UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-3124
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

EDWIN WIMBY,

Defendant-Appellant.

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No. 93-3186
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

MURRAY SUTTON,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CR-92-126 "A" (2) & CR-92-126-A)

(January 6, 1994)

Before DAVIS, JONES and DUHÉ, Circuit Judges.

PER CURIAM:[1]

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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

Appellants Edwin Wimby and Murray Sutton appeal their convictions and sentences on charges of possessing and passing counterfeit bills. We affirm.

I.

Louis Thompson of the Ponchatoula, Louisiana Police Department responded to a call that counterfeit bills had been passed at Bootsy's Eastside, a Ponchatoula convenience store. While driving toward the convenience store, Thompson observed a Buick Regal parked in front of Ponchatoula Antiques, which attracted his attention because the antique store was closed.

As he approached the vehicle, Thompson saw Murray Sutton sitting in the driver's seat and Edwin Wimby sitting in the back seat; both men were eating crawfish. Thompson asked Sutton for his driver's license, but Sutton was unable to produce it. Thompson then noticed a large, straight knife and a Crown Royal bag on the front passenger-side floorboard. Thompson received permission to search the vehicle. On the back seat were various articles of clothing, some neatly pressed and others strewn about, including a white dress shirt. In the trunk, in plain view, Thompson found a bag of $20 bills, which turned out to be counterfeit, and a .25 caliber automatic pistol. Sutton and Wimby were arrested. Sutton later admitted that the weapon belonged to him.

As Wimby was being taken from the vehicle, Sergeant Richard Prima inquired about the money in the Crown Royal bag, asking: "When a fake bill is cashed, where does the good money go?" Wimby

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should not be published.

replied: "That's where the good money goes," referring to the Crown Royal bag.

A later search of Sutton's person uncovered more counterfeit bills. No counterfeit bills were found on Wimby. Bogus bills also were retrieved from three establishments: Bootsy's Eastside, Bootsy's Westside, and Tucker's Conoco. All of the bills came from the same printing operation.

A third co-defendant, Charles Mitchell, was identified as one of two men who had passed counterfeit bills in Bootsy's Eastside. The store clerk could not identify the other man. A store clerk at Bootsy's Westside also identified Mitchell as the man who had passed a counterfeit bill in that store. She reported that Mitchell was wearing a white dress shirt when he was in the store. When he was arrested, Mitchell was wearing a blue shirt.

Wimby and Sutton were indicted on one count of conspiring to possess and pass counterfeit notes, in violation of 18 U.S.C. § 371, and three counts of possessing and passing counterfeit notes, in violation of 18 U.S.C. §§ 472 and 2. A superseding indictment also charged Sutton with being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

The evidence at trial showed that the three men -- Wimby, Sutton, and Mitchell -- had travelled the 50 miles from New Orleans to Ponchatoula and had stopped at the three convenience stores within a two mile strip just off of Interstate 55. The three men made small purchases at each store using the counterfeit bills.

At the close of all the evidence but before closing arguments, Sutton pled guilty to all counts of the superseding indictment. Subsequently, Sutton filed a motion to withdraw his guilty plea, which the court denied. Finding that Sutton had an offense level of 26 and a criminal history category of V, the district court sentenced him to 60 months imprisonment on the conspiracy count and to 120-month terms on the remaining four counts, all terms to run concurrently.

Wimby, however, did not enter a plea, and the jury found him guilty on all counts. Wimby's presentence report ("PSR") placed his offense level at 9 and his criminal history category at I. The applicable guideline range was imprisonment for 4-10 months. At sentencing, the district court ruled, over Wimby's objection, that he was not entitled to a two-point reduction for being a minor participant in the conspiracy. The court sentenced him to three years probation, with a condition that he spend six months in a half-way house. Both defendants timely filed notices of appeal.

II.

A.

Wimby contends first that the evidence was insufficient to support his conspiracy conviction. In assessing a challenge to the sufficiency of the evidence, we must consider the evidence in the light most favorable to the government and must afford the government all reasonable inferences and credibility choices. **See United States v. Ayala**, 887 F.2d 62, 67 (5th Cir. 1989). The evidence is sufficient if a rational jury could have found the

defendant guilty beyond a reasonable doubt based upon the evidence presented at trial. **See id.**

To prove a conspiracy in violation of 18 U.S.C. § 371, the government must prove that: (1) one or more persons and the defendant agreed to violate a law of the United States; (2) one of the conspirators committed an overt act in furtherance of the conspiracy; and (3) the defendant intended to further an unlawful objective of the conspiracy. **See United States v. Razo-Leora**, 961 F.2d 1140, 1144 (5th Cir. 1992). "No element need be proved by direct evidence, but may be inferred from circumstantial evidence. An agreement may be inferred from `concert of action.' Voluntary participation may be inferred from `a collocation of circumstances.'" **United States v. Arzola-Amaya**, 867 F.2d 1504, 1511 (5th Cir.) (citations omitted), **cert. denied**, 493 U.S. 933 (1989).

Wimby argues that the government failed to prove that he voluntarily joined in a conspiracy to possess and pass counterfeit bills in violation of 18 U.S.C. § 472. He concedes that the evidence established that Murray Sutton possessed and Charles Mitchell passed counterfeit money at convenience stores in Ponchatoula. He contends, however, that the only evidence connecting him with the conspiracy -- his "mere presence" in the back seat of Sutton's car and his statement to Sergeant Prima that he knew "where the good money goes" -- was insufficient to support his conviction for conspiracy.

"Although mere presence at the scene of the crime or close association with a co-conspirator alone will not support an inference of participation in a conspiracy, presence is a significant factor to be considered within the context of the circumstances under which it occurs." **United States v. Medina**, 887 F.2d 528, 531 (5th Cir. 1989) (internal citation omitted). The facts in this case demonstrate presence and association under suspicious circumstances. Ponchatoula police initially approached the car in which Wimby was seated because it was unusual for vehicles to be parked in that area at that time of day. Inside the car, in plain view, were a knife and a bag of money, as well as various articles of clothing. Sutton was searched and found to have counterfeit bills on his person. Although no counterfeit bills were found on Wimby, he knew that the money in the bag was the change received from the passing of the counterfeit notes. Based on this circumstantial evidence, a rational jury could have inferred Wimby's knowing participation in the conspiracy.

B.

Wimby also contends that he is entitled to a two-level reduction in his offense level because he was a minor participant under U.S.S.G. § 3B1.2. He argues that, since he neither passed nor possessed counterfeit bills, he was "substantially less culpable" than the other conspirators.

A minor participant is defined by the sentencing guidelines as "any participant who is less culpable than most other participants, but whose role could not be described as minimal." Whether a

defendant is a minor participant involves a complex factual analysis and is reviewed under the "clearly erroneous" standard. **See United States v. Gallegos**, 868 F.2d 711, 713 (5th Cir. 1989).

The gravamen of Wimby's argument is that the other participants in the conspiracy were more culpable. However, simply being less involved than other participants does not warrant minor-participant status; a defendant must be peripheral to the furtherance of the illegal endeavor. **See United States v. Thomas**, 932 F.2d 1085, 1092 (5th Cir. 1991), **cert. denied**, 112 S.Ct. 887 (1992). The PSR reflects that after Sutton and Wimby were arrested, Sutton implicated Wimby in the illegal activity and that Wimby, himself, admitted knowledge of the scheme. Thus, the district court did not clearly err in finding that minor-participant status was not warranted for Wimby.

III.

A.

In his appeal, Sutton argues first that the district court violated Fed. R. Crim. P. 11(c)(3) by failing to advise him of his right against self-incrimination. Rule 11 requires that, before accepting a guilty plea, the district court must determine whether the guilty plea was coerced and whether the defendant understands the nature of the charges and the consequences of his plea. **See United States v. Johnson**, 1 F.3d 296, 300 (5th Cir. 1993) (en banc). In reviewing a Rule 11 challenge, we utilize a two-step, harmless-error analysis: "(1) Did the sentencing court in fact vary from the procedures required by Rule 11, and (2) if so, did such

variance affect substantial rights of the defendant?" **Id.** at 298. In determining 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." **Id.** at 302 (internal quotations omitted).

During the plea colloquy, the district court did not explain to Sutton that, by pleading guilty, he waived his right against self-incrimination. However, because Sutton did not enter his plea until after he had rested his case and exercised his right to remain silent at trial, the court's omission could not have materially influenced his decision to plead guilty. In short, Sutton suffered no prejudice by not being reminded of a right he had already exercised.

B.

Sutton next argues that he did not understand the consequences of his plea because his trial counsel misinformed him regarding the possible guideline sentencing range. In **United States v. Jones**, 905 F.2d 867, 868 (5th Cir. 1990), we held that reliance on the erroneous advice of counsel regarding the likely sentence under the guidelines does not constitute a Rule 11 violation. "As long as the defendant understood the length of time he might possibly receive, he was fully aware of his plea's consequences." **Id.** (internal quotations omitted). Sutton was advised by the court of the maximum statutory penalty for each crime to which he was pleading guilty. The court also explained that it had the authority to impose a sentence more severe than that indicated by

the guidelines. Thus, we find that Sutton's guilty plea was knowing and voluntary under Rule 11.

Sutton's contention that his counsel's inaccurate prediction of his sentencing range constitutes ineffective assistance of counsel is also without merit. To prevail on this claim, Sutton must show both that his counsel's performance fell below an objective standard of reasonable competence and that he was prejudiced by his counsel's deficient performance. **See Strickland v. Washington**, 466 U.S. 668, 687 (1984). In order to show prejudice, Sutton must demonstrate that his counsel's error were so serious that it rendered the proceedings unfair or the result unreliable. **See Lockhart v. Fretwell**, 113 S.Ct. 838, 844 (1993).

Ineffective-assistance-of-counsel issues can be resolved on direct appeal only if the record provides substantial details about the attorney's conduct. **See United States v. Bounds**, 943 F.2d 541, 544 (5th Cir. 1991), **cert. denied**, 114 S.Ct. 135 (1993). The record in this case is sufficient to review the conduct of Sutton's counsel. It shows that, although his counsel calculated a maximum sentencing range of 51 to 63 months, he told Sutton that his estimates were not binding. Moreover, Sutton was informed by the district court that his attorney's prediction of the guideline sentencing range was merely an estimate based on present information that might be wrong. The court further stated that there was no "guarantee" as to the sentence Sutton might receive, which he stated he understood. Therefore, since Sutton has not

shown how he was prejudiced by his counsel's inaccurate prediction, his ineffective-assistance claim must fail.

C.

Sutton next contends that the district court abused its discretion by refusing to allow him to withdraw his guilty plea. Although Fed. R. Crim. P. 32(d) allows a withdrawal of a plea upon a showing of a "fair and just reason," the defendant bears the burden of establishing that withdrawal is justified, and the district court's ruling on such a motion will not be disturbed absent an abuse of discretion. **See United States v. Hurtado**, 846 F.2d 995, 997 (5th Cir.), **cert. denied sub nom. Aguas v. United States**, 488 U.S. 863 (1988).

In **United States v. Carr**, 740 F.2d 339 (5th Cir. 1984), **cert. denied**, 471 U.S. 1004 (1985), we enumerated seven factors for district courts to consider in deciding whether to allow a defendant to withdraw a guilty plea. The factors are: (1) whether the defendant has asserted his innocence; (2) whether the government would suffer prejudice if withdrawal were granted; (3) whether the defendant delayed in filing his withdrawal motion; (4) whether withdrawal would substantially inconvenience the court; (5) whether close assistance of counsel was available to the defendant; (6) whether the plea was knowing and voluntary; and (7) whether withdrawal would waste judicial resources. **Id.** at 343-44. In applying these factors, the court "should consider the totality of the circumstances." **Id**. at 344.

The **Carr** factors support the district court's ruling in this case. First, Sutton's assertion of innocence with respect to the firearms count, does not, by itself, justify reversal. **Id.** Second, the court found that the government would suffer prejudice from having to retry the case. Third, Sutton waited 48 days before moving for withdrawal. Fourth, the court found that granting the motion to withdraw would seriously inconvenience the court and waste judicial resources. Finally, as discussed above, Sutton's plea was knowing and voluntary, and he received effective assistance of counsel. Thus, the district court did not abuse its discretion in denying his motion.

D.

Lastly, Sutton contends, for the first time on appeal, that the district court erred in grouping the offenses from this case with offenses from a related case. We review errors raised for the first time on appeal only for plain error. **See United States v. Brunson**, 915 F.2d 942, 944 (5th Cir. 1990). Plain error is clear or obvious error that affects substantial rights and undermines "the fairness, integrity or public reputation of judicial proceedings." **United States v. Olano**, 113 S.Ct. 1770, 1777-79 (1993) (internal quotation omitted). Generally, the error must have prejudiced the outcome of the proceedings, and the defendant bears the burden of showing prejudice. **Id.** at 1778.

Sutton's PSR arrived at a combined offense level of 26 after grouping the counts from this case with the counts from the related case. The PSR, however, also calculated the total offense level to

be 26 based on his conviction on the firearm possession charge. Because Sutton's guideline range is the same as it would have been if the counts had not been grouped, Sutton has failed to meet his burden of showing prejudice.

For the reasons stated above, the convictions and sentences of Sutton and Wimby are affirmed.

AFFIRMED.