

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1458
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CLIFFORD ANTHONY KING,
a/k/a Charles Peter
Moody, a/k/a Chris,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Texas
(CA4-91-31-E (CR4-88-184-E))

(April 20, 1993)

Before POLITZ, Chief Judge, JOLLY and EMILIO M. GARZA, Circuit
Judges.

POLITZ, Chief Judge:*

Clifford Anthony King appeals denial of his 28 U.S.C. § 2255
motion to vacate his sentence, claiming the government breached
their plea agreement. Finding no error, we affirm.

*Local Rule 47.5 provides: "The publication of opinions that
have no precedential value and merely decide particular cases on
the basis of well-settled principles of law imposes needless
expense on the public and burdens on the legal profession."
Pursuant to that Rule, the Court has determined that this opinion
should not be published.

Background

Facing a 60-count indictment for his role in a marihuana distribution operation, King entered into a plea agreement with the government. He agreed to cooperate in the government investigation of the narcotics-trafficking activities of a codefendant and to plead guilty to two counts: traveling in interstate commerce in furtherance of a business enterprise involving the distribution of controlled substances in violation of 18 U.S.C. § 1952, and using a communication facility in a drug-trafficking offense in violation of 21 U.S.C. § 843(b). The government promised that

no evidence derived from the Defendant's cooperation will be used by the United States Attorney to prosecute the Defendant for any conduct which he reveals to the Government as having occurred in any District affected by the Stipulation of Facts . . .

and further, that it would

make no recommendation to the sentencing Court concerning the actual sentence to be imposed, except that the United States can urge the Court to assess a sentence within the statutory limits which takes into account the complete conduct of the Defendant.

A violation of 18 U.S.C. § 1952 carries a statutory maximum penalty of five years imprisonment; a violation of 21 U.S.C. § 843(b) is subject to a four-year statutory limit.

King pleaded guilty and cooperated with the government as required by the plea agreement. At sentencing he moved for a downward departure from the United States Sentencing Guidelines' range of 97 to 121 months for the combined offenses. The government opposed the motion, noting the magnitude of the charged transaction and referring in general terms to other misconduct,

revealed by King in post plea bargain discussions. The district court declined to depart and sentenced King to 108 months imprisonment, the combined statutory maximum sentences for the two offenses. King filed the instant 28 U.S.C. § 2255 motion to challenge the sentence on the grounds that the government had violated the plea agreement at the sentencing hearing. The district court denied relief and this appeal timely followed.¹

Analysis

King contends that the government breached the plea agreement by presenting information that it had promised not to use against him and by arguing against a downward departure. Whether this conduct violated the terms of the plea agreement is a question of law which we review *de novo*.²

King's first objection is baseless. The plea agreement prohibits the government from prosecuting him with information gathered as the product of his cooperation. The only reasonable interpretation of this promise is that the government would not charge King with additional offenses on the basis of the

¹ King has requested appointment of counsel to assist with his appeal. Because we dispose of his appeal under settled principles of law based on undisputed facts, the interests of justice do not require appointment of counsel and the request is therefore denied. See **Santana v. Chandler**, 961 F.2d 514 (5th Cir. 1992).

² **United States v. Valencia**, 985 F.2d 758 (5th Cir. 1993).

information he provided.³ It did not do so. The plea agreement does not prohibit the government from using the information as it did: at sentencing for the offense to which King pleaded guilty.⁴

Reinforcing our conclusion is the fact that the government offered the information of which King complains only to correct a misimpression left by his testimony, *to-wit*, that the only drug transaction in which he was involved was the one for which he was convicted. King's revelations about his codefendant indicated that this was not the case. Under the circumstances, the government was obliged to divulge this information. "[T]he Government is free to negotiate away any right it may have to recommend a sentence. However, the Government does not have a right to make an agreement to stand mute in the face of factual inaccuracies or to withhold relevant factual information from the court."⁵

King's second objection likewise founders. The plea agreement permits the government to argue for a sentence "which takes into

³ In determining whether the terms of a plea agreement have been violated, the court must determine whether the government's conduct is consistent with the defendant's reasonable understanding of the agreement." **Valencia**, 985 F.2d at _____, slip op. 2793, 2796.

⁴ Nor does the government's use of the information violate U.S.S.G. § 1B1.8, as King erroneously maintains. Section 1B1.8 prohibits the government from using self-incriminating information provided pursuant to certain plea agreements in determining the applicable guideline range. Here, the government used the information only in opposition to King's motion for a downward departure.

⁵ **United States v. Block**, 660 F.2d 1086, 1091-92 (5th Cir. 1981), cert. denied, 456 U.S. 907 (1982).

account the complete conduct of the Defendant." This is what the guideline sentence is designed to do.⁶ We conclude that the government did not breach the plea agreement by suggesting that the court not sentence below the guideline range.

AFFIRMED.

⁶ See U.S.S.G. § 1B1.3 (relevant conduct); **United States v. Blanco**, 888 F.2d 907 (1st Cir. 1989) (after determining applicable guideline, the court is to determine the applicability of various offense level adjustments by looking at the offender's actual conduct); S. Breyer, "The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest," 17 Hofstra L.Rev. 1 (1988) (charged offense determines base offense level, which in turn is adjusted by real conduct of the offender).