

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8129
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LEONARD V. LONGORIA,

Defendant-Appellant.

No. 93-8163

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN SALAS,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Texas
(SA-92-CR-336-2 & SA-92-CR-336-1)

(December 16, 1993)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

I

A three-count indictment charged Leonard Longoria and John Salas with conspiracy to distribute an unspecified quantity of cocaine and two counts of distributing, respectively, one kilogram and three kilograms of cocaine.¹ The government filed notices of sentence enhancement against each defendant pursuant to 21 U.S.C. § 841(b)(1)(A), alleging that the conspiracy charged in Count I involved over five kilograms of cocaine. Section 841(b)(1)(A) provides for a mandatory minimum ten-year sentence if the offense of conviction involves over five kilograms of cocaine. 21 U.S.C. § 841(b)(1)(A). Longoria and Salas pleaded guilty to Count I, and the Government agreed to dismiss Counts II and III.

The government submitted a factual basis for the guilty plea² that stated that Longoria had told an undercover officer that he and his sources could supply the officer with "large quantities of cocaine" and that Salas had negotiated to sell ten kilograms of

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

¹The court has granted Salas's motion to adopt the points of error raised by Longoria.

²The record provides no evidence that either defendant reviewed the statement of factual basis before signing his plea agreement.

cocaine to the officer. Longoria and Salas agreed to the factual basis except that they disputed the quantities of drugs cited by the government. The district court noted that the defendants disagreed with the government's assessment of the quantity of drugs involved in the conspiracy, and it informed the defendants and the government that the quantity of drugs would be determined at sentencing.

At the arraignment hearing, the district court, the prosecutor, and the defense attorney all misstated the quantity of cocaine that would require the imposition of a mandatory minimum sentence:

THE COURT: Mr. Longoria and Mr. Salas, for your offense, you can get 10 years to life. Is . . . well, okay, we discussed this before. It depends if it's more than . . .

PROSECUTOR: If the Court were to find that, pursuant to the Sentencing Enhancement that has been filed by the Government, that the conspiracy involved a quantity of 10 kilograms or more, there would be a mandatory minimum sentence of 10 years with a possible life sentence. . . .

THE COURT: And if it is less than 10 kilos?

PROSECUTOR: If the Court were to find that there was some quantity less than 10, I guess the lowest possible penalty that could be found would be up to 20 years, a million-dollar fine, 3 years of supervised release, and a \$50 mandatory assessment for the victims of crime. No minimum mandatory sentence.

DEFENSE COUNSEL: I don't think he said it right. He said the lowest would be 20, the highest would be 20.

PROSECUTOR: If, that would be the lowest of the maximum penalty, would be 20 years. However, there would be no mandatory minimum.

DEFENSE COUNSEL: He said it like that. I'll accept that.

THE COURT: Mr. Longoria and Mr. Salas, okay, I'm going to decide later on how much was involved, okay? If I say at least 10 kilos or more, the sentence has got to be 10 years to life. Okay? If I say, "No, it wasn't 10 kilos, it was a little less," then it's, it's up to 20 years. So you could get up to 20 years if it's less than 10 kilos, but if it's as least 10 kilos, then it's 10 years. Ten to life. Now do you understand?

LONGORIA: Yes.

SALAS: Yes.

THE COURT: Okay. If I find it's at least 10 kilos, the fine can be up to 4 million. If I find less than 10 kilos, the fine can be up to 1 million. Do you understand that?

LONGORIA: Yes.

SALAS: Yes.

THE COURT: If I find at least 10 kilos, there's a term of supervised release of 5 years. If I find less than 10 kilos, there's a term of supervised release of up to 3 years.

Longoria and Salas were actually subject to mandatory minimum ten-year sentences if the court determined that the conspiracy involved over five kilograms of cocaine. 21 U.S.C. § 841(b)(1)(A).

At sentencing, the district court found that the conspiracy had involved at least five kilograms of cocaine. The court

sentenced Salas and Longoria to the statutory minimum sentence of 120 months. See 21 U.S.C. § 841(b)(1)(A).

II

Federal Rules Criminal Procedure 11 requires that, before accepting a guilty plea, the district court personally determines whether the guilty plea was coerced and whether the defendant understands the nature of the charges and the consequences of his plea. Fed. R. Crim. P. 11(c).

We review violations of Rule 11 for harmless error. United States v. Johnson, 1 F.3d 296, 301-03 (5th Cir. 1993)(en banc). The district court's failure to comply with Rule 11 requires reversal and vacatur only if the error affects the defendant's "substantial rights." Id. at 298 (quoting Fed. R. Crim. P. 11(h)). The court will find that a substantial right has been violated if "the defendant's knowledge and comprehension of the full and correct information would have been likely to affect his willingness to plead guilty." Id. at 302. An affirmative misstatement by the district court is more likely to be harmful to the defendant than an error of omission. United States v. Whyte, 3 F.3d 129, 131 (5th Cir. 1993).

The quantity of drugs involved in the offense need not be finally determined until sentencing. United States v. Watch, 7 F.3d 422, ___ 1993 WL 452152 at *3 (5th Cir. Nov. 5, 1993). As there is no way to determine the statutory minimum and maximum penalties without knowing the quantities of drugs involved, the

district court must inform the defendant of "all of the possible minimums and maximums of punishment . . . which could possibly be applicable as a result of the appropriate determination of quantities using relevant conduct under the guidelines." United States v. Herndon, 7 F.3d 55, 58 (5th Cir. 1993). "[W]here the minimum mandatory sentence, of which the defendant was not informed, constitutes a substantial portion of the actual sentence . . . there is a significant possibility" that the error affected the defendant's decision to plead guilty. Id.

If the quantities of drugs involved are in dispute, notification of the statutory minimum sentence will inform the defendant of the "gross ranges of drug quantities which the government contends may be involved" and will be relevant to his decision whether to plead guilty or to "have his day in court under a 'not guilty' plea with a chance of getting off entirely." Id.

The district court erred when it informed the defendants that they would face ten-years-to-life sentences only if it found that the conspiracy involved at least ten kilograms and that if the conspiracy involved less than ten kilograms, their sentence range would be up to twenty years with no mandatory minimum sentence, when in fact a finding of only five kilograms mandated the minimum ten-year sentences, which they received. 21 U.S.C. § 841(b)(1)(A).

The convictions and sentences are VACATED and the cases REMANDED to allow the defendants to enter new pleas because it is likely that the affirmative misstatement by the district court

affected their willingness to plead guilty. Johnson, 1 F.3d at 302.

VACATED and REMANDED.