

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-31229
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TIMOTHY THOMAS,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. CR-95-34-D
- - - - -

April 14, 1997

Before WISDOM, KING, and SMITH, Circuit Judges.

PER CURIAM:*

Timothy Thomas appeals his sentence for distribution of cocaine in violation of 21 U.S.C. § 841(a)(1). Thomas argues that the Government breached the plea agreement. We have reviewed the record and find no plain error. The Government proffered evidence concerning Counts II and III only after the district court ordered it to do so, and not before re-urging its position that it did not oppose exclusion of such evidence as

* The court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

relevant conduct. Also, because all relevant conduct must be considered in determining the base level offense,¹ Thomas is unable to demonstrate that the alleged breach of the plea agreement affected his substantial rights.²

AFFIRMED.

¹ *United States v. Vital*, 68 F.3d 114, 117 (5th Cir. 1995); *United States v. Byrd*, 898 F.2d 450, 452 (5th Cir. 1990).

² *See United States v. Calverley*, 37 F.3d 160, 162-64 (5th Cir. 1994)(en banc), cert. denied, 115 S.Ct. 1266 (1995).