IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

OPINION AND ORDER

Plaintiff,

01-CR-0081-C-01

v.

HENRY L. JACKSON,

Defendant.

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Defendant Henry L. Jackson has moved to withdraw the guilty plea he entered in this case on February 11, 2002. He contends that his plea was not knowing or voluntary because he has no present memory of the plea hearing, he was reluctant to plead guilty, he did not understand the terms of the plea agreement, he never authorized his attorney to set up a plea hearing and the court did not comply fully with the requirements of Rule 11 in taking the plea. In support of his motion, he has submitted an affidavit from his new lawyer, appointed to represent him after his previously-appointed attorney had been given permission to withdraw. (Once defendant indicated he wanted to withdraw his plea, his former attorney became a potential witness at any hearing held to determine the

voluntariness of the plea.) Defendant has not submitted an affidavit of his own and he has advised the court that he does not request an evidentiary hearing on his motion.

Although Fed. R. Crim. P. 32(e) permits withdrawal of a plea of guilty before sentencing for any "fair and just reason," persons seeking to withdraw a plea of guilty have to overcome the "'presumption of verity'" that attends a plea hearing. United States v. Ellison, 835 F.2d 687, 691 (7th Cir. 1987) (quoting United States v. Key, 806 F.2d 133, 136 (7th Cir. 1986)). (This is not a case in which acceptance of the guilty plea was withheld until the court had reviewed the presentence report, in which case Rule 32(e) would be inapplicable and the court would be required to allow withdrawal of the plea. United States v. Shaker, 279 F.3d 494, 497 (7th Cir. 2002).) Defendants do not have an absolute right to withdraw a plea but are entitled to do so if they can show that the plea was not entered into voluntarily and knowingly. United States v. Wallace, 276 F.3d 360, 366 (7th Cir. 2002) (citations omitted). Defendant contends that he did not understand what he was doing when he entered his plea and that errors in the form of the plea agreement and in the plea colloquy constitute a fair and just reason for allowing him to withdraw his plea of guilty to one count of possession with intent to distribute 50 grams or more of cocaine base and one count of possession of a firearm by a felon.

In the absence of any sworn statement by defendant, I am forced to rely on the transcript of the plea hearing and my own observations of defendant to determine the merits

of his contentions. The transcript shows that the plea hearing was conducted at University Hospitals in Madison, Wisconsin, where defendant was a patient, that defendant's counsel had an opportunity to meet with him in his room before the plea hearing began and that, although defendant was taking narcotic medicines at the time, he told the court he was able to understand what was being said to him. When the court asked whether he was taking any narcotic medication, he said, "Yeah. But I still understand." Tr. at 2. When he was asked, "You feel like things are making sense to you and that you understand what I'm saying," he answered, "Hm-hmm," and changed this to "Yes," when his attorney told him he had to answer yes or no. Id. at 2-3. He said, "Okay," when told that he could stop the court at any time when there was something that he did not understand. Id. at 3. Defendant's counsel added that he was "confident at this point that [defendant] understands what he's doing and that he's prepared to move forward." Id. at 5. Defendant appeared to understand what was being said to him, able to follow the proceedings and fully aware of the nature of the proceedings and the decision he was making.

Defendant was able to tell the court what drug he was charged with possessing, id., to discuss with the court his understanding that the proper reference was to cocaine base and not crack cocaine, id., and to tell the court that he did not have a Remington 12 gauge shotgun, as charged in the indictment, but that he had possessed two handguns, "a .40 caliber Smith & Wesson and a .9 millimeter." Id. at 7. He told the court that it was his

understanding that he was pleading guilty to count 1 only, id. at 8, but did not persist in this assertion after his attorney reminded him that he had agreed to plead to both counts and that doing so would make no difference in the actual sentence to be imposed. Id. He was able to explain his crimes in his own words. Id. at 15.

Defendant argues that the plea agreement he entered was invalid because the parties had agreed it would be held in abeyance until he had had an opportunity to review the *Jencks* evidence. However, his attorney stated on the record at the plea hearing that both he and defendant had received the materials and had had a chance to speak by telephone about them some time before the plea hearing. Id. at 4. Thus, any condition precedent to the execution of the agreement had been removed before the entry of the plea. Defendant did not know in advance that his guilty plea hearing would take place on the day it did but he has not shown that the suddenness of the hearing caused him any prejudice. His counsel stated that he had had numerous conversations with defendant about the plea, id. at 4, including the conversation after defendant received the *Jencks* material, id. In addition, counsel had an opportunity to talk with defendant alone in his hospital room before the hearing began. Id. at 4-5.

I conclude that defendant has failed to show that his guilty plea was not a knowing and voluntary one. I can give no weight to his lawyer's averments that defendant says he does not remember either participating in the plea agreement or giving his former attorney

permission to accept the plea agreement. These averments are hearsay and are belied by defendant's own statements at his plea hearing.

Defendant contends that his plea colloquy failed to comply with Fed. R. Crim. P. 11(c)(4) because the court did not tell him explicitly that there would be no further trial of any kind if he pleaded guilty. Technically, this is accurate. However, defendant was told what he was giving up by pleading guilty; the implication is clear that once he entered his guilty plea, he would not have a trial.

Defendant contends that the colloquy did not comply with Rule 11(e)(2) because he was not advised that he would be unable to withdraw his guilty plea if the court rejected the government's recommendation for a reduction of his sentence under U.S.S.G. § 3E1.1. However, the written plea agreement he signed provided that "the defendant also acknowledges his understanding that the Court is not required to accept any recommendations which may be made by the United States." This was sufficient to advise him that his plea was unconditional and binding even if the court chose not to accept the government's recommendation for a reduction. I conclude that defendant has not succeeded in demonstrating that his substantive rights were affected by any violation of Rule 11 that may have occurred. See United States v. Delacruz, 144 F.3d 492, 494 (7th Cir. 1998).

ORDER

IT IS ORDERED that defendant Henry L. Jackson's motion to withdraw the plea of guilty he entered on February 11, 2002, is DENIED.

Entered this 9th day of July, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge