were prepared to testify to the facts stated in paragraph 11: "The fact remains that Robinson did attempt to purchase cocaine from an investigating officer and was arrested at that time." PSR Addendum, 2.

Robert Himmel, and agent for the Immigration and Naturalization Service, testified at the sentencing hearing that he had worked on the Organized Crime Drug Enforcement Task Force which investigated the conspiracy. Himmel's testimony was based upon his knowledge of the reports and investigatory materials compiled by the Government. Himmel testified that co-conspirators Sheila Williams, Darren Bernard, and Roy Plummer had told other investigators that Robinson had delivered cocaine to crack houses and other locations. Robinson directed people to deliver drugs to certain locations, personally drove co-conspirators to and from the airport, received money, and supplied persons outside of the conspiracy. Himmel testified that he was aware of the Dallas Police Department investigation leading to Robinson's arrest at the time of the purchase of the one kilogram quantity. Himmel admitted on cross-examination that he had only observed Robinson go to the Parnell Street apartment house (a building Robinson owned) on two occasions over a two or three month period of "on and off" surveillance. Himmel had no personal knowledge that other officers had observed Robinson go to the building during that period. Although several co-conspirators had told him that Robinson made deliveries to the crack houses, Robinson admitted that he had not conducted the interviews on which his testimony was based. He knew

of no officer who had personal knowledge regarding Robinson's transportation of co-conspirators to the airport. That testimony was based upon statements of co-conspirators. The district court found that the Government had established that Robinson made frequent deliveries of crack cocaine.

Although Himmel's testimony was equivocal, the Government was prepared to prove that Robinson's involvement in the conspiracy extended well beyond his role as landlord. See Hitsman, 604 F.2d at 446. Therefore, this case does not present a situation in which the defendant pleaded guilty to a crime which he did not actually commit. The district court's failure to question Robinson more thoroughly on the question whether he understood the application of the elements of the crime of conspiracy to the facts of his case cannot reasonably be regarded as having played a substantial role in his decision to plead guilty. Therefore, the error was harmless and does not provide a basis for relief.

Liberally construed, Robinson's pleadings raise the question whether his guilty plea was knowingly and voluntarily entered.

> In order for a guilty plea to satisfy the requirements of due process, the plea must constitute an intelligent admission of the commission of the offense based on the receipt of real notice of the true nature of the charge. The defendant must have a full understanding of what the plea connotes; in particular, she must possess an understanding of the law in relation to the facts. A plea is not voluntary if the accused has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt.

Briggs, 939 F.2d at 227-28 (internal quotations and footnotes omitted); accord Henderson v. Morgan, 426 U.S. 637, 645, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976). If the record shows that defense

counsel explained the nature of the offense to the defendant or that the defendant otherwise understood the charge, the failure of the trial court to explain those elements does not render the plea involuntary. Henderson, 426 U.S. at 647; Davis v. Butler, 825 F.2d 892, 893 (5th Cir. 1987).

The defendant in Briggs pleaded guilty to a crime which she later understood not to encompass her conduct. Id. at 228. The factual resume disclosed no evidence on an essential element of the crime of conviction and the record did not negate the allegations made by the defendant in her § 2255 motion. Id. Therefore, the Court remanded with instructions to the district court to hold a hearing to determine whether the defendant's guilty plea was unknowingly and unintelligently entered. Id. at 228.

In the instant case, Robinson contends that he was not advised and did not understand that an "agreement" to pursue an illegal objective is an essential element of the crime of conspiracy. Unlike in Briggs, however, the record in the instant case negates this allegation. At the rearraignment, the district court asked Robinson's attorney whether Robinson understood the indictment. The attorney responded that he had many discussions with Robinson regarding the factual claims contained in the indictment. The attorney stated, "Although Mr. Robinson has a limited formal education I believe that he does have a full understanding of the offense and the nature of the offense alleged in the Government's indictment." At the district court's request, the AUSA read from the indictment:

> "From at least in or about April 1988 and continuing thereafter to on or about the date of the return of this indictment, in the Dallas Division of the northern District of Texas, and elsewhere, Peter Lloyd Atkinson, also known as "Squally", Prince Anthony Edwards, Mark Pollack, Anez Sutherland Robinson, also known as "Dave", Byron Samuels Cassell Solomon Walker, also known as "Cassette", also known as "Cass", Roy Plummer, also known as Gifford Plummer, also known as "Bully", Darren Anthony Bernard, also known as "Shorty", Eve Veronica Matthews, also known as "Princess", Winston Gary Thomas, also known as "Blacka", Winston Anthony Wright, Patricia Polk and Sheila Alemetra Williams, defendants, knowingly, intentionally did combine, conspire, confederate and agree together and with each other and with other persons known and unknown to the Grand Jury, to commit offenses against the United States, that is the distribution of cocaine . . . and cocaine base, . . . and the possession with intent to distribute cocaine . . . in violation of Title 21, United States Code, Section 841(a)(1)."

The record does not support Robinson's allegation that his guilty plea was unknowingly and unintelligently entered.

Robinson argues in his reply brief that his attorney rendered ineffective assistance by urging him to plead guilty to a crime he did not commit. As was previously discussed, the record reflects that the Government was prepared to prove that Robinson engaged in conspiracy to distribute cocaine base. In exchange for his plea, Counts 4 and 20 through 24 were dismissed. Robinson has failed to overcome the strong presumption that counsel's strategy and tactics fell within the "wide range of reasonable professional assistance" consistent with the Sixth Amendment right to counsel. See Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Accordingly, Robinson has failed to carry his burden under the first prong of the Strickland test. See id. at 687-88 (requiring showing that counsel's actions were (1) objectively unreasonable and (2) prejudiced the outcome).

AFFIRMED.