

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60688
Summary Calendar

United States of America,

Plaintiff-Appellee,

versus

Derrick Lesure,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Mississippi
(3:93-CR-086-D)

(July 26, 1995)

Before JOHNSON, WIENER and STEWART, Circuit Judges.*

JOHNSON, Circuit Judge:

Derrick Lesure, convicted on his plea of guilty to distribution of cocaine base, appeals his conviction claiming that the district court erred in denying his presentence motion to withdraw his guilty plea. Finding no error, we AFFIRM.

I. FACTS AND PROCEDURAL HISTORY

A Mississippi grand jury, on June 9, 1993, returned an indictment against Derrick Lesure charging Lesure with two counts of knowingly and intentionally distributing a mixture 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

substance containing a detectable amount of cocaine base. On August 6, 1994, shortly before the scheduled trial, Lesure entered into a written plea agreement with the government. By this agreement, Lesure pled guilty to count one of the indictment in exchange for the government agreeing to dismiss count two and agreeing not to charge Lesure with any other offenses directly related to the conduct charged in the indictment.

The district court conducted a hearing pursuant to Fed. R. Crim. P. 11(e) on August 9, 1993. At this hearing, the district court questioned Lesure as to the voluntariness of his plea. Although Lesure's answers to these questions were unsophisticated, they were appropriate. Lesure testified that he was not then under the influence of any alcohol or drugs. He testified that he understood his right to a trial by a jury and that the government would have the burden of proof. He testified that he had discussed with counsel the charges against him and any possible defenses to the charges. He testified that he was satisfied with the efforts of his counsel and that no one had forced him to plead guilty or threatened him. He testified that he agreed with the substance of the plea agreement and he agreed with the factual basis for the plea as presented by government at the hearing. Lastly, he testified that he was guilty in fact.

In addition to Lesure's testimony, both Lesure's counsel and counsel for the government stated that they had no doubt but that Lesure was competent to enter a plea. Based on this information, the district court accepted Lesure's plea finding that it was

knowingly and voluntarily made.

Three months later, and after the issuance of the presentence report (PSR), Lesure filed a motion to withdraw his guilty plea. In addition, Lesure's appointed counsel filed a motion to withdraw on the ground that he no longer enjoyed the confidence of the defendant. The district court granted the attorney's motion to withdraw and appointed new counsel.

On May 5, 1994, the district court held a hearing on Lesure's motion to withdraw his guilty plea. The basis for the motion was that Lesure's plea was not knowing and voluntary in that he was unable to understand the proceedings against him. The district court denied the motion, though. It found that Lesure only elected to pursue the withdrawal of his plea after reviewing the PSR.¹

However, in light of the confused testimony of Lesure at the hearing, and because of some incomprehensible letters Lesure had sent to the court, the district court ordered a psychiatric evaluation of Lesure for the purposes of sentencing. The report of this evaluation found no evidence that Lesure suffered from any mental illness. It did reveal, though, that Lesure had below-average intellectual and reasoning abilities, indicating that he was capable of understanding most simple issues, but that he might experience difficulty understanding more complex issues.

On September 30, 1994, the district court sentenced Lesure

¹ Lesure objected to the fact that the PSR included as relevant conduct for sentencing the facts that constituted count two of the indictment.

to a thirty-month term of imprisonment, a five-year term of supervised release, a \$500 fine, and a \$50 special assessment. Lesure now appeals.

II. DISCUSSION

Lesure argues on appeal that he was incompetent to enter a plea and that he did not enter his plea knowingly and voluntarily. Thus, he contends that the district court erred in denying his motion to withdraw his plea.

Where a defendant moves to withdraw a guilty plea before sentencing, "the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason." Fed. R. Crim. P. 32(e). The defendant bears the burden of establishing a fair and just reason, *United States v. Hurtado*, 846 F.2d 995, 997 (5th Cir.), *cert. denied*, 109 S.Ct. 163 (1988), and this Court will reverse the district court's denial of a motion to withdraw a guilty plea only for an abuse of discretion. *United States v. Bounds*, 943 F.2d 541, 543 (5th Cir. 1991), *cert. denied*, 114 S.Ct. 135 (1993). Moreover, this Court must give credence to the credibility choices and findings of fact of the district court unless they are clearly erroneous. *United States v. Bass*, 10 F.3d 256, 258 (5th Cir. 1993).

This Court has enumerated seven factors for district courts to consider when ruling on a motion to withdraw a guilty plea: 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. *United States v. Carr*, 740 F.2d 339, 343-44 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 1865 (1985); *United States v. Badger*, 925 F.2d 101, 104 (5th Cir. 1991). No single factor or combination of factors mandates a particular result. Instead, the district court must make its determination based on the totality of the circumstances. *Carr*, 740 F.2d at 344.

In this case, we cannot, after applying the *Carr* factors, conclude that the district court abused its discretion. First, we note that Lesure has not asserted his innocence. He testified to his guilt at the Rule 11 hearing and he does not really claim to the contrary on appeal.² Next, Lesure waited three months before he attempted to withdraw his plea.³ This is a significant delay and we do not find Lesure's explanations delay availing. See *United States v. Thomas*, 13 F.3d 151, 153 (5th Cir. 1994) (finding a six-week delay significant). Instead, we conclude that the district court's conclusion with regard to this delay is

² At best, Lesure has argued that he never intended to plead guilty and he expressed his desire to remain silent as to his guilt and "take the Fifth."

³ The longer a defendant delays filing a motion for withdrawal, the more substantial reasons he must proffer in support of his motion. *Carr*, 740 F.2d at 344. Conversely, a prompt withdrawal may indicate that a plea was unknowingly entered in haste. *United States v. Benavides*, 793 F.2d 612 , 618 (5th Cir.), *cert. denied*, 107 S.Ct. 232 (1986).

more likely--that Lesure sought to withdraw his plea only after he saw the consequences of his plea as outlined in the PSR. Such a change of heart after reweighing the consequences of a plea is not sufficient to permit the withdrawal of a plea. *United States v. Hoskins*, 910 F.2d 309, 311 (5th Cir. 1990). Additionally, Lesure had the benefit of close assistance of counsel and, though he disputes it now, he testified at the Rule 11 hearing that his attorney's representation was satisfactory. We find all of these *Carr* factors to weigh against Lesure.

The factor that Lesure most challenges, however, is whether his plea was "knowing and voluntary." To support this, Lesure points to numerous instances of confused and rambling testimony by Lesure and to the psychiatric report stating that he would have difficulty understanding complex ideas. According to Lesure, this evidence shows that he did not have sufficient understanding to make his plea knowing and voluntary.

However, it is difficult for Lesure to draw support from the psychiatric report because while it does state that Lesure would have difficulty understanding complex issues, no evidence of mental defect was found and Lesure was found competent to understand most simple issues. Moreover, we note that the vast majority of the confusing statements proffered by the defense came from the hearing on the motion to withdraw the plea. By contrast, Lesure's testimony from the Rule 11 hearing made much more sense. At the Rule 11 hearing, Lesure adequately testified that he understood his rights to a trial by jury and that the

government bore the burden of proof. He further testified that he understood the nature of the plea and attested that he was entering it voluntarily. Finally, he admitted to the factual basis for the plea as outlined by the government and testified that he was guilty. Based on that testimony, the district court found that Lesure's plea was knowing and voluntary and we cannot say that this conclusion was clearly erroneous. Thus, this factor does not weigh in Lesure's favor either.

As Lesure has not asserted his innocence, as he waited three months before seeking to withdraw his plea, as he had the assistance of counsel at all times and as his plea was knowing and voluntary, we conclude that, under the totality of the circumstances, the district court did not abuse its discretion in denying Lesure's motion to withdraw his plea.⁴ Thus, Lesure's claim must fail.

III. CONCLUSION

For the reasons stated above, the judgment of the district court is AFFIRMED.

⁴ It is true that the government has not shown that it would be prejudiced by allowing withdrawal of the plea. However, this lack is not sufficient to require withdrawal of the plea where no credible reason is offered. *Benavides*, 793 F.2d at 617, *United States v. Rasmussen*, 642 F.2d 165, 168 n.6 (5th Cir. 1981). Lesure has offered no credible reason here.