

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5222
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RICKEY O'NEAL TONEY
a/k/a Rickey Bell
a/k/a Toney Bell,

Defendant-Appellant.

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Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 1:92-CR-10014

- - - - -
(March 22, 1994)

Before KING, DAVIS, and DeMOSS, Circuit Judges.

PER CURIAM:*

Rickey O'Neal Toney, a/k/a Ricky Bell, a/k/a Toney Bell, pleaded guilty and was sentenced to 27 months' imprisonment and two years' supervised release. Toney argues that Fed. R. Crim. P. 11 was violated, rendering his guilty plea unknowing and involuntary, because he was not informed of the mandatory minimum sentence. Toney also argues that his attorney told him that he would receive a sentence of less than 27 months.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

When a defendant claims that a district court has violated Rule 11, this Court conducts a two-part analysis: 1) Did the sentencing court vary from the procedures required by Rule 11; and 2) if so, did the variance affect the substantial rights of the defendant, i.e., was it harmless error? United States v. Johnson, 1 F.3d 296, 298 (5th Cir. 1993).

Rule 11(c)(1) requires a district court to inform the defendant of the mandatory minimum penalty provided by law. There is no statutory mandatory minimum penalty for his offense. See 18 U.S.C. § 2313. Toney's argument would require the district court to inform him of the likely sentence he would receive under the guidelines. The guidelines do not change the substantive penalties provided by law. "The district court is not required to calculate or explain the applicable guideline sentence before accepting a guilty plea." United States v. Jones, 905 F.2d 867, 868 (5th Cir. 1990). The district court did not violate Rule 11 by not explaining to Toney the minimum sentence that he was likely to receive under the guidelines.

As for Toney's allegation that his attorney had told him that he would receive a sentence of less than 27 months, "reliance on the erroneous advice of counsel relative to the sentence likely to be imposed does not render a guilty plea unknowing or involuntary." United States v. Santa Lucia, 991 F.2d 179, 180 (5th Cir. 1993). The district court advised Toney that he could receive a sentence of up to five years, the statutory maximum. Toney was fully aware of the consequences of his plea.

Lastly, the commentary to § 6B1.2 recommending that the prosecuting attorney reveal sentencing information known to him before the plea to the defendant is a recommendation only and does not "confer upon the defendant any right not otherwise recognized in law." § 6B1.2, comment. Further, Toney does not argue that the prosecutor failed to reveal any information before the plea which would have affected the calculation of his guideline sentence. Section 6B1.2 does not provide any basis for setting aside Toney's guilty plea.

AFFIRMED.