

IN THE  
SUPREME COURT OF THE UNITED STATES

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*Christopher Dominguez*

v.

*United States of America*

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On Petition for Writ of Certiorari to the  
United States Court of Appeals for the Tenth Circuit

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**APPENDIX C**

District court's unpublished opinion

FILED



8:15 am, 2/28/19  
Stephan Harris  
Clerk of Court

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF WYOMING

UNITED STATE OF AMERICA,

Plaintiff,

vs.

CHRISTOPHER DOMINGUEZ,

Defendant.

Case No: 17-CR-98-F  
18-CR-186-F

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**ORDER DENYING DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEA**

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This matter is before the Court on Defendant's Motion to Withdraw Guilty Plea. The Court has reviewed the motion, response and heard oral arguments and is fully informed in the premises. The Court FINDS and ORDERS as follows.

**PROCEDURAL HISTORY**

**A. Procedural History**

On December 20, 2016, a grand jury in the District of New Mexico indicted Defendant on various charges related to his involvement in a robbery of the Medicine Shoppe Pharmacy in Raton, New Mexico. Those charges were: Count 1 – 18 U.S.C. § 1951(a) (Hobbs Act Robbery); Count 2 – 18 U.S.C. § 924(c) (Brandishing a Firearm in Furtherance of a Crime of Violence and a Drug Trafficking Crime); Count 3 – 18 U.S.C. §§ 2118(a)(1) and (c)(1), and 2 (Robbery Involving Controlled Substances and Aiding and Abetting); Count 4 – 18 U.S.C. §§ 670(a)(1) and (b)(2)(A) and (B), and 2 (Theft of Medical Products and Aiding and Abetting); Count 5 – 21 U.S.C. §§ 841(a)(1) and

(b)(1)(C), and 18 § U.S.C. 2 (Possession with Intent to Distribute Oxycodone and Aiding and Abetting); and Count 8 – 18 U.S.C. § 922(g)(1) (Felon in Possession of a Firearm). On December 20, 2016, he pleaded not guilty to the charges and was detained.

Then on May 19, 2017, a grand jury in Wyoming indicted Defendant on various charges related to a carjacking and robbery of the Medicap Pharmacy in Cheyenne, Wyoming on October 6, 2016. Those charges were: Count 1 – 18 U.S.C. § 371 (Conspiracy to Commit Carjacking); Count 2 – 18 U.S.C. §§ 2119 and 2 (Carjacking and Aiding and Abetting); Count 4 – 18 U.S.C. §§ 924(c)(1)(A)(iii) and 2 (Using, Carrying, and Discharging a Firearm During and in Relation to a Crime of Violence and Aiding and Abetting); Count 5 – 18 U.S.C. §§ 2118(a)(1)(3)(c)(1) and 2 (Attempted Robbery Involving Controlled Substances and Aiding and Abetting); Count 6 – 18 U.S.C. § 1951 (Robbery); and Count 7 – 18 U.S.C. § 924(c)(1)(A)(iii) (Using, Carrying and Discharging, a Firearm During and in Relation to a Crime of Violence).

On January 31, 2018, the district court in New Mexico ordered Defendant's transport to the District of Wyoming to face his charges here. The Court arraigned Defendant on March 9, 2018. Defendant pled not guilty to the charges and was detained.

#### **B. Plea Agreement**

Over the course of the next several months the parties attempted to negotiate a plea agreement. This effort culminated in Defendant signing a plea agreement on December 20, 2018. (Docket Sheet for US v. Mitchell et al, 17-CR-98, Doc. 146 (Doc. \_\_)). The plea agreement, through Fed. R. Crim. P. 20, sought to resolve Defendant's cases in both New Mexico and in Wyoming. Specifically, the plea agreement provided:

Pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), the parties agree to a specific sentence that is not based on the advisory sentencing guidelines, though the parties have reviewed the application of the advisory guidelines and all of the other factors set forth in 18 U.S.C. § 3553(a) when fashioning this agreement.

The parties agree that with respect to 17-CR-98-F the Defendant will serve eight years with respect to Count Two (Carjacking and Aiding and Abetting, in violation of 18 U.S.C. §§ 2119, § 2), he will serve ten years with respect to Count Five (Attempted Robbery Involving Controlled Substances and Aiding and Abetting, in violation of 18 U.S.C. §§ 2118(a)(1)(3)(c)(1) and 2), and he will serve ten years with respect to Count Seven (Discharging, Using, and Carrying a Firearm During and in Relation to a Crime of Violence, in violation of 18 U.S.C. § 924(c)(1)(A)(iii)). The Defendant understands that Counts Two, Five, and Seven will run consecutively to one another. The Defendant will therefore serve a sentence of 28 years.

The parties further agree that with respect to 16-CR-4697-MV arising out of the Defendant's acts in the District of New Mexico, the Defendant will serve eighteen years with respect to Count One (Conspiracy to Interfere with Interstate Commerce by Robbery and Violence, in violation of 18 U.S.C. § 1951(a). The Defendant understands that Count One will run concurrent to his sentence for Counts 2 and 5 in 17-CR-98-F.

(Doc. 146 [Plea Agreement] at 4, ¶ 6). Additionally, the Districts of Wyoming and New Mexico agreed to dismiss all of the other charges against the Defendant. (Doc. 146, at 5, ¶ 9). Finally, the District of New Mexico agreed to not bring criminal charges against the Defendant arising out of an armed bank robbery that strong evidence, including forensic evidence, suggested Defendant committed on December 12, 2015 (Doc. 146, at 5, ¶ 11).

### **C. Defendant's Plea**

Defendant appeared for his change of plea hearing on December 21, 2018. The Court conducted the Rule 11 colloquy with the Defendant. First, the Court advised Defendant that if he rejected the 11(c)(1)(C) plea agreement, the Court would "afford you

an opportunity to reconsider any guilty plea you enter today and return to a plea of not guilty” (Doc. 163 [COP Tr.] at 14). The Court also held an extensive discussion with Defendant to assure: (1) that his pleas were voluntary; (2) that he had the benefit and advice of competent and experienced counsel; (3) that he was aware of the charges, as well as the potential penalties of the charges; (4) his right to a jury trial; and (5) the potential civil rights and sentencing consequences of pleading guilty to the charge. (*Id.* at 7-18). After addressing each of these categories in detail, Defendant clearly indicated that he understood the advisements and voluntarily chose to plead guilty to the charges as set forth in his plea agreement. (*Id.* at 7-9, 11-18).

The Court reviewed every element of the various charges with the Defendant. (*Id.* at 18-22). Next, Defendant, with the assistance of his counsel and questions from the Court, provided a detailed factual basis supporting the elements of each charge. (*Id.* at 23-29). Defendant unequivocally, and pursuant to the plea agreement, pled guilty to each of the four charges against him. (*Id.* at 29-30).

Following his change of pleas, the Court made the specific finding that the Defendant was fully competent and capable of entering an informed plea and conditionally adjudged him guilty of the four charges. (*Id.* at 31).

#### **D. Defendant’s Motion to Withdraw His Guilty Plea**

On February 4, 2018, Defendant filed his Motion to Withdraw His Guilty Plea. (Doc. 161). Defendant argues that on the day of his change of plea hearing, the President signed the First Step Act. One of the provisions of the Act, Section 403, amends 18 U.S.C. § 924(c)(1)(C). Under the new language, the 25-year mandatory minimum in

§ 924(c)(1)(C)(i) and the mandatory life sentence in § 924(c)(1)(C)(ii) no longer apply unless the defendant has a prior § 924(c) conviction that became final before the defendant's current § 924(c) violation. Even under the new amendments multiple § 924(c) convictions must still carry consecutive sentences.

In this case, Defendant argues that if he were convicted of both 924(c) charges he faces in Wyoming, his mandatory minimum sentence would be 20 years rather than 35 years. If he were then convicted in New Mexico of the 924(c) charge he would not face an additional 25-year consecutive sentence, but rather a seven-year consecutive sentence (this calculation ignores the additional potential seven years and additional predicate offense sentences for the armed bank robbery that the District of New Mexico agreed to forgo as part of the plea agreement).

Defendant claims this change in circumstance provides him "a fair and just reason," under Fed. R. Crim. P. 11(d)(2)(B) to withdraw his plea and proceed to trial.

### DISCUSSION

The first issue before the Court is whether it conditionally accepted Defendant's guilty plea. The Court conducted the Rule 11 plea colloquy and at the end of the hearing conditionally accepted the guilty plea, subject to reviewing the PSR. *See United States v. Byrum*, 567 F.3d 1255, 1262 (10th Cir. 2009) ("where a district court conducts a Rule 11 plea colloquy and then provisionally or conditionally accepts the defendant's guilty plea pending its review of the PSR, the district court has accepted the plea for the purposes of Rule 11." ). For these reasons, the Court finds it conditionally accepted Defendant's guilty plea. Thus, Defendant can only withdraw his plea if "(A) the court rejects a plea

agreement under Rule 11(c)(5); or (B) the defendant can show a fair and just reason for requesting the withdrawal.” Fed. R. Crim. P. 11(d)(2). In determining whether there is a “fair and just” reason for withdrawing the guilty plea, the Tenth Circuit set forth the following factors:

(1) whether the defendant has asserted his innocence; (2) whether withdrawal would prejudice the government; (3) whether the defendant delayed in filing his motion, and if so, the reason for the delay; (4) whether withdrawal would substantially inconvenience the court; (5) whether close assistance of counsel was available to the defendant; (6) whether the plea was knowing and voluntary; and (7) whether the withdrawal would waste judicial resources.

*United States v. Yazzie*, 407 F.3d 1139, 1142 (10th Cir. 2005) (citations omitted). “We review the district court’s denial of a motion to withdraw a guilty plea for an abuse of discretion.” *United States v. Jones*, 168 F.3d 1217, 1219 (10th Cir. 1999).

The first factor is whether Defendant has asserted his innocence. While Defendant asserts that the evidence in the Wyoming case against him is not significant, he acknowledges that the evidence in the New Mexico case is significant. Defendant has never asserted his innocence. This factor weighs against Defendant.

The next fact is whether allowing the plea withdrawal would prejudice the Government. This case was originally set for trial in September of 2018. The Court continued the trial to January 2019 to allow the Government additional time for a rebuttal expert. In anticipation of trial, the Government prepped witnesses, including victims. Additionally, the Government spent considerable time and effort in crafting plea agreements for all Defendants that would include charges in two districts and transferring the New Mexico cases to this district. This included meeting with victims in two districts

to discuss the plea agreement. Finally, the Government's plea agreements were conditioned on each Defendant taking the plea agreement. Based on all this, the Court concludes the Government would be substantially prejudiced by a withdrawal of Defendant's plea. The Court agrees with the Government that this factor weighs heavily against Defendant.

The Court finds that Defendant did not overly delay in filing this motion. Defendant's motion was filed a little more than a month after his change of plea, but there was necessary coordination between Defendant and his counsel to address this matter. The Court finds this factor is neutral.

The next factor is whether the delay would substantially inconvenience the Court. While there would not be a significant inconvenience to this Court, there is likely a substantial inconvenience to the U.S. District Court for the District of New Mexico. Defendant's New Mexico charges would transfer back to New Mexico pursuant to Fed. R. Crim. P. 20(c). The New Mexico Court is a significantly busy court and having to try this case after a trial in Wyoming would be a substantial inconvenience to that Court. This factor also weights against Defendant.

The next two factors, whether Defendant had close assistance of counsel and whether the plea was knowing and voluntary are the factors primarily at issue in this case. Defendant's counsel merely states that Defendant did not receive close assistance of counsel in deciding to plead guilty, because he was not informed of the changes to 18 U.S.C. § 924(c) contained in the First Steps Act. The President signed the Act on the same day as Defendant's change of plea hearing. At the hearing, Defendant's counsel



asserted that the potential stacking of the § 924(c) counts were a significant contributing factor to his decision to accept a plea agreement in this case.

It is not clear the exact standard for determining whether a Defendant had “close assistance of counsel”. The Tenth Circuit has considered this factor under the two step *Strickland* prong. See *United States v. Hamilton*, 510 F.3d 1209 (2007) (considering whether counsel was ineffective under *Strickland* in determining defendant provided “fair and just” reason for withdrawing his guilty plea). However, the Court questions whether this is the applicable standard because the *Yazzie* court chose the phrase “close assistance of counsel” rather than the well understood phrase “ineffective assistance of counsel”. However, the Court finds that under either *Strickland* or some other standard, Defendant received close assistance of counsel.

At the hearing, Defendant’s counsel recounted the work that went into reaching the plea agreement, including the meetings with the United States attorneys, the meetings with the co-defendants and their counsel, and all the other work that went into the plea agreement over the course of several weeks. Additionally, counsel provided Defendant with advice based on the law that was in place at the time of the negotiations. See *United States v. Harms*, 371 F.3d 1208, 1211 (10th Cir. 2004) (“The Sixth Amendment does not require counsel for a criminal defendant to be clairvoyant.”). While the timing of the plea negotiations leading up to the change of plea is unusual, it is important to realize that Defendant was engaged in plea negotiations for several weeks prior to the change of plea hearing, when the passage of the First Step Act was uncertain. Failure to fully consider this legislation that was not signed by the President until (shortly) after the change of plea

hearing does not constitute the lack of close of assistance of counsel. The Court would finally note that during the change of plea hearing, Defendant continually stated that he was satisfied with the advice of counsel he received throughout the entire process. Defendant is entitled to close assistance of counsel, not clairvoyant nor perfect assistance, and certainly not assistance based on 20/20 hindsight. For all these reasons, the Court finds Defendant was not denied "close assistance of counsel" in this case and this factor does not weight in favor of allowing Defendant to withdraw his guilty plea.

The final consideration is whether Defendant's guilty plea was knowing and voluntary. In this case, there is no dispute that the guilty plea was voluntary. However, Defendant asserts that it was not knowing because Defendant lacked the pertinent information regarding the stacking of the § 924(c) counts that would have altered his decision to plead in this case. In this case, the Court covered the Rule 11 colloquy. During the change of plea hearing the Court informed Defendant and he stated he understood the charges against him, the terms of the proposed plea agreement, the potential maximum sentences for each count, the range of sentencing for each count, the mandatory minimum involved in each count (without stacking), the rights he was relinquishing by entering into the plea agreement, that he was competent to enter into the plea agreement, that was not threatened or coerced into pleading guilty, that he was actually guilty of the charges, and that he was satisfied with his representation up to that point. (Doc. 163 [COP Tr.] at 8-15); *See United States v. Gordon*, 4 F.3d 1567, 1573 (10th Cir.1993) (knowing and voluntary plea taken in compliance with Rule 11 weighs against motion to withdraw). There was no indication that Defendant was confused about


any of these issues. The fact Defendant was not aware of potential statutory changes does not provide a sufficient basis for the Court to find that his guilty plea was not knowingly entered.

### CONCLUSION

For all these reasons, the Court finds that Defendant failed to establish a “fair and just” reason for allowing Defendant to withdraw his guilty plea.

IT IS ORDERED that Defendant’s Motion to Withdraw his guilty plea is DENIED.

Dated this 28th day of February, 2019.

  
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NANCY D. FREUDENTHAL  
UNITED STATES DISTRICT JUDGE