

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

MATTHEW R. SCHUSTER,

Defendant.

ORDER

04-CR-0175-C-01

Defendant Matthew R. Schuster is scheduled for sentencing on October 28, 2005. On October 25, 2005, defendant filed a motion pursuant to Fed. R. Crim. P. 11(d)(2) to withdraw his plea of guilty, contending that he has an absolute right to withdraw his plea when the court has deferred acceptance of the plea and alternatively, that the court can permit withdrawal when defendant shows a “fair and just reason” for doing so. United States v. Milquette, 214 F.3d 859, 861 (7th Cir. 2000). Finally, he argues that the court’s failure to inform defendant about the government’s burden of proof regarding damages was plain error. The government opposes the motion.

Defendant was charged with two crimes: (1) knowingly causing the transmission of a code, program, command or information to a protected computer used in interstate

commerce and communication and intentionally causing damage to the computer and to the computer's user and its customers of at least \$5,000, in violation of subsection (i) of 18 U.S.C. § 1030(a)(5); and (2) intentionally accessing a protected computer used in interstate commerce and communication without authorization and recklessly causing damage to the computer and to its user and its customers of at least \$5,000, violation of subsection (ii) of 18 U.S.C. § 1030(a)(5). Defendant entered a plea of guilty to count 2 on May 13, 2005.

It appears that defendant's primary objection is to the government's stated intent to introduce evidence that defendant's actions resulted in the *intentional* denial of service attacks. The government suggests that it is not necessary for the court to consider any loss from the denial of service attacks in computing the loss for restitution or sentencing purposes. I will adopt that suggestion.

If the decision not to consider the denial of service attacks assuages defendant's concerns about his sentencing, we will proceed immediately to the sentencing hearing at 1:00, as previously scheduled. If it does not, we will begin with a hearing on the reasons defendant has asserted for allowing him to withdraw his plea of guilty. If the outcome of that hearing is unfavorable to defendant, we will proceed immediately to the sentencing hearing.

I note that defendant does not have an absolute right to withdraw his guilty plea, as he argues. His plea was accepted on May 13, 2005, when he entered it. Only the plea

agreement was accepted conditionally, not the plea itself. Cf. United States v. Shaker, 279 F.3d 494, 496 (7th Cir. 2002) (trial judge informed defendant that he was deferring his decision on “acceptance or rejection of [defendant’s] plea of guilty *and* [his] Plea Agreement” until he had time to study presentence report) (emphasis added). Therefore, if defendant wants to withdraw his plea he will have to persuade the court that he has just and fair reasons for doing so.

Entered this 27th day of October, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge