

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

UNITED STATES OF AMERICA) CRIM. ACTION NO. 5:01CR30075
)
v.)
) MEMORANDUM OPINION
RICHARD L. FULTON,)
)
)
) JUDGE JAMES H. MICHAEL, JR.

Currently before the court is the defendant's Motion to Withdraw Guilty Plea, filed on February 12, 2003. Having reviewed the motion and opposition thereto, and for the reasons hereinafter set forth, the defendant's motion shall be DENIED.

I. Background and Parties' Arguments

On November 13, 2001, a grand jury sitting in Charlottesville, VA handed down a five count indictment charging the defendant Richard L. Fulton and his codefendant Antoinette Rosette Boxley with various violations of federal law. Specifically, defendant Fulton was charged with: 1) conspiracy to distribute and possess with intent to distribute 50g or more of cocaine base; 2) possession of a semiautomatic assault weapon during and in relation to a drug trafficking crime; and 3) possession of a firearm after a prior felony conviction. *See* 18 U.S.C.A. §§ 841(a)(1) and 846 (West 1994 & Supp. 2002); 18 U.S.C.A. § 924(c) (West 1994 & Supp. 2002); 18 U.S.C.A. § 922(g)(1) (West 1994 & Supp. 2002). On October 25, 2002, pursuant to a written plea agreement with the government, defendant Fulton pleaded guilty to Counts 1 and 3 of the indictment. At the hearing on the defendant's plea, *see* FED. R. CRIM.

P. 11(b), the court found the defendant competent to enter an informed plea, and found that the plea is knowing and voluntary and supported by an independent basis of fact.

Accordingly, the court accepted the defendant's plea and adjudged the defendant guilty of Counts 1 and 3 of the indictment in the above-captioned criminal action.

More than three months after the defendant's guilty plea hearing, the defendant filed the instant motion to withdraw his guilty plea. The defendant argues that he should be allowed to withdraw his guilty plea because the presentence report prepared by the United States Probation Office assesses a four-point increase in the defendant's offense level for his leadership role in the offense of conviction. *See* U.S.S.G. §3B1.1(a). Specifically, the defendant asserts that the plea agreement between the defendant and the government set out sentencing factors agreed upon by the parties. For example, the plea agreement includes a provision that the defendant will be held responsible for distributing more than 1.5KG of cocaine base in the Western District of Virginia, and that he possessed a firearm during the commission of a drug-trafficking crime.¹ *See* U.S.S.G. §§ 1B1.3, 2D1.1, 2D1.1(b)(2). The defendant argues that the United States inadvertently breached the plea agreement by presenting a factual proffer in support of the guilty plea that "virtually mandated that Defendant be assessed a four level adjustment for an aggravating role." (Mot. to Withdraw Guilty Plea at ¶ 4.) The defendant asserts that he did not knowingly and voluntarily agree to a

¹ The plea agreement also includes a provision on the defendant's acceptance of responsibility, *see* U.S.S.G. § 3E1.1(a), treatment as a career offender, *see* U.S.S.G. § 4B1.1, and a promise by the United States that it will recommend a sentence at the low end of the applicable sentencing guideline range if the defendant accepts responsibility and fulfills his obligations under the plea agreement.

plea of guilty that included an aggravating role adjustment, and accordingly, requests that he be permitted to withdraw his guilty plea.²

On February 26, 2003 the government filed a response to the defendant's motion. The government urges the court to deny the defendant's motion to withdraw his plea of guilty, and to rule that the four level enhancement based on the defendant's role in the offense is proper.³ The government argues that the court should deny the defendant's motion because the defendant has not shown any "fair and just reason." *See* FED. R. CRIM. P. 11(d)(2). Specifically, the government argues that if the court considers the six factors, first articulated in *United States v. Moore*, 931 F.2d 245 (4th Cir. 1991), that govern a court's determination of a defendant's motion to withdraw his guilty plea, the court must deny the defendant's motion. The government asserts that each of the six *Moore* factors leads to the conclusion that the defendant's plea was informed, knowing, and voluntary, and therefore, should be upheld.

² The defendant also claims that he was unaware of the potential adjustment for an aggravating role because the government failed to provide the defendant with a copy of the factual proffer prior to the guilty plea hearing. In its response to the defendant's motion, however, the government represents that a copy of the government's factual proffer was provided to the defendant's local counsel, Richard Morgan. The court will not address this argument because the defendant fails to provide any authority for the argument that the government has a duty or obligation to provide the defendant with its factual proffer prior to the hearing, and because the court is unaware of any such requirement.

³ At this time, the court will not rule on whether the probation officer correctly assessed a four level enhancement because of the defendant's leadership role in the offense of conviction. The court does not read the defendant's instant motion as raising such an objection to the Presentence Investigation Report ("PSR"). The court is aware that the defendant has filed a separate objection to the PSR challenging the application of U.S.S.G. § 3B1.1(a), but will take up that objection at the defendant's sentencing hearing.

II. Discussion

In pertinent part, FED. R. CRIM. P. 11(d)(2)⁴ provides that a defendant may withdraw a guilty plea after the court accepts the plea but before the imposition of sentence if “the defendant can show a fair and just reason for requesting the withdrawal.” The Rule does not grant defendants an absolute right to withdraw their plea. *See United States v. Moore*, 931 F.2d 245, 248 (4th Cir. 1991). The district court has discretion to determine whether a defendant seeking to withdraw his plea has proffered a “fair and just reason.” *United States v. Ubakanma*, 215 F.3d 421, 424 (4th Cir. 2000); *Moore*, 931 F.2d at 248 (citing *United States v. DeFreitas*, 865 F.2d 80, 82 (4th Cir.1989)); *United States v. Haley*, 784 F.2d 1218, 1219 (4th Cir.1986). *Moore* outlines six factors a court should consider in deciding a motion to withdraw a guilty plea:

- (1) whether the defendant has offered credible evidence that his plea was not knowing or not voluntary;
- (2) whether the defendant has credibly asserted his legal innocence;
- (3) whether there has been a delay between the entering of the plea and the filing of the motion;
- (4) whether defendant has had close assistance of competent counsel;
- (5) whether withdrawal will cause prejudice to the government; and
- (6) whether it will inconvenience the court and waste judicial resources.

Moore, 931 F.2d at 248, *cited in Ubakanma*, 215 F.3d at 424.

Furthermore, the Fourth Circuit has held that the key to a motion to withdraw a guilty plea is “whether or not the Rule 11 proceeding was properly conducted.” *United States v. Wilson*, 81 F.3d 1300, 1306 (4th Cir. 1996) (citing *United States v. Puckett*, 61 F.3d 1092,

⁴ Prior to the December 2002 amendments to the Federal Rules of Criminal Procedure, this provision was codified in FED. R. CRIM. P. 32(e).

1099 (4th Cir. 1995)). A "fair and just" reason for withdrawing a guilty plea is one that "essentially challenges . . . the fairness of the Rule 11 proceeding.'" *Puckett*, 61 F.3d at 1099 (quoting *United States v. Lambey*, 974 F.2d 1389, 1394 (4th Cir.1992) (en banc)). Rule 11 of the Federal Rules of Criminal Procedure requires a court to address a defendant pleading guilty in open court to ascertain whether the defendant's plea of guilty is knowing and voluntary. A proper Rule 11 hearing creates a strong presumption that the guilty plea was knowing and voluntary, and therefore, is final and binding. *See Wilson*, 81 F.3d at 1306-307; *Puckett*, 61 F.3d at 1099; *Lambey*, 974 F.2d at 1394.

The defendant does not challenge the completeness of the guilty plea hearing. In fact, a review of the record shows that the court's colloquy with the defendant exceeded the baseline requirements of FED. R. CRIM. P. 11. At the hearing, the court carefully ascertained the defendant's educational background, that the defendant was not under the influence of any alcohol or narcotic, and that he had spoken with his attorney about the indictment. The court specifically asked the defendant several times whether the defendant understood the proceedings in which he found himself. The court reviewed the charges against the defendant and the minimum and maximum possible penalties. The United States gave a factual proffer as to the evidence it would present if the case went to trial, and defense counsel and the defendant agreed with the proffer. The defendant did not offer any evidence. The court also reviewed the plea agreement submitted by the parties and asked whether the defendant understood the agreement and all of the various waivers of appellate rights included in the agreement. The defendant responded affirmatively and stated the he entered into the plea

agreement knowingly and voluntarily. At each stage of the proceedings, the court ascertained that the defendant understood the ramifications of his guilty plea. The defendant responded each time that he understood the implications of the plea, the penalties he faced, the rights he would be renouncing, and the proceedings themselves. Accordingly, because the court conducted a proper Rule 11 hearing, the defendant's guilty plea is presumed to be knowing and voluntary, and therefore, is considered final and binding. *See Wilson*, 81 F.3d at 1306-307; *Puckett*, 61 F.3d at 1099; *Lambey*, 974 F.2d at 1394.

A close examination of the six *Moore* factors further convinces the court that the defendant has not articulated a fair and just reason for withdrawing his guilty plea. First, the aforementioned discussion about the court's Rule 11 colloquy with the defendant shows that the defendant has not offered credible evidence that his plea was not knowing or voluntary. Second, the defendant has not asserted his legal innocence in either the instant motion, or at the guilty plea hearing. Third, the defendant waited more than three months between his guilty plea hearing and the filing of the instant motion. Fourth, throughout this case, the defendant had the close assistance of two counsel.⁵ Furthermore, in response to the court's questions during the Rule 11 colloquy, the defendant acknowledged that he was satisfied with the advice of his counsel.⁶ Fifth, withdrawal of the defendant's guilty plea will undoubtedly prejudice the government. A review of the record reveals several trial continuances, and one

⁵ The defendant is represented by Archangelo Tuminelli from Baltimore, Maryland, and Richard Morgan, who serves as defendant's local counsel.

⁶ The defendant's plea agreement also contains a provision acknowledging the defendant's satisfaction with the advice offered him by his attorney(s). (P.A. at ¶ 19.)

continuances of the defendant's sentencing hearing. If the defendant is allowed to withdraw his guilty plea and the matter proceeds to trial, the aforementioned delays would prejudice the government's ability to present its case. As the government argues in its Response, if the defendant withdraws his guilty plea, the government "will have to re-expend resources in order to prepare again for trial, effectively doubling the cost of trying the case." (Gov'ts Resp. to Def's Mot. to Withdraw Guilty Plea at 6.) Furthermore, because large portions of the government's case are based on historical evidence, government witnesses may no longer have complete recollections of events" that occurred more than two years ago. *Id.* Finally, allowing the defendant to withdraw his plea at this stage, will inconvenience the court and waste judicial resources. The defendant's sentencing hearing is only a few days away,⁷ and the United States Probation Office already has completed its presentence investigation and report. Additionally, if the matter proceeds to trial, the court will incur additional expenses in summoning a jury, subpoenaing witnesses, etc. In balancing the six *Moore* factors with the defendant's rights, the court does not find that a fair and just reason exists to allow the defendant to withdraw his guilty plea.

The court also rejects the argument that the government breached its plea agreement by presenting a factual proffer that may be used to support the assessment of a four point enhancement for the defendant's leadership role in the offense. *See* U.S.S.G. § 3B1.1(a). Although the government must be held "to promises it made [in the plea agreement], it will not be bound to those it did not make. To do otherwise is to strip the bargaining itself of

⁷ The defendant's sentencing hearing is currently scheduled for March 3, 2003.

meaning and content.” *United States v. Fentress*, 792 F.2d 461, 464-65 (4th Cir. 1986).

Nothing in the plea agreement limits the government’s freedom to present a complete and accurate factual proffer in support of the defendant’s pleas of guilty. Nor does the plea agreement prohibit the government from seeking the § 3B1.1(a) enhancement. The plea agreement is simply silent on the matter. The government did not breach the agreement by presenting an accurate and complete factual proffer that supports the Probation Officer’s finding that the enhancement applies. Rather, the parties simply failed to consider fully how the Sentencing Guidelines apply to the instant case.

Finally, the plea agreement’s failure to address the application of the § 3B.1.1(a) enhancement does not detract from the knowing and voluntary nature of the defendant’s guilty plea. The plea agreement itself informs the defendant that sentencing is within the sole discretion of the court, and that the court need not accept any recommendation by the parties and may sentence the defendant up to the maximum provided by law. (P.A. at ¶ 6, 20.) Significantly, the agreement provides:

I understand that a thorough presentence investigation will be conducted and sentencing recommendations independent of the United States Attorney’s Office will be made by the presentence preparer, which the Court may adopt or take into consideration. I understand that any calculation regarding the guidelines by the United States Attorney’s office or by my attorney is speculative and is not binding upon the Court, the Probation Office or the United States Attorney’s Office. No guarantee has been made by the United States Attorney’s Office regarding the effect of the guidelines on my case.

(P.A. at ¶ 20.) In addition to signing the entire plea agreement, and thereby indicating his

understanding of and agreement thereto, the defendant also initialed each page of the plea agreement. Furthermore, during the Rule 11 colloquy with the defendant, the court informed the defendant that the court will not be able to determine which sentencing guidelines apply to the defendant's case until after the presentence report was prepared by the United States Probation Office. Additionally, prior to accepting the plea agreement submitted by the parties, the court carefully ascertained that the defendant fully understood the agreement, had discussed the agreement with this attorney(s), and did not have any questions regarding it. The court cannot justify the withdrawal of the defendant's guilty plea because the parties failed to consider and agree on how each guideline provision may or may not apply to the defendant.

III. Conclusion

For the reasons stated above, the court shall deny the defendant's Motion to Withdraw Guilty Plea. An appropriate Order this day shall issue.

ENTERED: _____
Senior United States District Judge

Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

UNITED STATES OF AMERICA)	CRIM. ACTION NO. 5:01CR30075
)	
v.)	
)	<u>ORDER</u>
RICHARD FULTON,)	
)	
Defendant.)	JUDGE JAMES H. MICHAEL, JR.

Before the court is the defendant's February 12, 2003 Motion to Withdraw Guilty Plea. For the reasons stated in the accompanying memorandum opinion, it is hereby

ADJUDGED, ORDERED, and DECREED

that defendant's motion to withdraw his guilty plea shall be, and hereby is, DENIED.

The Clerk of the Court is hereby directed to send a certified copy of this order to all counsel of record.

ENTERED: _____
Senior United States District Judge

Date