

JUN 16 2011

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>UNITED STATES OF AMERICA,</p> <p style="text-align: center;">Plaintiff - Appellee,</p> <p>v.</p> <p>TOMMY RAY ELAM,</p> <p style="text-align: center;">Defendant - Appellant.</p>
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No. 09-50078

D.C. No. 2:03-cr-00565-ABC-1

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Audrey B. Collins, Chief District Judge, Presiding

Argued and Submitted June 7, 2011
Pasadena, California

Before: D.W. NELSON and IKUTA, Circuit Judges, and PIERSOL, Senior District Judge.**

The district court did not clearly err in determining that Elam’s reasons for withdrawing his guilty plea were not credible, given Elam’s prior statements during an extensive plea colloquy that he was competent to enter a guilty plea, that

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Lawrence L. Piersol, Senior District Judge for the U.S. District Court for South Dakota, Sioux Falls, sitting by designation.

his plea was knowing and voluntary, and that he was guilty. The court-appointed psychiatrist's testimony that Elam was malingering in the weeks before he entered that plea likewise supported the court's conclusion. Therefore, the district court did not abuse its discretion in denying Elam's motion to withdraw his plea on the ground that he had not offered a "fair and just reason" for so doing. Fed. R. Crim. P. 11(d)(2)(B); *United States v. Ensminger*, 567 F.3d 587, 590 (9th Cir. 2009). Further, our decision in *United States v. Baptist*, --- F.3d ----, 2011 WL 2150993 (9th Cir. June 2, 2011) (per curiam), forecloses Elam's argument that the Fair Sentencing Act of 2010 (FSA) applies retroactively to him.

For the first time at oral argument, Elam urged us to remand to the district court to consider whether the FSA might itself constitute a "fair and just" reason for withdrawing his guilty plea. Because we conclude that the district court did not err in denying Elam's withdrawal motion, there is no basis for such a remand. Moreover, the enactment of non-retroactive legislation a year after the district court imposed Elam's sentence cannot logically constitute a "fair and just" reason for withdrawing a guilty plea that he entered before that sentence was imposed.

AFFIRMED.