

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-11395
Non-Argument Calendar

D.C. Docket No. 0:18-cr-60035-BB-1

DALE LUTGEN,

Defendant-Appellant,

versus

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(February 11, 2020)

Before WILLIAM PRYOR, JILL PRYOR, and EDMONDSON, Circuit Judges.

PER CURIAM:

Dale Lutgen appeals his convictions after pleading guilty to two counts of production of child pornography, in violation of 18 U.S.C. § 2251(a). No reversible error has been shown; we affirm.

On appeal, Lutgen challenges the district court's denial of his motion to withdraw his guilty plea. Briefly stated, Lutgen contends that he was denied close assistance of counsel for his plea because (1) his lawyer failed to advise him adequately about all discovery provided by the government; and (2) his lawyer refused to investigate evidence pertinent to a potential defense Lutgen wanted to pursue.

We review the denial of a motion to withdraw a guilty plea under an abuse-of-discretion standard. United States v. Brehm, 442 F.3d 1291, 1298 (11th Cir. 2006). No abuse of discretion occurs “unless the denial is ‘arbitrary or unreasonable.’” Id.

A defendant who seeks to withdraw a guilty plea after the court has accepted the plea but before sentencing bears the burden of demonstrating “a fair and just reason” for doing so. See Fed. R. Crim. P. 11(d)(2)(B); United States v. Izquierdo,

448 F.3d 1269, 1276 (11th Cir. 2006). We construe liberally whether a defendant's pre-sentence motion to withdraw is supported by "a fair and just reason." See United States v. Buckles, 843 F.2d 469, 471 (11th Cir. 1988). A defendant, however, has "no absolute right to withdraw a guilty plea." Id. Instead, whether a defendant will be allowed to withdraw his plea is a decision "left to the sound discretion of the trial court." Id.

In determining whether a defendant has satisfied his burden of showing a "fair and just reason" for withdrawal, the district court must "consider the totality of the circumstances surrounding the plea." Id. at 471-72. The district court considers (1) whether the defendant received close assistance of counsel, (2) whether the plea was entered knowingly and voluntarily, (3) whether judicial resources would be conserved, and (4) whether allowing a defendant to withdraw his plea would prejudice the government. Id. at 472. On appeal, Lutgen challenges only the district court's determination that Lutgen received close assistance of counsel.

The district court abused no discretion in denying Lutgen's motion to withdraw his guilty plea. As an initial matter, the district court conducted an extensive plea colloquy before accepting Lutgen's plea. At the plea hearing, Lutgen testified that he had discussed with his lawyer the charges against him and

the possible sentences, that he had no unanswered questions for his lawyer, and that he was fully satisfied with his lawyer's representation. Lutgen also confirmed that he understood the charges against him, that he agreed with the government's factual proffer, and that he was pleading guilty of his own free will because he had committed the offense of production of child pornography.

Lutgen, however, also told the district court that he was "still waiting on some things" to review as part of discovery. In response to the district court's follow-up questions, Lutgen said that he already had an opportunity to talk with his lawyer about the discovery items and that he had reviewed all the discovery that he had requested. Lutgen then said that he "just needed more time to review them [more] accurately." The district court then asked these questions:

THE COURT: All right. Now, do you need more time to review them before we proceed today?

THE DEFENDANT: Oh, no. We can continue.

THE COURT: Are you certain, sir?

THE DEFENDANT: Positive.

THE COURT: Well, then let me ask the question again. Are you fully satisfied with the counsel, the representation, and the advice given to you in this case by your attorney[?]

THE DEFENDANT: Yes.

We stress that statements made under oath by a defendant during a plea colloquy receive a strong presumption of truthfulness. See United States v. Medlock, 12 F.3d 185, 187 (11th Cir. 1994). A defendant “bears a heavy burden” to show that statements he made under oath were false. United States v. Rogers, 848 F.2d 166, 168 (11th Cir. 1988).

Lutgen’s later conclusory assertions that his lawyer failed to advise him adequately about all discovery and refused to pursue additional discovery are not enough to overcome the earlier contrary statements Lutgen made at the plea colloquy. In the pertinent plea colloquy, Lutgen testified under oath that he had discussed the discovery with his lawyer, that he had reviewed all the requested discovery, that he needed no additional time to review documents before proceeding with his plea, that he had no unanswered questions for his lawyer, and that he was fully satisfied with his lawyer’s performance.

On this record, we are unpersuaded that the district court’s decision to deny Lutgen’s motion was arbitrary or unreasonable; we see no abuse of discretion.

AFFIRMED.