UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-1119
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

TONYE DAGO JACK,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(CR 3 91 267 T (03))

October 26, 1993

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:[1]

Having plead guilty to using a communication facility in furtherance of a drug transaction, Appellant was sentenced to forty-eight months imprisonment (the statutory maximum) and one year of supervised release. The recommended guidelines sentencing range was fifty-one to sixty-three months of imprisonment. Appellant claims several violations of Rule 11. We affirm.

In examining the validity of guilty pleas challenged under Rule 11 we apply the harmless error analysis of Rule 11(h). This

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

review requires a two-step "analysis: (1) did the . . . court in fact vary from the procedures required by Rule 11, and (2) if so, did such variance affect substantial rights of the defendant?" To determine whether substantial rights have been affected, we focus on whether the Rule 11 error "may reasonably be viewed as having been a material factor affecting [defendant's] decision to plead guilty." United States v. Johnson, 1 F.3d 296 (5th Cir. 1993) (en banc).

Appellant first complains that the district court violated Rule 11(c)1 by failing to mention that the guidelines must be considered in sentencing, and that the court could depart from the guideline range. The written plea agreement stated that the sentencing guidelines were applicable and the court informed Appellant of the applicability of the Sentencing Reform Act of 1984. No substantial right was implicated by the failure of the district court to use the term "sentencing guidelines". Likewise, there was no error for failure to mention upward departure since such departure was not possible in this case. The statutory maximum which was the sentence imposed, was less than the guideline range so no upward departure was possible. Since it was not possible it could not have been a material factor affecting the decision to plead guilty.

Next, Appellant complains that the prosecutor and not the court stated the possible penalties and urges us to reconsider our decision in United States v. Hekimain, 975 F.2d 1098, 1100-1001 (5th Cir. 1992). We decline the invitation. Appellant makes no

showing of how his substantial rights were affected by the fact that the statement came from the prosecutor and not the court.

Appellant also complains that the prosecutor and not the court stated the period of supervised release applicable to the offense and that it was incorrectly stated to be one year. Indeed, since the count of conviction was a Class D felony, the minimum period of supervised release was two years. 21 U.S.C. § 843(d)(c) (West 1981); USSG § 5D1.2(b)(2). The district court had been improperly informed by the probation officer and the U.S. Attorney that the appropriate period of supervised release was one year. Since this error worked in favor of the Appellant and not against him it was obviously harmless. Appellant also complains that the district court erroneously believed that supervised release of this case was mandatory. In fact, it is. See USSG § 5D1.1(a). Also, as previously noted, the fact that the information came from the U.S. Attorney and not the court affected no substantial right.

The district court warned Appellant that he was a witness under oath and must answer truthfully or be subjected to penalties for perjury. Appellant contends that this warning was not sufficient since the rule requires that he be warned concerning "false statements". He does not contend that he made a false statement or that he has been prosecuted for making such statements. He has not, therefore, shown that any substantial right was affected.

Finally, the Appellant complains that he was not advised of the possibility of restitution. No restitution was ordered and

indeed none could have been ordered in this case. Accordingly, no substantial right was affected.

AFFIRMED.