

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-1942
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JOHN VERNON HOBBS,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(4:93-CR-66-Y)

(August 31, 1994)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.

PER CURIAM:¹

John Vernon Hobbs appeals his conviction entered following his plea of guilty to one count of robbery affecting commerce in violation of 18 U.S.C. § 1951, and one count of possession of a firearm during a crime of violence in violation of 18 U.S.C. § 924(c). Although the district court did not follow Rule 11, we

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

find the deficiency harmless. We also conclude that Hobbs' conviction and sentence do not offend the Double Jeopardy Clause and we therefore affirm.

I.

A.

The principal issue presented in this appeal involves the manner in which the district court conducted the Rule 11 guilty plea hearing. More particularly, the defendant contends that the court did not comply with Rule 11(c)(1) and

address[ed] the defendant personally in open court and inform[ed] the defendant of and determined that the defendant understands . . . (1) the nature of the charge to which the plea is offered . . . the fact that the court is required to consider any applicable sentencing guidelines . . . that the court may also order the defendant to make restitution to any victim of the offense.

At the Rule 11 hearing, the district court did not have the indictment read and instead permitted the defendant to waive the reading of the indictment.² The court then offered to explain the

² The pertinent exchange between the district court and the defendant was as follows:

THE COURT: Mr. Hobbs, have you received a copy of the indictment in this case?

DEFENDANT HOBBS: Yes, Your Honor.

THE COURT: Have you read it?

DEFENDANT HOBBS: Yes, sir.

THE COURT: Do you understand the nature of the charges made against you?

central elements of the offense but also allowed the defendant to waive this explanation.

Fortunately, the record does include a signed plea agreement and a factual resume. The resume includes a stipulation of the facts on which the offenses are based and sets forth the elements of the charged offenses. The court determined that Hobbs had read and signed the plea agreement and the factual resume.

In a factually similar case, **United States v. Bernal**, 861 F.2d 434 (1988), we reversed a conviction based on an inadequate explanation of the nature of the charges at the Rule 11 hearing.

DEFENDANT HOBBS: Yes, sir.

THE COURT: Even so, I will now require the United States attorney to read the counts of the indictment into the record unless you waive your right to have it read. Do you wish to waive?

DEFENDANT HOBBS: Yes, I do, Your Honor.

THE COURT: You also have the right to have explained to you the essential elements of the offense, that is, what the government will be required to prove at trial. Again, I will allow you to waive the giving of that explanation if you understand the nature of the charges and the essential elements of the offense with which you are charged.

Do you understand the essential elements of the offense with which you are charged?

DEFENDANT HOBBS: Yes, Your Honor.

THE COURT: Do you then admit that you committed all the essential elements of the offense?

DEFENDANT HOBBS: Yes, Your Honor.

However, in **United States v. Johnson**, 1 F.3d 296, 299 (5th Cir. 1993), we made clear that a harmless error analysis applies to all Rule 11 concerns. We stated that "reversal and vacature will be required when--but only when--the challenged variance from the procedures required by [Rule 11] . . . affects substantial rights of the defendant." **Id.**

Therefore, under **Johnson**, when the sentencing court varies from the procedures required by Rule 11, we must ascertain whether that variance was a material factor affecting the defendant's decision to plead guilty. **Id.** at 302.

Had the district court engaged in an exchange with Hobbs about the nature of the charges and the elements of the offenses we would have a much sounder basis for concluding that Hobbs understood the nature of the charges. Nonetheless, we are persuaded that the signed plea agreement and factual resume adequately demonstrates that Hobbs understood the nature of the charges. Thus the court's failure to address the defendant on these subjects did not materially affect his decision to enter the plea.

The factual resume correctly tracks the language of the statute concerning the elements of the robbery offense and properly states the law concerning the firearms offense. The plea agreement states that the sentencing guidelines apply to Hobbs' case and that the guideline range cannot be determined until the PSR is prepared.

The plea agreement also informed Hobbs that he could withdraw his plea if the court departed from the guideline range.

At the sentencing hearing, Hobbs persisted in his assertion that he committed the essential elements of the offense and that the factual resume was accurate. At that hearing, neither Hobbs nor his attorney objected to the voluntariness of his plea nor contended that the recommended applicable sentence was longer than expected. Indeed, our conclusion that the error in this case is harmless is buttressed by Hobbs' failure to offer any explanation as to how the court's failure to inform him of the nature of the offenses affected his decision to plead guilty. Thus, because the district court's failure to follow Rule 11 was not a material factor that affected Hobbs' decision to plead guilty, the district court's error does not require reversal of the conviction.

B.

Hobbs argues next that the court violated his double jeopardy rights by convicting him on the firearms count because that offense contained the same elements as the robbery offense plus use of a firearm.

The Fifth Amendment protects a criminal defendant from multiple punishments for the same offense. **United States v. Singleton**, 16 F.3d 1419, 1422 (5th Cir. 1994). To determine whether a multiple punishment has been imposed, we first consider whether each statutory provision requires proof of an additional

fact that the other does not. **Blockburger v. United States**, 284 U.S. 299 (1932). But even assuming that § 1951 and § 924(c) requires proof of the same elements and therefore Hobbs satisfied the **Blockburger** test, Hobbs' conviction and sentence would still not violate the Fifth Amendment if Congress intended to impose cumulative punishment for the two offenses.³ **Missouri v. Hunter**, 459 U.S. 359 (1983).

In an analogous case, **United States v. Holloway**, 905 F.2d 893 (5th Cir. 1990), we held that Congress intended § 924(c) to impose cumulative punishment in addition to that provided for armed bank robbery. 18 U.S.C. § 2113(A)(D); **see also Singleton**, 16 F.3d 1419. For the reasons stated in **Holloway**, we are persuaded that Congress also intended to impose cumulative punishment against a defendant convicted of violating §§ 1951 and 924(c). Therefore, Hobbs' conviction and sentence do not violate double jeopardy because of the congressional intent to impose cumulative punishment for convictions of these two offenses. Moreover, we find unpersuasive Hobbs' argument that **United States v. Dixon**, 113 S.Ct. 2849, 2857-58 (1993), implicitly overruled **Missouri v. Hunter**, and thus **Holloway**. We find nothing in **Dixon** to support the argument that the Double Jeopardy Clause is implicated when Congress intends to

³ This court recently held that conviction under § 1951 and § 924(c)(1) required proof of different elements and concurrent prosecutions did not violate the Double Jeopardy Clause. **United States v. Martinez**, ___ F.3d ___, 1994 WL 392671 (5th Cir. 1994).

impose cumulative punishment for two offenses. We reaffirmed the validity of **Holloway** in **Singleton**, 16 F.3d 1419, which was handed down after the Court's opinion in **Dixon**.

For the foregoing reasons, Hobbs' conviction is
AFFIRMED.