

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10120

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DEREK GLEN ADKINS,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:93-CR-231-D-01)

(December 28, 1994)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:*

Derek Glen Adkins, pursuant to a plea bargain, pleaded guilty to possession of cocaine with the intent to distribute and to aiding and abetting that crime in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B)(ii). The district court accepted the plea and set the case for sentencing. Subsequently, Adkins was sentenced to 262 months imprisonment and to five years supervised

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

release, and ordered to pay a mandatory special assessment of fifty dollars. Alleging that his guilty plea was involuntary and unintelligent and that his plea was entered in violation of Federal Rules of Criminal Procedure 11 and 32, Adkins appeals. We affirm.

I. BACKGROUND

In June of 1993, Adkins and a codefendant were charged in a three-count indictment. Adkins was named in two of the counts. First, Adkins was charged with possession of cocaine with the intent to distribute and for aiding and abetting that crime in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B)(ii). Second, the indictment alleged Adkins used the telephone to commit a felony in violation of the Controlled Substance Act, 21 U.S.C. § 843(b).

Eventually, Adkins signed a written plea agreement in which he pleaded guilty to the possession with intent to distribute and aiding and abetting charges. The agreement further stated that the minimum and maximum penalties that the court could impose included "imprisonment for a period of not less than 5 nor more than 40 years; if ADKINS has one prior felony drug conviction, then punishment is increased to a period of not less than 10 years up to life imprisonment." The agreement also provided that Adkins: (1) could be fined in amounts up to two million dollars and up to four million dollars if he had a prior felony drug conviction; (2) would be subject to a period between four and eight years of supervised release following his imprisonment;

and (3) would be required to pay a fifty dollar special assessment.

Additionally, the plea agreement stated that:

The sentence in this case will be imposed by the court. There is no agreement as to what that sentence will be. Sentencing is pursuant to the Sentencing Reform Act of 1984, making the sentencing guidelines applicable. Adkins has reviewed the application of the guidelines with his attorney, but understands that no one can predict with certainty what guideline range will be applicable in the case until after a presentence investigation has been completed and the Court has ruled on the results of that investigation. Adkins will not be allowed to withdraw his plea if the applicable guideline range is higher than expected, or if the Court departs from the applicable guideline range.

Finally, the agreement noted that Adkins understood that the agreement did not "create any right to be sentenced within, or below any particular punishment range, and . . . that the determination of the sentencing range or guideline level, as well as the actual sentence imposed, is solely in the discretion of the Court."

On October 29, 1993, the district court held a hearing regarding the plea. During that hearing, the district court judge noted that "in light of the plea agreement I would expect that you're not seeking enhancement. I'm going to assume not then and the warnings will be based upon an unenhanced offense in accordance with the plea agreement." Later in the proceeding the district court judge reiterated that he was proceeding under the assumption that there was no prior conviction.¹ The judge also

¹ Specifically, the district court judge commented:

reemphasized that by pleading guilty Adkins subjected himself to a sentence between five and forty years.

The district court judge also discussed the potential impact of the sentencing guidelines on the sentence. Specifically, the judge made sure that Adkins understood that "criminal history is an important factor in applying the sentencing guidelines." Further, the judge stressed that no one could determine Adkins's sentence until after "a probation officer has prepared a written presentence report." After discussing these issues with Adkins and his attorney, the district court judge accepted Adkins's guilty plea.

A presentence report ("PSR") was prepared, and because Adkins fell within the career criminal provisions of the sentencing guidelines, Adkins's offense level was calculated as

The court is proceeding on the assumption that there is no prior conviction. In particular as the court understands the law, in order for the government to rely on enhancement it must file an information with the court alleging that prior conviction and no such information has been filed, as far as the court knows.

thirty-four.² This offense level translated into a period of incarceration between 262 and 327 months.

Sentencing took place in January of 1994. At the sentencing hearing, Adkins's counsel argued that the court should not apply the career criminal provisions or should depart downward from the guidelines. More precisely, Adkins's counsel indicated that when he and the Assistant U.S. Attorney previously had discussed the likely offense level, both believed that it would be computed at level twenty-six and reduced to level twenty-four for acceptance of responsibility. Consequently, Adkins's counsel had advised his client that the sentence would be "somewhere between four and a half to ten and a half years." Adkins's counsel also reminded the court that at the plea hearing the government had represented that there were no enhancements in this case. Finally, Adkins's counsel stated that the discovery information provided by the government indicated that Adkins had two convictions for drug possession offenses, not the convictions for possession with intent to distribute indicated on the PSR.

² The Sentencing Guidelines state, in part:

A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.1.

The district court judge rejected Adkins's requests. The judge noted that when he used the term "enhancement" at the plea hearing he was inquiring "whether there [was] a statutory minimum enhancement." The court also stated that the inquiry is made because "the court is obligated to advise a defendant of the statutory minimum and maximums; and if the government is seeking enhancement . . . then the court must advise the defendant of [the] increased statutory minimum that applies to incarceration and perhaps to other aspects of the sentence." Moreover, the court commented that its obligation "in dealing with the career offender guidelines is to advise the defendant concerning the statutory sentence, not the possibility of career offender application of the guidelines."

The district court judge sentenced Adkins to 262 months imprisonment, five years of supervised release, and a mandatory special assessment of fifty dollars. Adkins brought this appeal, alleging that because neither he nor the government was aware of the range of punishment when the plea was entered, the plea was not entered into knowingly or intelligently, thus violating Federal Rules of Criminal Procedure 11 and 32.

II. STANDARD OF REVIEW

In examining the application of Rule 11, we review for harmless error. United States v. Johnson, 1 F.3d 296, 302 (5th Cir. 1993) (en banc). If there is in fact an error in the application of Rule 11, "to determine whether an error is

harmless (i.e., whether the error effects substantial rights), we focus on whether the defendant's knowledge and comprehension of the full and correct information would have been likely to affect his willingness to plead guilty." Id.

When we review whether the application of the sentencing guidelines was legally correct, "this court makes its determination de novo." United States v. Smallwood, 920 F.2d 1231, 1236 (5th Cir.), cert. denied, 501 U.S. 1238 (1991); accord United States v. McCaskey, 9 F.3d 368, 372 (5th Cir. 1993), cert. denied, 114 S. Ct. 1565 (1994). On the other hand, when we look at a sentencing court's factual findings, we apply the clearly erroneous standard of review. McCaskey, 9 F.3d at 372; accord Smallwood, 920 F.2d at 1236.

III. DISCUSSION

Adkins asserts that his guilty plea was not entered into knowingly and voluntarily. More specifically, Adkins argues that because "neither he nor the government were aware of the range of the punishment applicable in this case[,] [t]he appellant's plea was entered into in violation of Fed. R. Crim. Proc. 11 and 32." Because of this alleged error, Adkins asks this court to vacate his sentence and remand him for trial. We decline this invitation.

We have noted that "[f]or a plea to be knowing and voluntary, `the defendant must understand the consequences of the [guilty] plea.'" United States v. Gaitan, 954 F.2d 1005, 1011

(5th Cir. 1992) (quoting United States v. Pearson, 910 F.2d 221, 223 (5th Cir. 1990), cert. denied, 111 S. Ct. 977 (1991)); accord Young, 981 F.2d at 187. Understanding the "consequences" of a guilty plea "mean[s] only that the defendant know must know the maximum prison term and fine for the offense charged. As long as the [defendant] understood the length of time he might possibly receive, he was fully aware of his plea's consequences." Pearson, 910 F.2d at 223 (internal quotation and citation omitted); accord Young, 981 F.2d at 184; Gaitan, 954 F.2d at 1011.

The career criminal provisions of the Sentencing Guidelines do not increase the statutory maximum penalty. Instead they "merely adjust[] the applicable guideline range within the same statutory maximum." Pearson, 910 F.2d at 223. The fact that a defendant does not know that the career criminal provisions of Sentencing Guidelines may increase his sentence within that statutory range does not render his plea involuntary or unknowing. See Gaitan, 954 F.2d at 1011-12 (rejecting an argument that a plea was not knowing and voluntary because the defendant was unaware of the possible application of the career offender enhancement); Pearson 910 F.2d at 223 (same). As we noted in Pearson, for a plea to be knowing and voluntary, there is no requirement that a defendant have "notice, advice, or a probable prediction of where, within the statutory range, the guideline sentence will fall." Pearson, 910 F.2d at 223.

In the instant case, it is clear that Adkins was fully aware of the potential maximum length he could be imprisoned. The plea agreement explicitly stated that a sentence of up to forty years was possible, and the district court reiterated this maximum sentence during the plea hearing. Adkins was sentenced to twenty-one years and ten months, less than the forty year maximum period of incarceration of which he was advised. Adkins was well aware of maximum applicable sentence, and accordingly, we find that his plea was not involuntary or unknowing merely because he was unaware of the possible application of the career offender enhancement. See Gaitan, 954 F.2d at 1011; Pearson, 910 F.2d at 223.

Adkins relies on United States v. Watley, 987 F.2d 841 (D.C. Cir. 1993), to support his contention that his plea was involuntary. In that case, the District of Columbia Circuit held that the defendant had "fair and just reason, within the compass of Rule 32(d) to withdraw his plea" because the defendant, his counsel, the prosecutor, and the judge misunderstood the sentence that would result from a guilty plea. Id. at 847. Because the defendant was given "incorrect information, at and prior to the plea hearing, regarding the sentence he could possibly receive," the court vacated his guilty plea. Id.

Watley, however, offers Adkins no respite. In that case, the court expressly noted that "[t]his is not a case in which absence of information, or incorrect information, about a defendant's criminal record limited the ability of counsel and

court to project the sentence." Id. at 847 n.7. The instant case, however, is just such a case. Adkins's case is similar to United States v. Horne, 987 F.2d 833 (D.C. Cir. 1993), which the court in Watley contrasted. See Watley, 987 F.2d at 847 nn. 7, 10. In Watley, the court distinguished Horne because, inter alia, "the district court judge expressly told the defendant, before accepting his plea, that 'he should not rely upon any [sentencing] estimate made by his counsel or anyone else.'" Id. at 847 n.10 (quoting Horne, 987 F.2d at 836). In the instant case, the district court informed Adkins that his criminal record would be an important factor in determining his sentence, and that no one could compute his sentence until a PSR was completed. This information was also included in the plea agreement which explicitly informed Adkins that no one could compute his sentence "until after a presentence investigation has been completed and the Court has ruled on the results of that investigation." Thus, it is clear that Adkins, unlike Watley, had sufficient notice of the consequences of his plea.

Adkins also claims that the plea hearing violated the requirements of the Federal Rules of Criminal Procedure. Rule 11 sets forth the requirements for pleas and mandates certain procedures to ensure that a guilty plea is entered into knowingly and voluntarily. One such procedure dictates that:

The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness

to plead guilty results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.

Fed. R. Crim. P. 11(d). We reject Adkins's contention that the plea hearing violated this rule.

In this case, the district court judge asked Adkins if "anyone made any different promises or assurances to induce you to enter into a plea of guilty in this case, other than what's set forth in the plea agreement?" Adkins answered "no." The judge also asked Adkins "[h]as anyone threatened you or attempted in anyway to force you to plead guilty in this case?" Again, Adkins replied "no." Conversely, when the judge inquired whether Adkins was "pleading guilty voluntarily?" Adkins responded affirmatively. We find that this colloquy satisfied the requirements of Rule 11.

Similarly, we find no violation of Rule 32. That rule provides, in part, that:

If a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.

Fed. R. Crim. P. 32(d).

In the instant case, there was no motion for withdrawal of the plea prior to sentencing, and after sentencing we will withdraw a guilty plea only upon a showing of "'a fundamental defect which inherently results in a complete miscarriage of justice' or 'an omission inconsistent with the rudimentary demands of fair procedure.'" United States v. Hoskins, 910 F.2d

309, 311 (5th Cir. 1990) (quoting Hill v. United States, 368 U.S. 424, 428 (1962)). The only defect alleged by Adkins's was that his plea was not knowing and voluntary. As noted above, we reject this contention, and accordingly, we decline to set aside Adkins's guilty plea under Rule 32(d).

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the decision of the district court.