

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 01-11452  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES CHARLES HOWELL, also known as Jay Howell,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 3:00-CR-473-1  
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June 20, 2002

Before DeMOSS, PARKER, and DENNIS, Circuit Judges.

PER CURIAM:\*

James Charles Howell appeals the sentence imposed following his guilty-plea conviction for possession of an unregistered firearm in violation of 26 U.S.C. §§ 5845(a), 5861(d), and 5871. The Government argues that Howell knowingly and voluntarily waived his right to appeal his sentence as part of his plea agreement. Howell argues that the waiver provision does not bar this appeal because it allows him to appeal an upward departure. He argues that he is challenging the district court's imposition

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

of a partly consecutive sentence which was the functional equivalent of an upward departure.

Howell has not shown that the sentence imposed by the district court was the result of an upward departure. The district court sentenced Howell to 51 months, a sentence within the applicable guideline range of 41 to 51 months. The district court explained that it was imposing a partly consecutive sentence because the state felony offense was only partly taken into consideration in calculating the applicable guideline range for the firearm offense. If the district court had fully considered the state narcotics offense by applying U.S.S.G. § 2K2.1(c) in calculating Howell's offense level, Howell would have faced a guideline sentencing range of 78 to 97 months of imprisonment. Because the district court did not fully take the state narcotics offense into consideration, U.S.S.G. § 5G1.3(c) applied to the calculation of Howell's sentence.

Section 5G1.3(c) authorized the district court to impose a sentence "to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense." Therefore, Howell's sentence was not the result of an upward departure from the applicable guideline range. Because the district court did not depart upward, the waiver-of-appeal provision in the plea agreement is applicable. The record indicates that Howell knowingly and voluntarily waived the right to appeal his sentence. See United States v. Henderson, 72 F.3d 463, 464-65 (5th Cir. 1995); see also United States v. Melancon,

972 F.2d 566, 567 (5th Cir. 1992). Therefore, Howell may not appeal his sentence, and the appeal is DISMISSED.