

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-8615
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

RICHARD ALVARADO BARRON,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas

(W-93-CR-52-1)

(August 23, 1994)

Before THORNBERRY, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

THORNBERRY, Circuit Judge:*

Facts and Prior Proceedings

After a reverse sting operation, Richard Alvarado Barron was indicted for possession with intent to distribute cocaine and aiding and abetting the same, in violation of 21 U.S.C. § 841 and 18 U.S.C. § 2. Barron entered a guilty plea to the indictment and

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

was sentenced to 151 months in prison, followed by three years of supervised release. Barron timely appeals to this Court.

Discussion

Barron contends that the district court should not have accepted his guilty plea because the factual basis provided by the Government was insufficient to establish his guilt for possession with intent to distribute cocaine. Specifically, Barron argues that there was no evidence that he ever possessed the cocaine offered for sale by the undercover officer.

Under Fed. R. Crim. P. 11(f), a guilty plea is insufficient in itself to support a conviction.¹ The rule additionally requires the district court to question a defendant or examine the record to satisfy itself that an adequate factual basis for the guilty plea exists. **United States v. Adams**, 961 F.2d 505, 508 (5th Cir. 1992). The record must reveal specific factual allegations supporting each element of the offense. **Id.**

To support a violation of § 841, the Government must prove (1) knowledge, (2) possession, and (3) intent to distribute drugs. **United States v. Garza**, 990 F.2d 171, 174 (5th cir.), **cert. denied**, 114 S.Ct. 332 (1993). Barron does not contest either the knowledge or intent elements of § 841. Rather, he contends that the factual summary provided by the Government did not establish that he possessed the cocaine. The sufficiency of the factual basis for a

¹ **Determining Accuracy of Plea.** Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

guilty plea is reviewed for clear error. **Adams**, 961 F.2d at 509. To determine whether the district court erred in concluding that there was adequate factual basis for the plea, this Court examines the relevant materials in the record. **Id.** at 508-09 & n.3.

The factual summary read into the record at the plea hearing, in relevant part, states the following:

At approximately 3:30 p.m., Barron parked next to Sgt. Coy in Investigator Aguillon's undercover vehicle. Barron was accompanied by Hector Manuel Colon, Jr. Sgt. Coy approached Barron's vehicle and spoke to Barron and Colon. Sgt. Coy advised Barron and Colon that he was only able to obtain one kilo of cocaine and that more cocaine could be obtained at a later date. Sgt. Coy asked if Barron and Colon had brought the necessary money. Sgt. Coy and Barron previously negotiated the selling price of the cocaine at \$18,500. Barron and Colon advised the money was in their possession and accounted for. Colon asked to inspect the cocaine before allowing Sgt. Coy to view the money. Sgt. Coy agreed and showed the cocaine to Colon. As Colon was inspecting the cocaine, Barron advised Sgt. Coy that he wanted to travel to another location to conduct the transaction. Sgt. Coy stated to Colon that he wanted to see the money. Barron and Colon both advised Sgt. Coy that they had the necessary money, but the transaction would take place at another location. During this exchange, Barron also handled the cocaine. Sgt. Coy advised he would discuss the relocation with Investigator Aguillon. Coy walked over to Aguillon's side of the vehicle and electronically advised the arrest unit to take action.

Both Barron and Colon were then arrested.

According to Barron, these facts do not support a finding of either actual or constructive possession of the cocaine. Actual possession is "knowingly having a direct physical control over a thing at a given time." **United States v. Ivy**, 973 F.2d 1184, 1188

(5th Cir. 1992), **cert. denied**, 113 S.Ct. 1826 (1993)(internal quotations and citation omitted). We commonly define constructive possession as "the knowing exercise of, or the knowing power or right to exercise, dominion and control over the proscribed substance." **United States v. Gardea Carrasco**, 830 F.2d 41, 45 (5th Cir. 1987) (internal quotations and citation omitted).

Based on the record before us, we are persuaded that the facts presented are sufficient to establish constructive possession. Knowledge and intent are elements of constructive possession. **United States v. Willis**, 6 F.3d 257, 261-62 (5th Cir. 1993). Clearly Barron had the intent to exercise dominion and control over both the money and the cocaine. Barron arrived at the transaction site in his own registered vehicle. The money for the purchase of the cocaine was in his vehicle. Barron examined the cocaine, and he took the cocaine with the conceded intention to complete the legal condition on possession and ownership. Based on this information, which was available to the district court when it accepted the plea, the facts are sufficient to support the guilty plea as required by Rule 11(f). There is no error.²

Barron next argues that the district court erred by not departing downward, based upon its mistaken belief that it lacked the authority to do so because Barron was classified as a career offender under U.S.S.G. § 4B1.1. Even though Barron acknowledges

² Having concluded that the district court did not commit error in accepting Barron's plea, it is unnecessary to proceed through the harmless error analysis announced in **United States v. Johnson**, 1 F.3d 296 (5th Cir. 1993)(en banc) which is utilized when deficiencies in the Fed. R. Crim P. 11 colloquy are found.

that he made no specific request for departure nor did he object to the probation officer's conclusion that there were no factors warranting a departure, he contends that the district court felt constrained by the career offender provision found in the Sentencing Guidelines. Barron supports this contention by describing the district court's tenor at the sentencing hearing as "reluctantly brief", and suggests that the district court might have at least considered a downward departure because the district court sentenced Barron to the bottom of the guideline range.

There is absolutely no merit in Barron's argument. The sole support relied upon by Barron for his argument is the district court's decision to sentence him at the low end of the guideline range. There is no indication that the district court would have entertained a motion for downward departure, but for, the career offender provision of § 4B1.1. Barron simply has not shown that the district court believed that it did not have the authority to depart, therefore Barron has failed to show any error.

Conclusion

Based on the foregoing, Barron's conviction and sentence are AFFIRMED.