

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 93-5335  
Summary Calendar

---

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JAMES KEITH MULLINS,

Defendant-Appellant.

---

Appeal from the United States District Court  
for the Western District of Louisiana  
(CR 92-50070-01)

---

(April 22, 1994)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:\*

James Mullins appeals his conviction of possession with intent to distribute one pound of marihuana, in violation of 21 U.S.C. § 841(a)(1), challenging the district court's refusal to let him withdraw his guilty plea. Finding no error, we affirm.

---

\* Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Mullins was charged with three counts of possession with intent to distribute marihuana and cocaine. He agreed to plead guilty to count 1 possession with intent to distribute one pound of marihuana, in exchange for the dismissal of counts 2 and 3. At the rearraignment hearing on May 28, 1993, Mullins entered an Alford<sup>1</sup> guilty plea as to count 1. Mullins stated that he was not guilty of count 1 but was pleading guilty to avoid prosecution of count 3, possession with intent to distribute cocaine, which carried a higher penalty, of which he was guilty. The district court accepted his guilty plea to count 1.

Mullins moved to withdraw his plea prior to sentencing, alleging that there was no factual basis to support an Alford plea to count 1. The district court denied his motion. Mullins filed a supplemental motion to withdraw his guilty plea, alleging the same grounds as in the prior motion. The district court denied the supplemental motion.

II.

A district court may permit a defendant to withdraw a guilty plea prior to sentencing upon a showing of "any fair and just reason." FED. R. CRIM. P. 32(d). The defendant bears the burden of establishing a fair and just reason. United States v. Hurtado, 846 F.2d 995, 997 (5th Cir.), cert. denied, 488 U.S. 863 (1988).

---

<sup>1</sup> Under North Carolina v. Alford, 400 U.S. 25, 37-38 & n.10 (1970), a defendant may plead guilty while asserting actual innocence.

The district court considers seven factors when ruling on a rule 32(d) motion: (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; (6) whether the plea was knowing and voluntary; and (7) whether withdrawal would waste judicial resources. United States v. Carr, 740 F.2d 339, 343-44 (5th Cir. 1984), cert. denied, 471 U.S. 1004 (1985). No single factor or combination of factors mandates a particular result. Instead, the district court should make its determination based upon the totality of the circumstances. Id. at 344. This court will reverse a lower court's denial of a motion to withdraw a guilty plea only for abuse of discretion. United States v. Bounds, 943 F.2d 541, 543 (5th Cir. 1991).

Mullins argues that he asserted his innocence and filed his motion to withdraw as soon as he retained new counsel and thus stated a "fair and just reason" for withdrawing his plea. Mullins did not raise these arguments in the district court.

Mullins argues that his Alford plea was improperly accepted because there was no evidence that he was guilty of count 1. "`An individual accused of a crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.'" United States v. Montoya-Camacho,

644 F.2d 480, 487 (5th Cir. Unit A May 1981) (quoting Alford, 400 U.S. at 37). A district court may accept an Alford guilty plea if there is a factual basis for the plea and if the court inquires into the conflict between the plea and the claim of innocence. Alford, 400 U.S. at 38 n.10; see also United States v. Jack, 686 F.2d 226, 230 (5th Cir. 1982).

Evidence about the events of March 30, 1992, the subject of count 1, was introduced at the arraignment hearing. DEA Special Agent Michael Hembree testified that a confidential informant (CI) informed the DEA that Mullins sent the CI to acquire marijuana for him, and the CI did so acquiring one pound, the context reflecting it was for distribution.

Mullins, an attorney, conceded that he was pleading guilty to count 1, of which he did not think he was guilty, to avoid prosecution of count 3, of which he admitted his guilt. The district court accepted Mullins's Alford plea, stating,

Mr. Mullins, since you acknowledge at least that you are guilty of conduct charged in count three and since you are making an informed and I think intelligent choice on your decision to plead guilty to count one since there is evidence which as you indicated the jury might well believe and find you guilty of count one. You know your rights, what the maximum possible punishment is, the plea is without a doubt voluntary, I will accept it and enter a judgment of guilty as a factual basis for the plea.

At the motion-to-withdraw hearing, the district court stated that it believed Mullins was aware of what he was doing when he entered the Alford plea.

Mr. Mullins, is there any doubt in your mind you and I talked about this was an intelligent waiver and that you knew that, you didn't feel guilty of your first count, but you were scared about what would happen with the

mandatorics and so forth on the last count, and you were willing, we did all of that, right?

Mullins acknowledged that was true.

The district court considered the reasons for withdrawal presented by Mullins and the voluntariness of his plea. See Hurtado, 846 F.2d at 995. The district court did not abuse its discretion by denying Mullins's motions to withdraw his guilty plea.

AFFIRMED.