

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-50214

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSE MENDOZA GUTIERREZ,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas
(EP-93-CR-206-1)

(June 1, 1995)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:*

Jose Mendoza Gutierrez appeals from the district court's denial of his motion to withdraw his guilty plea. Finding no error, we affirm.

Gutierrez was indicted on fifteen counts of drug offenses, including conspiracy to import marijuana, see 21 U.S.C. § 963 (1988), conspiracy to possess with intent to distribute marijuana, see 21 U.S.C. §§ 841(a)(1), 846 (1988), importation of marijuana,

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

see 21 U.S.C. §§ 952(a), 960(a)(1) (1988), and possession with intent to distribute marijuana, see 21 U.S.C. § 841(a)(1) (1988). The day after Gutierrez' trial had begun and jury selection had occurred, Gutierrez pled guilty to the two conspiracy counts.¹

More than two months after pleading guilty, Gutierrez retained new counsel and moved to withdraw his plea. Gutierrez argued that his plea was not voluntary because government agents had threatened to arrest his family if he did not plead guilty. He stated that he had not told his counsel or the district court of these threats because he feared governmental retaliation against his family. After a hearing, the district court denied Gutierrez' motion. The court sentenced him to 151 months' imprisonment. Gutierrez appeals from the district court's denial of his motion.

Gutierrez argues that the district court should have allowed him to withdraw his guilty plea. We review a district court's denial of a motion to withdraw for abuse of discretion. *United States v. Thomas*, 13 F.3d 151, 153 (5th Cir. 1994) (reviewing for abuse of discretion); *United States v. Watson*, 988 F.2d 544, 550 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 698, 126 L. Ed. 2d 665 (1994); *United States v. Young*, 981 F.2d 180, 183 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2454, 124 L. Ed. 2d 670 (1993). "If a motion to withdraw a plea of guilty . . . is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason."

¹ After Gutierrez pled guilty, the Government moved to dismiss the remaining counts.

Fed. R. Crim. P. 32(e) (formerly Rule 32(d)). Although we construe this rule liberally, a defendant does not have an absolute right to withdraw his plea. *United States v. Young*, 981 F.2d at 183; *United States v. Badger*, 925 F.2d 101, 103 (5th Cir. 1991); *United States v. Hurtado*, 846 F.2d 995, 997 (5th Cir.), *cert. denied*, 488 U.S. 863, 109 S. Ct. 163, 102 L. Ed. 2d 133 (1988). Indeed, the defendant has the burden to prove justification. *Badger*, 925 F.2d at 104; *United States v. Daniel*, 866 F.2d 749, 752 (5th Cir. 1989).

"Trial courts in this circuit are to consider the seven factors enumerated in *United States v. Carr*^[2] in deciding whether the defendant has carried his burden of justifying withdrawal." *Thomas*, 13 F.3d at 152-53. These factors are:

(1) whether or not the defendant has asserted his innocence; (2) whether or not the government would suffer prejudice if the withdrawal motion were granted; (3) whether or not the defendant has delayed in filing his withdrawal motion; (4) whether or not the withdrawal would substantially inconvenience the court; (5) whether or not close assistance of counsel was available; (6) whether or not the original plea was knowing and voluntary; and (7) whether or not the withdrawal would waste judicial resources; and, as applicable, the reason why defenses advanced later were not proffered at the time of the original pleading, or the reasons why a defendant delayed in making his withdrawal motion.

Carr, 740 F.2d at 344; *see also Thomas*, 13 F.3d at 153 n.4 (listing factors); *United States v. Clark*, 931 F.2d 292, 294 (5th Cir. 1991) (applying factors). In reviewing these factors, we consider the totality of the circumstances, and one single factor will not dictate the outcome of the evaluation. *Badger*, 925 F.2d at 104.

² 740 F.2d 339 (5th Cir. 1984), *cert. denied*, 471 U.S. 1004, 105 S. Ct. 1865, 85 L. Ed. 2d 159 (1985).

Gutierrez argues that he asserted his innocence by "grinding towards trial, selecting a jury, and preparing himself for a trial on the merits" and by stating in his withdrawal affidavit that he felt he was not guilty. An assertion of innocence alone, however, does not warrant withdrawal of a guilty plea. *Clark*, 931 F.2d at 295; *Hurtado*, 846 F.2d at 997.

Gutierrez contends that he acknowledged his guilt at his plea hearing under coercion, and that his plea was thus not voluntary. The record of the plea hearing, however, contradicts Gutierrez' contentions. The district judge thoroughly discussed with Gutierrez the facts to which he pled and the consequences of a guilty plea. Gutierrez then stated that no one had coerced him into pleading guilty, and that he was not pleading guilty to help his family. However, "[t]he defendant's declaration in open court that his plea is not the product of threats or coercion carries a strong presumption of veracity." *Clark*, 931 F.2d at 295 (quoting *United States v. Darling*, 766 F.2d 1095 (7th Cir.), cert. denied, 474 U.S. 1024, 106 S. Ct. 579, 88 L. Ed. 2d 561 (1985)). Gutierrez cannot now rescind his sworn testimony without more support than his own affidavit, especially given that the agent whom Gutierrez accused of coercion testified that he had not threatened Gutierrez or any member of his family. See *Young*, 981 F.2d at 184 (affirming denial of motion where defendant's statements conflicted defendant's sworn testimony at plea hearing); *United States v. Fuller*, 769 F.2d 1095, 1099 (5th Cir. 1985) (noting, with respect to a request for evidentiary hearing, that defendant could not

refute sworn testimony at plea hearing without "specific factual allegations supported by the affidavit of a reliable third person"). Consequently, we accept the district court's finding that Gutierrez' plea was knowing and voluntary.

Gutierrez further contends that the district court should have excused his delay in filing his motion to withdraw his plea. "[T]he longer a defendant delays in filing a withdrawal motion, the more substantial reasons he must proffer in support of his motion." *Carr*, 740 F.2d at 344. When the defendant has delayed in moving to withdraw his plea, he must similarly provide substantial reasons to excuse the delay. See *Clark*, 931 F.2d at 295 (requiring substantial reasons for lengthy delay). As his substantial reason, Gutierrez cites his "revolving door of attorneys." The record again contradicts his contention. Although Gutierrez had several attorneys throughout the proceedings, the attorney who represented him at his plea hearing had been his attorney for the preceding two months. The record also reflects that the attorney capably represented Gutierrez.³ Accordingly, Gutierrez has not shown a plausible excuse for his two-month-plus delay. See *Thomas*, 13 F.3d at 153 (finding that six-week delay weighed significantly against defendant); *United States v. Rinard*, 956 F.2d 85, 88-89 (5th Cir. 1992) (finding 69-day delay between guilty plea and motion to

³ The attorney stated that he had discussed the consequences of a guilty plea with Gutierrez and also was prepared to go to trial. Moreover, Gutierrez stated at his plea hearing that he was satisfied with his counsel's performance. We therefore agree with the district court's statement that Gutierrez' attorney was more than "a potted plant," and provided the "close assistance of counsel" that *Carr* requires. See *Thomas*, 13 F.3d at 153 (finding defendant's statement at guilty plea of satisfaction with counsel's representation persuasive on issue of whether representation was effective).

withdraw plea excessive); *Carr*, 740 F.2d at 345 (finding 22-day delay excessive).⁴

In short, we agree with the district court's assessment that Gutierrez has merely changed his mind about the wisdom of his guilty plea. Indeed, the record indicates that Gutierrez did not move to withdraw his guilty plea until after completion of the presentence report, which indicated that a severe sentence was probable. Changing one's mind, however, does not justify withdrawal of a guilty plea. *United States v. Hoskins*, 910 F.2d 309, 311 (5th Cir. 1990); *Daniel*, 866 F.2d at 752; see also *Carr*, 740 F.2d at 345 ("The purpose is not to allow a defendant to make a tactical decision to enter a plea, wait several weeks, and then obtain a withdrawal if he believes that he made a bad choice in pleading guilty.").

Given that none of the *Carr* factors favor granting Gutierrez' motion to withdraw his guilty plea, the district court did not abuse its discretion in denying the motion. We therefore AFFIRM the decision of the district court.

⁴ With respect to the remaining *Carr* factors, the district court found that permitting withdrawal of the guilty plea would prejudice the Government, inconvenience the court, and waste judicial resources. The district court listed its reasons, and we see no abuse of discretion in its findings. See *Clark*, 931 F.2d at 295 (deferring to district court's finding that government would suffer prejudice).