UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3563
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ALBERT ALLEN,

Defendant-Appellant,

Appeal from the United States District Court
for the Eastern District of Louisiana
(CR 93-120 "H")

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No. 93-3572
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

EVON BELL,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CR 93-120-H-3)

(March 18, 1994)

Before KING, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Albert Allen challenges his conviction, following a guilty plea, for possession with intent to distribute cocaine base and possession with intent to distribute marijuana. Evon Bell (alias Yvonne Bell) challenges the sentence imposed following her guilty plea to conspiracy to possess with intent to distribute cocaine. We **AFFIRM.**

I.

A confidential informant (CI) told law enforcement officers that he[2] had been contacted by Bell, whom he had known for several years. (Bell was known to the CI as a distributor of large amounts of cocaine and marijuana.) According to the CI, Bell requested a meeting; when they met, Bell inquired if he knew anyone who could supply her with large amounts of cocaine and marijuana; and the CI told her that he would check into it and get back with her.

Acting under law enforcement supervision, the CI advised Bell that he could supply cocaine to her, and arranged a meeting with Bell and the CI's "source", an undercover law enforcement officer. The CI met with Bell at a restaurant; Bell arrived in a truck with Allen and two others. After Bell spoke with the CI, she returned

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

[2] The CI is identified neither by name nor by gender in the Presentence Report (PSR); accordingly, the masculine pronoun will be used.

to the truck, where she obtained money from Allen. Bell then travelled with the CI (in the CI's car) to a nearby location, where the CI introduced Bell to the undercover agent posing as his source. There, Bell negotiated with the agent for the purchase of five kilograms of cocaine. The agent then obtained five "bricks" of a substance represented to be cocaine out of her vehicle. Bell, who had $30,000 in her possession, was arrested.

Meanwhile, agents continued their surveillance of Allen and his fellow passengers, who remained at the restaurant. The three entered a nearby store, and upon exiting it, seemed to spot one of the surveillance agents and began to behave nervously. The agents arrested them. Upon searching the truck, the agents seized the following: a canvas bag containing a triple beam scale; two boxes of baggies; one box of surgical masks; one package of razor blades; 28 grams of cocaine base ("crack"); and 14 grams of marijuana.

Allen was indicted for conspiracy to possess with intent to distribute five kilograms of cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 846, possession with intent to distribute cocaine base ("crack"), in violation of § 841(a)(1), and possession with intent to distribute marijuana, in violation of § 841(a)(1); Bell, for conspiracy.

Bell pleaded guilty, and was sentenced, *inter alia*, to 120 months in prison. Allen pleaded guilty to the possession with intent to distribute cocaine count, as well as the marijuana count. He was sentenced, *inter alia*, to 120 months and 60 months incarceration respectively, to run concurrently.

II.

A.

Allen contends that, under Fed. R. Crim. P. 32(d), the district court should have allowed him to withdraw his guilty plea. The basis of this contention is that his first counsel[3] provided him with incorrect information regarding the sentencing guidelines, which resulted in his plea of guilty to the possession with intent to distribute counts, rather than accepting the government's original offer to plead to only the conspiracy count; and that such a plea would have resulted in a sentence that might have been "years less" than his actual sentence.

A district court may allow a defendant to withdraw a guilty plea "upon a showing ... of any fair and just reason." Fed. R. Crim. P. 32(d). "Although Rule 32(d) should be construed and applied liberally, there is no absolute right to withdraw a guilty plea." ***United States v. Badger***, 925 F.2d 101, 103 (5th Cir. 1991) (citation omitted). We review the denial of a withdrawal motion only for abuse of discretion. ***Id.***

Among the factors a district court may consider in deciding a withdrawal motion, seven have been iterated by this court:

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[3] Allen pleaded guilty on April 30, 1993, and the district court set sentencing for June 30, 1993. In two *pro se* documents dated May 15 (and filed on May 18 and 19, respectively), Allen stated that he wished to withdraw his plea and indicated that he was dissatisfied with his lawyer. Therefore, Allen's attorneys were allowed to withdraw; a federal public defender represented him. On June 23, 1993, the district court held a hearing to consider Allen's motion to withdraw his plea. Following a second hearing on June 30, it denied the motion. And, at sentencing, the district court denied Allen's motion to reconsider the denial of the motion to withdraw the plea.

> (1) whether the defendant has asserted his innocence; (2) whether withdrawal would prejudice the Government; (3) whether the defendant delayed in filing the motion and, if so, the reason for the delay; (4) whether withdrawal would substantially inconvenience the court; (5) whether adequate 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 104 (citing ***United States v. Carr***, 740 F.2d 339, 343-44 (5th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985)). While this list is useful, it is well to remember that "[n]o single factor or combination of factors mandates a particular result. Instead, the district court should make its determination based on the totality of the circumstances." ***Id.*** (citing ***Carr***). Of course, "[t]he burden of establishing a fair and just reason for withdrawing a guilty plea remains *at all times* on the defendant." ***Id.*** (emphasis added; citation omitted). Finally, we will not consider factors raised for the first time on appeal. *See* ***United States v. Gaitan***, 954 F.2d 1005, 1011-12 (5th Cir. 1992); ***Badger***, 925 F.2d at 104.

1.

Allen's written motion raised only one of the factors: adequate assistance of counsel. It stated that he was advised by his lawyer "that an early plea would most likely result in a sentence of no more than 6 years." According to Allen, the probation officer later informed Allen that his "possible sentence exposure [was] 10 years, not 6." At the June 30 hearing, as in this appeal, this argument has also transmuted into an attack on the knowing and voluntary nature of Allen's original plea.

These contentions lack merit. As Allen concedes in his reply brief, "the district court correctly advised the defendant of the maximum penalty of twenty years" when he entered his guilty plea. When a defendant is correctly informed of the maximum sentence he faces, it cannot be said that his plea was involuntary or unknowing; he understands the consequences of his plea. ***Gaitan***, 954 F.2d 1011-12; *see also* ***United States v. Santa Lucia***, 991 F.2d 179, 180 (5th Cir. 1993). The district court's explanation of this issue merits reiteration:

> ... I asked Mr. Allen many times on the day when he entered his guilty plea, did he understand it, was he doing it voluntarily, did anybody force him to do it, did he understand that any talk about guidelines was only an estimate, that nobody could tell him what the guidelines would be, that I might sentence him above the guidelines, that he faced a maximum sentence of twenty-five years, did he understand that? Yes, he understood all of that. No question in my mind. Mr. Allen is an intelligent man, he has been before me enough for me to make that observation for the record, as well.

In short, the district court informed Allen fully of the consequences of his plea before accepting it. Therefore, he cannot later withdraw that plea as involuntary or unknowing because his lawyer's estimate was incorrect.

Likewise, the district court's Fed. R. Crim. P. 11 colloquy with Allen, which occurred prior to its accepting Allen's plea, undercuts the ineffective assistance of counsel claim. As the district court stated in discussing the motion to withdraw:

> The only possible error on the part of counsel in this case was with respect to the application of guidelines. He was told at the hearing that anything the lawyers told him about guidelines were

> estimates only, he was told that there was no way to predict what [the] guidelines would be. All of that was explained to him and he said he understood all of that. That was all advised him. I am not going to let him withdraw the plea on the basis that his lawyers may have made a mistake in explaining guidelines to him, when I told him that whatever the lawyers were telling him might well be wrong.

The district court's reasoning is sound; it did not abuse its discretion in ruling that the plea was not involuntary, unknowing, or solely the result of ineffective assistance of counsel.

2.

Out of an abundance of caution, we will examine Allen's assertions of innocence. While this factor was not in the written, *pro se* motions to withdraw, Allen did offer to make a declaration of innocence at the June 30 hearing. He now contends that he has "steadfastly asserted his innocence to the charges, the single exception being his guilty plea." Assuming, without deciding, that we may consider Allen's claim of innocence as a factor the district court should have considered, we find that it does not counsel withdrawal of his plea.

Allen's accuracy may be called into doubt; in addition to assertions of guilt surrounding his guilty plea,[4] he moved at

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[4] In addition to actually entering the guilty plea, the following exchanges took place between the district court and Allen at an April 30 hearing:

> THE COURT: I will ask you, first, do you understand those are the two counts you are pleading guilty to?
>
> DEFENDANT ALLEN: Yes, sir.
>
> THE COURT: Are you pleading guilty because

sentencing for a reduction of his sentence for acceptance of responsibility. Later, he stated: "I would like to express the utmost of apology to the court for the role I played in this matter. So, yes, I am truly sorry."

The assertions of innocence also must be viewed critically in light of the following exchange at the June 23 hearing:

> THE COURT: ... I asked you whether you were having any trouble understanding what was going on. You said no. I described to you in detail what was involved. I asked you whether you had read the factual basis that the government supplied to me. You said that you had. I asked you whether you understood it. You said that you had. And now you just changed your mind?
>
> [DEFENDANT] ALLEN: I didn't understand the fact that I was looking at ten years or seventeen years.

As this exchange underscores, Allen is not an innocent man coerced into a guilty plea.

> you did on or about March 16 possess quantities of cocaine, crack, and a quantity of marijuana, each with intent to distribute them?
>
> DEFENDANT ALLEN: Yes, sir.
>
> ....
>
> THE COURT: Do you understand what you are charged with? I have summarized what you are charged with. Are you pleading because you did, in fact, commit the crimes charged in the indictment? Did you, in fact, commit these crimes you are pleading to?
>
> ....
>
> DEFENDANT ALLEN: Yes, sir.

Finding too much in the record that contradicts his assertion of innocence, we conclude that this assertion does not suggest that the district court abused its discretion.[5]

B.

Bell contends that the district court erred in finding that, for sentencing purposes, the amount of cocaine for which she was responsible was five kilograms.[6] At sentencing, Bell stated about the PSR:

> I don't agree with the report completely because it is stated that I was trying to purchase five kilos, and the money that was provided was only enough for one. So, I wasn't satisfied with that.

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[5] Allen did not suggest to the district court that his motion was timely made. As the district court did not have the opportunity to address that contention, we will not do so. We do, however, note that Allen's bare assertion to this court that "[c]ertainly, his motion to withdraw was timely made", is not so certain. Allen offers no explanation for the 18 days that elapsed from his plea to the filing of his motion to withdraw, and this court has previously held that a motion to withdraw filed 22 days after a guilty plea "was not promptly filed." ***Carr***, 740 F.2d at 345; *see also* ***id.*** ("The rationale for allowing a defendant to withdraw a guilty plea is to permit him to undo a plea that was unknowingly made at the time it was entered. The purpose is not to allow a defendant to make a tactical decision to enter a plea, wait several weeks, and then obtain a withdrawal if he believes he made a bad choice in pleading guilty.") (citation omitted).

Allen also asserts, as he did in his motion to reconsider, that he would not have pleaded guilty if he thought that Bell would withdraw her plea, because then she would not be obliged to testify against him. (Bell did attempt to withdraw her guilty plea; however, the district court denied her motion.) In light of the district court's refusal to allow Bell to withdraw, Allen's contention is moot. Furthermore, the decision of a co-defendant to attempt to withdraw from a guilty plea is not one of the factors that this circuit has recognized as being relevant to a defendant's similar motion.

[6] Of course, we review a district court's factual findings with regard to drug quantity only for clear error. ***United States v. Brown***, 985 F.2d 766, 769 (5th Cir. 1993).

The district court did not reject the PSR's factual finding regarding the amount. Its refusal to do so was not clear error.

Bell concedes that she negotiated to purchase five kilograms, as the PSR and the factual resume accompanying her plea both stated. Accordingly, five kilograms was the appropriate amount to use for sentencing. *See* U.S.S.G. § 2D1.1, comment. (n. 12) ("In an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount."). Given Bell's admission that she intended to purchase five kilograms of cocaine, her contention that she lacked the financial wherewithal to consummate the deal is irrelevant. *See* ***Brown***, 985 F.2d at 768-69 (applying former U.S.S.G. § 2D1.4 comment. (n.1), now § 2D1.1 comment. (n.12)).[7]

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[7] U.S.S.G. § 2D1.1 comment. (n.12) provides:

> In an offense involving negotiations to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. However, where the court finds that the defendant did not intend to produce *and* was not reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant did not intent to produce *and* was not reasonably capable of producing.

(Emphasis added). In light of the application note's requirement that a defendant lack intent *and* capability to produce (or, in a case such as this, to purchase) before reducing the amount for guidelines purposes, a defendant's admission of intent regarding a specified amount forecloses that defendant from challenging the use of the amount under negotiation. *See* ***Brown***, 985 F.2d at 768-69, where this court stated:

> The defendants rely on the fact that they did

Moreover, it is highly doubtful that Bell's oral objection was adequate to raise the issue: "If information is presented to the sentencing judge with which the defendant would take issue, the defendant bears the burden of demonstrating that the information cannot be relied upon because it is materially untrue, inaccurate, or unreliable." ***United States v. Angulo***, 927 F.2d 202, 205 (5th Cir. 1991) (citations omitted). The objection made, namely, that "the money that was provided was only enough for one" kilogram of cocaine, does not seem, by itself, to meet that burden; it was a statement of tangential relevance made by Bell during a longer statement in which she was attempting to place blame on other individuals involved in the transaction. *See also* ***United States v. Hurtado***, 846 F.2d 995, 998 (5th Cir.) ("Rule 32(c)(3)(D) does not obligate a district court to make a finding or determination unless the defendant asserts `with specificity and clarity each factual

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> not have sufficient capital to consummate the transaction. ... As a result, they argue that because they possessed only $5,000 at the time of the deal that they were incapable of possessing 750 pounds of marijuana.
>
> Applying the facts of the case, it seems clear that the defendants were involved in repeated negotiations aimed at securing possession of a large quantity of marijuana. During the course of the negotiations they were told that they would receive 750 pounds. The defendants were not perplexed, swayed, or hindered by this knowledge. ... *Surely, they intended to possess the marijuana* -- if only they could get their hands on it.

(Emphasis added). Thus, this court rejected a challenge relating to the capability to purchase by relying on the intent to purchase.

mistake' of which he complains") (citation omitted), *cert. denied*, 488 U.S. 863 (1988).

III.

For the foregoing reasons, the convictions and sentences are **AFFIRMED.**