

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-40711
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

DAMON TYRONE MEDCAFE,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(4:93-CR67.1)

(February 23, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:¹

Appellant Damon Tyrone Medcafe (Appellee) appeals from the district court's denial of his motion to withdraw his plea of guilty, and the magistrate judge's denial of his motion for substitution of counsel. For the reasons below, we affirm.

I. BACKGROUND

Appellant and Barron Metcalfe (Barron) were charged with possession, and conspiracy to possess, with intent to distribute

¹ 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

more than 50 grams of cocaine base (crack) and possession of a firearm during the commission of a drug-trafficking offense. Appellant plead guilty, and was ultimately sentenced to 210 months of incarceration and a \$20,000 fine on the drug charges, and 60 months on the firearm count to run consecutively. Baron proceeded to trial, at which Appellant testified, and was acquitted.

After Baron's trial, but prior to imposition of sentence on his guilty plea, Appellant moved to withdraw his guilty plea and further--in a joint motion with his attorney--requested substitution of counsel. At a hearing before the magistrate on the motion for substitution of counsel, Appellant and his attorney asserted that Appellant no longer trusted his counsel, and therefore requested that new counsel be appointed. The magistrate denied the motion, but specifically held that Appellant's counsel should renew the motion should the district court set the motion to withdraw guilty plea for hearing. Although the district court in fact set the matter for hearing, Appellant's motion was not renewed, nor did he again complain of his attorney's representation.

At the hearing before the district court on the motion to withdraw his guilty plea, the court took testimony from three defense witnesses and one government witness. Essentially, Appellant claimed that he was coerced into his guilty plea because of threats against him and his family. He asserted that his testimony at Barron's trial, which lead to Barron's acquittal, was totally false, and that Barron was guilty of the crime charged.

Appellant further indicated that his testimony at his plea hearing had been false, and in fact he was innocent of the crimes charged.

The district court found the Appellant's testimony lacked credibility, and denied the motion to withdraw the guilty plea. We will address the motions in their temporal order.

II. SUBSTITUTION OF COUNSEL

As discussed above, although the magistrate judge denied Appellant's motion for substitution of counsel, the judge specifically stated that such motion should be renewed if the district court set the motion to withdraw guilty plea for hearing. Although the motion was in fact set for hearing, the motion for substitution of counsel was never renewed, nor did the Appellant or his attorney ever again complain of Appellant's representation. In addition, Appellant never appealed the magistrate judge's order to the district court. As a result, we are without appellate jurisdiction to review the order. See Colburn v. Bunge Towing, Inc., 833 F.2d 372, 379 (5th Cir. 1989).

III. WITHDRAWAL OF PLEA

Under Federal Rule of Criminal Procedure 32(d), prior to sentencing a district court may permit the withdrawal of a guilty plea for "any fair and just reason." However,

[T]he trial court's decision regarding a withdrawal motion must be accorded "broad discretion." As we have stated:

it is well settled that there is no absolute right to withdraw a guilty plea before the imposition of sentence. Instead, the right to do so is within the sound discretion of the trial court which will be reversed by an appellate court only for an abuse of discretion.

United States v. Carr. 740 F.2d 339, 344 (5th Cir. 1984)(citations omitted), cert. denied, 471 U.S. 1004 (1985). We have previously set out seven factors for the district court to consider when ruling on a Fed. R. Crim. P. 32(d) motion,

(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.

United States v. Carr, 740 F.2d at 343-44 (footnotes omitted).

Following the hearing on Appellant's motion, the district court entered an order finding,

1. That if the motion were granted the government would suffer prejudice by having to try a case twice that could have been properly joined with the case of codefendant Barron Tyrone Metcalfe;

2. That the defendant MEDCALF delayed forty days in filing his withdrawal motion;

3. That this Court would be substantially inconvenienced by having to hear this case a second time since the withdrawal motion was not filed until after trial of codefendant Barron Tyrone Metcalfe;

4. That the defendant MEDCAFE has had close assistance of counsel in all of his dealings before the Court;

5. That the defendant MEDCAFE's original plea of guilty was entered into both knowingly and voluntarily, and;

6. That the Court observed the defendant MEDCAFE testify at both the trial of codefendant Barron Tyrone Metcalfe and at the hearing on the motion to withdraw his

guilty plea, and is of the opinion that defendant MEDCAFE's testimony was not credible or based in fact. It is unreasonable to believe that defendant MEDCAFE was under duress by codefendant Barron Tyrone Metcalfe in entering his plea, or that such alleged duress affected defendant MEDCAFE's testimony at the trial of the codefendant, given the fact that the defendant eventually implicated the codefendant and the defendant MEDCAFE now levies another charge against the codefendant.

After a careful examination of the record, we find no basis to conclude that the findings of the district court were erroneous. At his plea hearing, Appellant specifically averred, under oath, that his plea was voluntary and not the product of coercion. We find no basis to conclude that the district court abused its discretion in denying Appellant's motion.

IV. SUMMARY

For the foregoing reasons, we find that we are without jurisdiction to review the order of the magistrate judge, and further find that Appellant has failed to show that the district court abused its discretion in denying his motion to withdraw his guilty plea. Appellant's appeal from the order of the magistrate is DISMISSED for lack of appellate jurisdiction, and the order of the district court denying Appellate's motion to withdraw his plea of guilty is AFFIRMED.