

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7211
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DAVID E. HULL,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Northern District of Mississippi
USDC No. CR 92-112-S-001
- - - - -
(January 6, 1994)

Before GARWOOD, JOLLY, and BARKSDALE, Circuit Judges.

PER CURIAM:*

David E. Hull pleaded guilty to a two-count indictment and was sentenced to consecutive 60-month terms of imprisonment on each count, five years supervised release on count one, and a \$2,000 fine.

When a defendant argues that the district court has failed to comply with Fed. R. Crim. P. 11, this Court conducts a two-part harmless-error analysis: "(1) Did the sentencing court in fact vary from the procedures required by Rule 11, and (2) if so,

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

did such variance affect substantial rights of the defendant?" United States v. Johnson, 1 F.3d 296, 298 (5th Cir. 1993) (en banc).

The district court informed Hull that he was subject to a sentence of not less than five years nor more than 40 years imprisonment on count one, and a mandatory consecutive five-year sentence on count two, and Hull indicated that he understood the potential sentence. Following this explanation the transcript shows that the court stated "[t]hat means it will not run consecutive with or at the same time as the crack cocaine [count one] sentence. It's important you understand it, young man. Do you?" Apparently the district court inadvertently said or the court reporter inadvertently recorded "consecutive" rather than "concurrent," but neither Hull nor his attorney indicated that there was any confusion about the potential punishment. Hull has not shown that the district court varied from the requirements of Rule 11.

For the first time on appeal Hull argues that he was denied effective assistance of counsel because it is per se ineffective assistance to recommend that a defendant plead guilty if the defendant can obtain no benefit from pleading guilty. To prevail on this claim Hull must demonstrate that his attorney's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 74 (1984). Hull's particular allegations can never rise to the level of ineffective assistance of counsel.

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AFFIRMED.