

UNITED STATES COURT OF APPEALS  
for the Fifth Circuit

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No. 93-8901  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

BRUCE KEITH MARSHALL,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Western District of Texas  
(A-93-CR-038)

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(August 10, 1994)

Before DAVIS, JONES and DUHÉ, Circuit Judges.

DAVIS, Circuit Judge:<sup>1</sup>

Bruce Keith Marshall challenges the district court's order refusing to allow him to withdraw his guilty plea. We find no abuse of discretion and affirm.

I.

Marshall pleaded guilty to three counts of bank robbery pursuant to a plea agreement. In exchange for his plea, the

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<sup>1</sup>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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

government dismissed five other bank robbery counts pending against him. As part of the plea agreement, Marshall waived his right to appeal his sentence unless the court departed upwards from the applicable sentencing guideline range.

Four months after entering his guilty plea, Marshall filed a motion to withdraw his plea on grounds that his attorney failed to inform him about the operation of U.S.S.G. § 3D1.2, which governs grouping of multiple counts and which caused Marshall's sentence to be higher than he expected. At this time, Marshall's counsel, assistant Federal Public Defender Abe P. Hernandez, Jr., filed a motion to withdraw as counsel due to Marshall's desire for new counsel.

At Marshall's sentencing hearing, the district court denied both motions. The court sentenced Marshall to a prison term of 125 months on each of the three counts, to run concurrently, imposed a supervised release term of three years, and ordered that Marshall pay \$20,414 in restitution. The sentence was within the applicable guideline range.

Marshall argues that the district court (1) abused its discretion by denying his motion to withdraw his guilty plea; and (2) erred in concluding that Marshall's note to a bank teller<sup>2</sup> was an express threat of death under the guidelines warranting a two-level increase in Marshall's base offense level. The government filed a motion to strike and dismiss Marshall's second issue on the

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<sup>2</sup> Marshall stated in the note: "I have a gun, give me \$10,000, I don't want any police involvement or I will kill you,"

ground that he waived his right to appeal this issue in the plea agreement. The court granted this motion and struck Marshall's challenge to the calculation of his sentence. Therefore, we need only address Marshall's first issue on appeal.

## II.

Marshall argues that the district court abused its discretion in refusing to allow him to withdraw his guilty plea pursuant to Fed. R. Crim. P. 32(d).

Under Rule 32(d), a district court may allow a defendant to withdraw a guilty plea prior to sentencing upon a showing of "any fair and just reason." **United States v. Gaitan**, 954 F.2d 1005, 1011 (5th Cir. 1992) (**quoting** Rule 32(d)). Although Rule 32(d) should be "construed and applied liberally," the defendant possesses no absolute right to withdraw a guilty plea. **United States v. Badger**, 925 F.2d 101, 103 (5th Cir. 1991). The trial court's resolution of a Rule 32(d) motion is reviewed for abuse of discretion. **Gaitan**, 954 F.2d at 1011.

This court considers seven factors in determining whether the trial court's refusal to permit the withdrawal of a guilty plea is appropriate:

- (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.

**Badger**, 925 F.2d at 104. Because "[n]o single factor or combination of factors mandates a particular result," the district court should base its decision on a totality of the circumstances. **Id.** Moreover, the district court is not obligated to make specific findings on each of these factors. "The burden of establishing a fair and just reason for withdrawing a guilty plea remains at all times on the defendant." **Id.** This court will review only those factors made aware to the district court. **See Gaitan**, 954 F.2d at 1011 (addressing only the single **Carr** factor raised by the appellant).

In this case, the district court provided both Marshall and his counsel Hernandez a full opportunity to argue the motion to withdraw. Hernandez indicated that he filed Marshall's motion to withdraw his plea at the request of Marshall and that he did not "have anything to say about the motion."

Marshall's explanation of why he wanted to withdraw his plea focused entirely on his dissatisfaction with Hernandez' failure to explain to him under U.S.S.G. § 3d1.2, he would receive three extra offense levels. Marshall told the court that "[i]f Mr. Hernandez would have told me I was going to get the three levels for pleading guilty to the first three counts, I wouldn't have pleaded guilty to them."

A defendant's subjective expectation about his sentence or "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). "As long as the defendant understood the length of time he might possibly receive he was fully aware of his plea's consequences." **Id.** (internal quotation marks and citation omitted). In this case Marshall was informed by the district court that he faced a maximum term of imprisonment of twenty years on each of the three counts. **See** 18 U.S.C. §§ 2113(a). Marshall does not argue that the district court failed to satisfy any of the requirements of Fed. R. Crim. P. 11 at the rearraignment.

Because the district court did not abuse its discretion in refusing to allow Marshall to withdraw his guilty plea, its judgment is affirmed.

AFFIRMED.