

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20284
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSE JOAQUIN ALICANO
a/k/a Joaquin Jose Alicano,

Defendants-Appellant.

Appeal from United States District Court
for the Southern District of Texas
(CR-H-93-3-1)

(June 2, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

Court-appointed counsel for Jose Joaquin Alicano, a/k/a William Saa, has filed an appeal pursuant to Anders v. California, 386 U.S. 738 (1967), stating that after a thorough examination of the record, there are no legitimate issues to be raised on appeal. She has also filed a motion to withdraw as counsel. For the

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

following reasons, the appeal is dismissed, and the motion of Alicano's lawyer to withdraw as counsel of record is granted.

BACKGROUND

Pursuant to a written plea agreement, Jose Joaquin Alicano, a/k/a William Saa, pleaded guilty to conspiracy to possess with the intent to distribute five kilograms or more of cocaine, and the use of a firearm during and in relation to a drug-trafficking offense. The agreement does not preserve Alicano's right to appeal any of the pre-trial rulings. He received two concurrent 188-month terms of incarceration, a consecutive 60-month term of incarceration, two concurrent five-year terms of supervised release, one concurrent three-year term of supervised release, and a \$150 special assessment. On appeal, Alicano's counsel filed a motion to withdraw under Anders v. California, 386 U.S. 738 (1967). Alicano has not filed a response to his counsel's Anders brief.

DISCUSSION

In Anders v. California, 386 U.S. 738 (1967), the Supreme Court established standards for an appointed attorney who seeks to withdraw from a direct criminal appeal on the ground that there are no non-frivolous issues to be urged. After a "conscientious examination" of the case, the attorney must request permission to withdraw and must submit a "brief referring to anything in the record that might arguably support the appeal." Anders, 386 U.S. at 744. The attorney must isolate "possibly important issues and . . . furnish the court with references to the record and legal authorities to aid it in its appellate function." United States v.

Johnson, 527 F.2d 1328, 1329 (5th Cir. 1976). After the defendant has had the opportunity to raise any additional points, the court fully examines the record and decides whether the case is frivolous. Anders, 386 U.S. at 744.

Alicano's counsel has complied with Anders by filing a brief identifying possible issues for appeal and we have independently reviewed the record. The only two issues worthy of any note are whether Alicano voluntarily pled guilty and whether Alicano is sentence was legally imposed. We deal with each issue in turn.

Issue 1:

When a defendant pleads guilty to a criminal charge, he waives several constitutional rights. The record of the guilty plea hearing therefore must affirmatively reflect that the plea is knowing and voluntary. See Boykin v. Alabama, 395 U.S. 238, 243 (1969). "Rule 11 is intended to ensure that a defendant makes an informed and voluntary plea." United States v. Martirosian, 967 F.2d 1036, 1038-39 (5th Cir. 1992), overruled on other grounds by United States v. Johnson, 1 F.3d 296, 302 (5th Cir. 1993) (en banc). That rule requires that the district court, before accepting a guilty plea, personally determine whether the guilty plea was coerced and whether the defendant understands the nature of the charges and the consequences of his plea. See Johnson, 1 F.3d at 300; Rule 11(h).

Alicano's attorney analyzes the Rule 11 issue in terms of whether its core concerns were met. That analysis is not

dispositive now. In examining whether the district court fulfilled the Rule 11 requirements, this court utilizes a two-question, harmless-error analysis: "(1) Did the sentencing court in fact vary from the procedures required by Rule 11, and (2) if so, did the variance affect substantial rights of the defendant?" See Johnson, 1 F.3d at 298.

At the arraignment, the district court ensured that Alicano was competent to understand the nature of the proceedings. The court informed Alicano of the charges against him and the maximum penalty for those charges. See Rule 11(c)(1) (court must determine that defendant understands the nature of the charge).

Alicano was placed under oath. The court informed Alicano that he would be subject to further prosecution if he told any lies during the proceeding. See also Rule 11(c)(5) (court must inform defendant that his answers, given under oath, may lead to future prosecution for perjury). Alicano indicated that he had consulted with his attorney, that he was not under the influence of drugs or alcohol, that he had no history of mental problems, and that he was pleading guilty voluntarily, without threats or pressure. Rule 11(d).

The court noted the range of possible imprisonment. See Rule 11(c)(1) (court shall determine that defendant understands the maximum possible penalty). The mandatory minimum sentence for Alicano's 21 U.S.C. § 841(b)(1)(A) violations is ten years. See Rule 11(c)(1) (requiring the district court to inform the defendant about any mandatory minimum sentence, if any). The district court

did not specifically inform Alicano that the mandatory minimum sentence was ten years although it did inform him that the statutory range was from ten years to life.

The court informed Alicano that he would be required to pay a \$150 assessment. The district court also mentioned the maximum terms of supervised release and its effect. See Rule 11(c)(1) (noting maximum possible penalties includes the effect of a term of supervised release). The court did not specifically inform Alicano that, under any of the maximum-punishment possibilities, a fine would be possible. See Rule 11(c)(1). Such an oversight is harmless under Johnson. See 1 F.3d at 298.

Alicano informed the court that his counsel had not reviewed the sentencing possibilities with him. Alicano's lawyer stated that she had discussed the guidelines with Alicano. Alicano then stated that he had discussed the guidelines with his lawyer. The court informed Alicano that, although the sentencing guidelines were applicable, no one could say exactly what Alicano's sentence would be until after the preparation of the presentence investigation report (PSR), and that despite the plea agreement, the court could possibly depart from the sentencing guidelines; Alicano was apprised of the possibility of departure. See Rule 11(c)(1).

The district court explained to Alicano his rights if he did not continue with his guilty plea: a right to a jury trial, the Government's burden to prove him guilty, the presumption of

innocence, assistance of counsel at trial, the right to confront witnesses, the right to have witnesses testify on his behalf, the right to testify for himself, and the right to remain silent. The court explained that by pleading guilty, Alicano would give up these rights and that the remaining proceeding, sentencing, would occur September 24, 1993. Alicano answered that he understood this. See Rule 11(c)(3) and (4).

The court sought to ensure the voluntariness of Alicano's plea by asking if he understood the plea agreement and if he had been coerced into the plea. Rule 11(d). The factual basis for the plea was also proffered and agreed to by Alicano. See Rule 11(f) (factual basis for plea).

The record indicates that Alicano's guilty plea complied with the dictates of Rule 11 except for errors regarding possible fine amounts and specific mandatory minimum sentences. See Johnson, 1 F.3d at 302. 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 Rule 11(h)). This court will find that a substantial right had 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. After due consideration, we find that the district court's failure to inform the defendant of minimum sentences and possible fines would not have affected Alicano's willingness to plead guilty. Thus, any error was harmless.

We note that Alicano did not respond to counsel's Anders motion. This valid guilty plea waives Alicano's right to challenge any non-jurisdictional defects in the proceedings leading to his conviction. U.S. v. Smallwood, 920 F.2d 1231, 1240 (5th Cir.), cert. denied, 501 U.S. 1238 (1991). There is no non-frivolous issue concerning Alicano's guilty plea.

Issue 2:

Alicano's attorney also addressed whether the district court complied with Rule 32 and imposed a legal sentence. Alicano's sentence will be vacated only if it was imposed in violation of law, if the guidelines were incorrectly applied, or if the sentence is outside the guidelines and is unreasonable. United States v. Parks, 924 F.2d 68, 71 (5th Cir. 1991).

At the sentencing hearing, the court determined that Alicano and his counsel had been furnished with, and had been given the opportunity to review, the PSR. Rule 32(a)(1)(A). The court gave both Alicano and his counsel an opportunity to speak on Alicano's behalf. Rule 32(a)(1)(B) and (C). Neither the government nor Alicano filed objections to the PSR. Rule 32 was satisfied. See United States v. Mora, 994 F.2d 1129, 1141 (5th Cir.), cert. denied, 114 S. Ct. 417 (1993). The district court imposed a legal sentence. Alicano's sentence falls within the range recommended in the guidelines and is not in violation of the law or based on incorrect application of the guidelines. He does not have a non-frivolous argument with respect to this issue.

CONCLUSION

For the foregoing reasons, this appeal is DISMISSED as frivolous. Alicano's counsel's motion to withdraw as counsel is GRANTED.