

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-1722
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

IMAGBE OSIFO

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:93-CR-174-T)

(August 15, 1994)

Before JOLLY, WIENER, and STEWART, Circuit Judges.

PER CURIAM:¹

Pursuant to a written plea agreement, Imagbe Osifo pled guilty to the possession of a foreign passport knowing it to be counterfeit or altered. He was sentenced to a three-year term of probation, a \$1,000 fine, and a \$50 special assessment. Osifo appeals his conviction, asserting that there was an insufficient factual basis for one element of the offense and that the district court failed to make sure he understood the nature of the charges.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

We affirm.

FACTUAL AND PROCEDURAL HISTORY

Imagbe Osifo was arrested and charged by information with the knowing possession of a counterfeit passport, in violation of 18 U.S.C. § 1546(a). He pled guilty to the offense pursuant to a plea agreement, signed by Osifo, which included the following factual resume:

On April 5, 1993, Imagbe Osifo, defendant, presented an altered Nigerian passport at the Mexican consulate in Dallas, Texas in an effort to obtain a Mexican tourist visa. Although the passport the defendant presented bore a fingerprint and signature of another person, the defendant represented to the consulate that the passport he possessed was his. The passport was a document prescribed by statute or regulation for entry into the United States.

At Osifo's arraignment, this factual resume was read into the record. Osifo stated that he agreed with it and still wished to plead guilty. The district court found that the factual resume formed a factual basis for Osifo's plea and took the plea agreement under advisement until it had an opportunity to review the presentence report (PSR).

Upon completion of the PSR, Osifo filed an objection because the PSR gave no consideration for his acceptance of responsibility for the offense. The district court addressed this objection at the sentencing hearing and asked Osifo specifics about the passport. Osifo responded that the picture, signature, and fingerprint on the passport were not his and that he knew they were not his. Osifo stated that he had learned his lesson and accepted full responsibility. The district court then modified the PSR's

findings on acceptance of responsibility, adopted the PSR as modified, and sentenced Osifo to three years of probation, a \$1,000 fine, and a \$50 special assessment.

Osifo appeals his conviction, contending that (1) the district court erred in finding a factual basis for his guilty plea because the factual resume which he signed did not provide a sufficient factual basis to show that he knew that the passport was counterfeit or altered, and (2) the district court did not comply with Fed.R.Crim.P. Rule 11 because it "failed to satisfy the core concern that Osifo understood the nature of the charges."²

STANDARD OF REVIEW

The acceptance of a guilty plea is deemed a factual finding that there is an adequate factual basis for the plea. U.S. v. Adams, 961 F.2d 505, 509 (5th Cir. 1992), citing U.S. v. Davila, 698 F.2d 715, 717 (5th Cir. 1983). We review this finding under the clearly erroneous standard. Id.

We review a district court's failure to comply with Rule 11 for harmless error. Fed.R.Crim.P. 11(h). Under this Rule 11(h) harmless error analysis, we determine whether any variance from the procedures required by Rule 11 affects the substantial rights of

² Appellant did not raise these arguments in the district court by a motion to withdraw his guilty pleas, see Fed. R. Crim. P. 32(a), or other pleading. Both Osifo and his attorney signed the factual resume as being "true and correct." Forfeited error is ordinarily reviewed under the "plain error" standard. See Fed.R.Crim.P. 52(b). However, on direct appeals challenging Rule 11 compliance, this Court applies a full standard of review even though the asserted error has not been brought to the attention of the district court. See, generally, U.S. v. Bachynsky, 934 F.2d 1349 (5th. Cir. 1991) (en banc); U.S. v. Johnson. 1 F.3d 296 (5th Cir. 1993) (en banc).

the defendant. See Adams, supra, at 510, and cases cited therein.³

DISCUSSION

Factual Basis

A guilty plea is insufficient in itself to support a conviction; the district court is obligated to question a defendant or examine the record to satisfy itself that an adequate factual basis for the guilty plea exists. Fed.R.Crim.P. Rule 11(f); U.S. v. Adams, 961 F.2d 505, 508 (5th Cir. 1992). The record must reveal specific factual allegations supporting each element of the offense. Id. However, if sufficiently specific, an information may be the only source for the factual basis for the guilty plea. Id. at 509.

To determine whether the district court erred in concluding that there was an adequate factual basis for the plea, this Court examines the information and the plea hearing. Id. at 509 n.3. As stated in Adams, supra, at 511, Rule 11(f) ". . . does not specifically require any on-the-record colloquy. It requires that the court *subjectively* satisfy *itself* of an adequate factual basis." Noncompliance with Rule 11(f) does not automatically affect a defendant's substantial rights. See Adams, id. at 511-512.

To prove a violation of § 1546(a), the Government must prove that: (1) the defendant knowingly used an immigration document

³ We no longer review alleged violations of "core concerns" any differently than other Rule 11 violations. U.S. v. Johnson, 1 F.3d 296 (5th Cir. 1993) (en banc). For a discussion of "core concerns", see U. S. v. Bernal, 861 F.2d 434 (5th Circuit 1988), U.S. v. Dayton, 604 F.2d 931 (5th Cir. 1979), cert. denied, 445 U.S. 904, 100 S.Ct. 1080, 63 L.Ed.2d 320 (1980), and cases cited therein.

prescribed by statute or regulation for entry into the United States; (2) that the document was counterfeited or altered; and (3) that the defendant knew at the time of the use that the document had been counterfeited or altered. See § 1546(a). The applicable textual basis for Osifo's first contention is Fed.R.Crim.P. Rule 11(f), which provides that,

[n]otwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

The information states that,

[o]n or about April 5, 1993 in the Dallas Division of the Northern District of Texas, IMAGBE OSIFO, defendant, did knowingly possess a counterfeit and altered document prescribed by statute and regulations for entry into the United States, to wit: a foreign passport, knowing it to be counterfeit and altered.

This information, together with the factual resume, arguably provides a sufficient factual basis for the plea. Osifo suggests that Adams requires a statement of specific facts which show that Osifo knew the counterfeit or altered nature of the passport. However, the district court could infer from the facts stated in the resume and the information that Osifo knew he presented a counterfeit passport as his own. Unlike the "affirmative concealment" element required for the Adams offense of misprision, there is no element of the instant offense which requires an affirmative act of knowledge. See and compare, Adams, 961 F.2d at 508-510. We find no clear error in the district court's acceptance of the instant factual resume and information as a factual basis for Osifo's plea.

Understanding the Charges

A guilty plea must be informed and voluntary. Fed. R. Crim. P. 11. This Court applies a harmless-error analysis to its review of possible violations of Fed.R.Crim.P. 11. U.S. v. Johnson, supra, 1 F.3d at 299; Fed.R.Crim.P. 11(h). Before a variance from the requirements of Rule 11 merit reversal, it must affect the "substantial rights" of the defendant-appellant. Fed.R.Crim.P. 11(h). First, however, the Court must determine whether the sentencing court varied from the procedures required by Rule 11. Johnson, id. 298, 302.

When the court reviews a Rule 11 challenge it "principally" considers the transcript of the plea-colloquy hearing, but also looks to plea agreements, sentencing-hearing transcripts, and the actual sentence if relevant. Id. at 298. Post-plea-colloquy sources such as the presentence investigation report (PSR) are used for the limited purpose of testing whether the defendant's plea was voluntary and knowing at the time it was made. Id.

Osifo contends that the district court "failed to satisfy the [Rule 11] core concern that Osifo understood the nature of the charges" because "[n]othing in the record indicate[ed] that Osifo understood that 'knowing it to be counterfeited or altered' meant knowing that someone other than the issuing Nigerian governmental agency had altered the document." Osifo maintains that the sentencing court varied from the procedures required by Rule 11 because it did not adequately question him regarding whether he believed that the passport was in the same condition as when it left the Nigerian agency. Assuming, arguendo, that a variance occurred, it did not affect Osifo's "substantial rights" and was

harmless.

At sentencing, Osifo admitted that he knew that the picture, signature, and fingerprint on the passport he presented to the Mexican consulate were not his. The PSR indicates that Osifo stated that the confiscated passport was his. The PSR also indicates that Osifo stated that "his mother used an old photograph of him to place on the passport . . . that it was cheaper for him to obtain a passport through his mother in Nigeria than to go to a business in the United States . . . [that] [h]e signed the paperwork, obtained a fingerprint, and returned it . . . [and] that his mother returned the passport to him via the mail." The district court then found that Osifo had made an intelligent and voluntary plea and ordered that a judgment be entered.

Although Osifo argues that he "could have believed that the [passport] was in the exact same condition as when it left the appropriate issuing agency and not realized that this belief negated guilt," he has not provided any support for his assertion that he did not understand the nature of the charges against him. He seeks to have this Court require that the district court add an element to § 1546(a) which is not contained in the statute.

The district court's alleged failure to question Osifo more thoroughly about whether he believed that the passport was in the same condition as when it left the Nigerian agency cannot reasonably be regarded as having played a substantial role in Osifo's decision to plead guilty. Therefore, any possible Rule 11 error was harmless and did not affect Osifo's substantial rights. See Johnson, id.

CONCLUSION

We find no clear error in the factual basis before the district court at the time of Osifo's plea. As to Osifo's understanding of the nature of the charge to which he pled, we find no error. Moreover, even if we were to assume arguendo that the district court erred as contended by Osifo, the record as a whole indicates no harmless error. Accordingly, we affirm Osifo's conviction.

AFFIRMED.