

June 2, 2004

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 03-11334  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GARY GENE KENNEDY,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 7:03-CR-3-ALL  
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Before SMITH, DeMOSS, and STEWART, Circuit Judges.

PER CURIAM:\*

The Federal Public Defender appointed to represent Gary Gene Kennedy on direct appeal has filed what he terms a "quasi-Anders" brief. He argues that, based upon extra-circuit law and the district court's alleged misapplication of the sentencing guidelines, the appeal-waiver provision in Kennedy's plea agreement is unenforceable and should be severed from the plea agreement. Counsel recognizes, however, that this court's jurisprudence and the plain language of the waiver preclude an

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\* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

appeal based upon the enhancement of his offense level under the sentencing guidelines. Counsel therefore asserts that, if we decide the appeal waiver is enforceable, there are no nonfrivolous issues for appeal, and he requests permission to withdraw pursuant to Anders v. California, 386 U.S. 738, 744 (1967).

We have reviewed the record and, based upon this court's jurisprudence, the guilty plea and appeal waiver were knowing and voluntary, and Kennedy is precluded from arguing that his sentence was improperly enhanced under United States Sentencing Guidelines § 2K2.1(b). See United States v. Robinson, 187 F.3d 516, 517 (5th Cir. 1999); United States v. Melancon, 972 F.2d 566, 567, 568 (5th Cir. 1992). We note that, even under our sister circuits' jurisprudence regarding the enforceability of appeal waivers, we would conclude that the appeal waiver provision is enforceable. See United States v. Teeter, 257 F.3d 14, 24, 25-27 (1st Cir. 2001); United States v. De-La-Cruz Castro, 299 F.3d 5, 12-14 (1st Cir. 2002); United States v. Rosa, 123 F.3d 94, 96, 101-02 (2d Cir. 1997); United States v. Goodman, 165 F.3d 169, 174-75 (2d Cir. 1999); United States v. Khattak, 273 F.3d 557, 563 (3d Cir. 2001); United States v. Brown, 232 F.3d 399, 403 (4th Cir. 2000); United States v. Andis, 333 F.3d 886, 890, 891-92 (8th Cir. 2003).

Accordingly, the motion for leave to withdraw is GRANTED, counsel is excused from further responsibilities herein, and the APPEAL IS DISMISSED. See 5TH CIR. R. 42.2.