

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAVID DRONE,

Defendant.

ORDER

03-CR-0089-C-01

Defendant David Drone has moved for leave to withdraw the plea of guilty he entered on November 13, 2003. Fed. R. Crim. P. 11(d) allows a defendant to withdraw his plea for any reason or no reason before the court has accepted the plea. After the court has accepted the plea, a defendant may withdraw his plea only if he can show a fair and just reason for requesting the withdrawal. Rule 11(d)(2)(B).

Defendant alleges that when he entered his plea, he was not advised by counsel that he could be categorized as a “career offender,” subject to a lengthy sentence, or if he was so advised, he did not focus on the advice because it came at a time when he was preoccupied with the potential defense of the charges. Defendant’s failure to appreciate the possibility that he could be found to be a career offender is not a sufficient reason to allow him to

withdraw his plea. Defendant knew at the time he entered his plea that he could be subject to a sentence up to and including the maximum set by statute. Even with his career offender status, he will not be subject to a sentence that exceeds the statutory maximum. Just because his counsel failed to alert him to the possibility of career offender status is no reason to find that defendant did not enter his plea of guilty knowingly. I explained to defendant at his plea hearing how and by whom his sentencing guideline range would be determined; he knew from this that the range was not predetermined.

Defendant's case is similar to United States v. Barnes, 83 F.3d 934 (7th Cir. 1996). Barnes, too, sold heroin within a federal prison while incarcerated and entered into a plea agreement with the government under which he was to receive the sentence prescribed by the sentencing guidelines. Both Barnes and his attorney were unaware that he would be classified as a career offender, which would give him a sentencing range of 262-327 months instead of the 46-57 month range he would face if he were not a career offender.

The district court refused to allow Barnes to withdraw his plea; the court of appeals affirmed the district court's decision. The court of appeals found that Barnes, his attorney, the prosecutor and the court had all agreed about the essential terms of the plea bargain before it became final. Thus, there was no ambiguity about any essential term or any mutual mistake about the meaning of a term. Id. at 939. The court of appeals rejected Barnes's argument that his ignorance of the sentencing consequences showed that his trial counsel

was not reasonably competent, holding that “an attorney’s ‘mere inaccurate prediction’ of a sentence, standing alone, does not demonstrate the deficient performance component of a claim of ineffective assistance of counsel.” Id. at 940 (quoting United States v. Arvantis, 902 F.2d 489, 494 (7th Cir. 1990) (quoting in turn Iaea v. Sunn, 800 F.2d 861, 865 (9th Cir. 1986))).

Defendant has suggested that his trial counsel might not have warned him that he could be a career offender. Under Barnes, this would not be a reason to allow him to withdraw his plea. At the least, defendant would have to establish that his counsel made no good faith effort to discover the facts relevant to defendant’s sentencing. Having observed counsel’s work in a number of cases, I think it is highly unlikely that defendant could make such a showing. Certainly he has not done so at this point.

ORDER

IT IS ORDERED that defendant David Drone’s motion to withdraw his plea is

DENIED. Sentencing will go forward on January 14, 2004, as scheduled.

Entered this 9th day of January, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge