

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2447
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

GILBERTO JIMENEZ-JIMENEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
CR H 91 126 03

May 5, 1993

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

Gilberto Jimenez-Jimenez ("Jimenez") appeals his sentence imposed following a plea bargain, alleging that the district court erred by failing to determine whether the government adhered to the terms of its plea agreement when it refused to recommend a downward departure in exchange for Jimenez's substantial assistance, that the district court erred in not reducing the sentence on the basis

* Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

of Jimenez's minimal participation in the crime, and that he received ineffective assistance of counsel. Finding that Jimenez has a colorable claim that the government failed to deliver on its end of the bargain, we remand so that the district court may determine whether Jimenez was provided an opportunity to render substantial assistance.

I.

On December 4, 1989, the Drug Enforcement Administration (DEA) Miami Organized Crime and Drug Enforcement Task Force (OCDETF) initiated an undercover investigation to infiltrate a complex international criminal organization (the "organization") operating in the United States. The organization was known to be smuggling and distributing narcotics and laundering money for a Colombian drug empire known as the Cali Cartel. The undercover operation revealed that this criminal organization is headed by Jairo Ivan Urdinola-Grajales, a/k/a "DonIvan," who maintains a central base of operation in Cali, Colombia, with operational groups, or cells, in Miami, New York, Newark, Houston, Chicago, Detroit, and Los Angeles. The organization procures and packages cocaine in Colombia, then ships it to Guatemala, whence it is carried overland through Mexico and into the United States. Houston and Phoenix are hub locations utilized by the organization for the distribution and sale of cocaine shipments to other operational cells.

With the help of cooperating individuals, the undercover operation infiltrated one of the money laundering cells of the Cali

Cartel, based in Miami and directed and managed by an individual known as "Mr. X." The infiltration by Mr. X was initially accomplished by the recruitment of an uncharged cooperating individual, "Eduardo," who was willing to work in an undercover capacity. Eduardo convinced Mr. X that he could help Mr. X in the gathering of drug proceeds from various source cities for shipment to Colombia. The government recruited an additional cooperating individual, "Francisco," to infiltrate the organization and act as a currency transporter. Francisco was given responsibility for currency pickups in Houston and Los Angeles.

On January 31, 1990, Francisco was instructed by Mr. X to travel from Miami to Houston to receive \$500,000 in cash from "Rey," who subsequently was identified as co-defendant Reynaldo Rodriguez. After his arrival in Houston, Francisco met Rodriguez at a local hotel. At that meeting, Rodriguez expressed his reluctance to bring the money to the hotel and insisted upon a different location. Francisco then contacted another high-level manager within the organization, co-defendant Diego Echeverri, who assured Francisco that traveling with Rodriguez was a safe proposition and that the location where the money was stored was safe, secret, and was the same place where drugs were received. Francisco agreed to follow Rodriguez.

On the way, Francisco and Rodriguez stopped at a restaurant for lunch. While there, Rodriguez contacted his assistant, Jimenez, and instructed him to come to the restaurant. A short time later, Jimenez joined Rodriguez and Francisco there.

Jimenez told them that the \$500,000 was packed in an ice-cooler at another location and proposed taking Francisco's car to that location to put the cooler in the trunk, and then returning to the restaurant with it. Agents on surveillance observed Jimenez enter Francisco's car and drive to 708½ Chenevert, Houston, subsequently identified as Jimenez's residence. Agents watched Jimenez exit the vehicle, enter the residence, and emerge carrying a red and white ice chest, which he placed in the trunk of a car. Jimenez then returned to the restaurant.

Meanwhile, Rodriguez had advised Francisco that in the future, Jimenez was to be contacted directly for currency pickups. When Jimenez returned, he gave Francisco's car back to him, with the ice chest full of money stowed inside. Francisco returned to his hotel and counted the money, which he then transported to Florida, where he turned it over to Eduardo who, in turn, laundered it for Mr. X.

On February 8, 1990, Mr. X advised Francisco to prepare for another currency-pickup trip to Houston and, on February 10, 1990, Eduardo instructed Francisco to fly to Houston to pick up another \$500,000. Once in Houston, Francisco contacted Rodriguez, who told him that the money was not ready for pickup and asked Francisco to call again in two hours. On the second call to Rodriguez, Rodriguez instructed Francisco to contact Jimenez. Francisco called Jimenez and a meeting was arranged at a local restaurant.

In the meantime, agents had established surveillance at Jimenez's residence, and observed him leave in a van and proceed to a tire shop, where he met briefly with Rodriguez. Jimenez then

left the tire shop and returned to his residence, where he was observed unloading a red and white ice chest from his van and going into his residence. Jimenez then drove to the local restaurant where Francisco was waiting. As before, Jimenez took Francisco's car, drove it to his residence, placed a red and white ice chest into the trunk of the vehicle, and returned the vehicle to Francisco, who remained waiting at the restaurant. Upon delivering the money to Francisco, Jimenez advised him that there was a shortage of money, and it was therefore agreed that the money would be counted before Francisco left Houston.

Francisco then went to the DEA offices in Houston, where the money was counted and found to be \$31,000 short of the \$500,000 Francisco was supposed to receive. Francisco contacted Echeverri, who stated that he would check with Rodriguez about the shortage. A short time later, Jimenez called Francisco and told him that Rodriguez had ordered him also to count the money to confirm the shortage.

Francisco and Jimenez then met at a local hotel and checked into a room. The money was counted, and it was confirmed that \$31,000 was missing. Jimenez placed a telephone call to Rodriguez and blamed "Kuki")) later identified by agents as Marcelo Marquette, a drug distributor for the organization)) for the shortfall. Rodriguez instructed Jimenez to give Francisco another \$31,000. Jimenez told Francisco that obviously there had been a mistake and handed Francisco a piece of paper indicating that Jimenez had received \$370,920 from "Kuki." Jimenez informed

Francisco that he had an additional \$129,000 and requested Francisco to follow him to his residence, where Jimenez supplied Francisco with the missing \$31,000. Francisco then delivered the funds to the DEA office for processing. The \$500,000 subsequently was transported back to Miami and delivered to Eduardo.

In March of 1990, Victor Rayo)) previously convicted and now cooperating with the government)) agreed to transport twenty-six kilograms of cocaine from Houston to a Fernando Lopez in New York. Rayo had been employed as a high level manager for the organization, engaged in distributing cocaine from Houston to New York. Rayo instructed Echeverri to travel to Miami to pick up a 1985 grey Oldsmobile outfitted with secret compartments. The Oldsmobile was to be brought to Houston to be used to transport cocaine to New York. Subsequently, on March 28, 1990, agents on surveillance followed Rodriguez and Echeverri to Jimenez's residence, where Jimenez was storing the Oldsmobile.

The men encountered difficulties loading the Oldsmobile; as only twenty kilograms of cocaine would fit inside the secret compartments, the remaining six kilograms were sold in Houston. Echeverri then departed for New York, arriving there on March 30, 1990, followed by government surveillance teams. Once in New York, Echeverri parked the Oldsmobile on a public street. DEA special agents seized the vehicle, and a search revealed 19.7 kilograms of eighty-eight-percent pure cocaine secreted in the rear quarter panels.

II.

Jimenez was indicted on July 31, 1991, and charged with five counts of money laundering, possession of cocaine with intent to distribute, and conspiracy to commit money laundering and to possess cocaine with intent to distribute, in violation of 18 U.S.C. §§ 2 and 1956(a)(1)(A) and 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846. In exchange for a plea of guilty to counts 2 (money laundering) and 8 (conspiracy to possess cocaine with intent to distribute), the government promised to move to dismiss the remaining counts at sentencing. The government also agreed to move for a downward departure from the sentencing guidelines pursuant to U.S.S.G. § 5K1.1, in the event that Jimenez provided substantial assistance to the government.

Pursuant to the agreement, the district court sentenced Jimenez to 121 months on counts 2 and 8, to be served concurrently, a three-year term of supervised release on count 2, and a concurrent five-year term of supervised release on count 8, and ordered him to pay special assessments totaling \$100. The Assistant United States Attorney ("AUSA") handling the case did not recommend a downward departure for substantial assistance, and the court did not depart downward.

III.

In Santobello v. New York, 404 U.S. 257, 262 (1971), the Court stated that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to

be part of the inducement or consideration, such promise must be fulfilled." We apply an objective standard to determine whether the government's conduct is consistent with the defendant's reasonable understanding of the terms of his plea agreement. United States v. Chagra, 957 F.2d 192, 194 (5th Cir. 1992). We therefore look to the terms of Jimenez's plea agreement to determine whether the government's conduct accorded with his reasonable understanding of what he agreed to in his plea.

The written plea agreement entered into by the parties states, in pertinent part,

The Government agrees to bring to the attention of the court, [sic] the nature and extent of cooperation rendered by Gilberto Jimenez-Jimenez to any law enforcement personnel. The Government further agrees that if the extent of the cooperation is such that it would amount to substantial assistance, then the Government will so advise the Court and request a downward departure from the sentencing guidelines. The decision on substantial assistance will be made by the Government. If the Government files a motion, the Court may depart pursuant to Section 5(k)(1) of the sentencing guidelines. The decision on departure is totally within the discretion of the Court.

At sentencing, the AUSA represented to the court that agents from the DEA had debriefed Jimenez and found him reticent and evasive under questioning and that he could not be of substantial assistance to them. Although Jimenez's counsel disputed whether the DEA debriefing was in fact an initial interview conducted prior to the plea agreement, the district court, on the basis that the government retained the discretion not to recommend departure, declined to award the downward departure.

As we read the terms of the plea agreement, it appears to be

ambiguous with respect to whether the government has bargained away its discretion to recommend the departure once the defendant has provided what the government deems to be substantial assistance. Such a conclusion is important, because in order for Santobello's injunction to apply, the alleged promise must be determined to have been a part of the inducement to the bargain. If the government retained complete discretion as to whether it would recommend a departure, as the third-to-last quoted sentence above suggests, then such a provision in a plea bargain could not have constituted part of the bargain and would not be enforceable by the criminal defendant. See United States v. Campbell, No. 92-1509, 1993 U.S. App. LEXIS 6884, at *19-*25 & n.3 (5th Cir. Apr. 5, 1993) (harmozing Santobello and United States v. Wade, 112 S. Ct. 1840 (1992), by distinguishing on basis of whether plea bargain retains discretion in prosecutor to recommend departure).

We conclude that in the plea agreement the prosecutor did commit himself to recommending the departure if, in his estimation, Jimenez offered substantial assistance. While the agreement's terms retain in the prosecutor discretion to determine whether the extent of Jimenez's assistance warranted departure, the government did not have discretion to deny the recommendation once having made that determination in Jimenez's favor.

This conclusion brings the instant case squarely within the facts of our recent opinion in Campbell and requires that the government, at the least, provide the defendant with an opportunity to render assistance to government agents. Because it is unclear

from the record whether Jimenez was given that opportunity, we vacate and remand to the district court so that this factual determination may be made. See United States v. Melton, 930 F.2d 1096, 1098-99 (5th Cir. 1991) ("If [defendant] . . . stood ready to perform but was unable to do so because the government had no further need or opted not to use him, the government is obliged to move for a downward departure."). If Jimenez should succeed in convincing the district court that he stood ready to assist the government, but was denied an opportunity to do so, he will be entitled to specific performance of the plea agreement in sentencing proceedings before a different judge. See United States v. Valencia, 985 F.2d 758, 761 (5th Cir. Feb. 24, 1993).¹

IV.

Jimenez also asserts that the district court erred in its refusal to reduce his sentence by four levels pursuant to U.S.S.G. § 3B1.2(a), based upon his minimal role in the offense. The court, however, did award Jimenez a two-level reduction under U.S.S.G. § 3B1.2(b) for his minor participation in the offense. We review a district court's determination of a defendant's mitigating role in the offense under a clearly erroneous standard. United States v. Hatchett, 923 F.2d 369, 376 (5th Cir. 1991). Findings on this issue are not clearly erroneous if they are "plausible in light of the record reviewed in its entirety." United States v. Fields, 906

¹ The government agrees that remand is necessary on this issue, for further development of the record.

F.2d 139, 142 (5th Cir. 1990).

Jimenez originally raised no objections to the factual findings contained in the presentence investigation report ("PSI"), but later objected to the PSI's conclusion that he knew the car he stored contained twenty kilograms of cocaine. The district court nevertheless adopted the PSI's factual findings, and we cannot say it clearly erred in doing so. Jimenez repeatedly admitted at his presentence interview that he knew the car contained cocaine or something of that nature.

Jimenez contends that his lack of knowledge of the scope or structure of the criminal enterprise constitutes a factor warranting a finding of minimal participation. His role, he argues, was that of a mere "mule," delivering the car and money without knowledge of the latter's source or of the former's contents.

Although Jimenez's lack of knowledge respecting the conspiracy is indicative of a minimal role, see U.S.S.G. § 3B1.2, application note 1, the guidelines state that "[i]t is intended that the downward adjustment for a minimal participant will be used infrequently." Id., application note 2. Moreover, the PSI concluded that Jimenez "functioned as Reynaldo Rodriguez' primary assistant in the money laundering operation. He was responsible for currency collections, storage and subsequent delivery to the [cooperating individual] and undercover agent. . . . Jimenez-Jimenez also safe-housed the 1985 Oldsmobile used by Echeverri to transport 20 kilograms of cocaine to New York and was aware of the vehicle's purpose."

In short, the PSI rejected Jimenez's assertions that he was ignorant of the car's purpose and believed the money to be derived from lottery winnings. Although there certainly were others involved in the conspiracy more culpable than Jimenez, his role cannot properly be described as minimal, and the decision to grant him a reduction for minor participation therefore was correct. See U.S.S.G. § 3B1.2, application note 3. As the Background note to that section points out, "[t]he determination whether to apply subsection (a) [minimal participant] or subsection (b) [minor participant], or an intermediate adjustment, involves a determination that is heavily dependent upon the facts of the particular case." The district court's conclusion that a reduction for a minor role was indicated was certainly "plausible in light of the record reviewed in its entirety," and we decline to disturb it.

v.

Lastly, Jimenez's claim of ineffective assistance of counsel, inasmuch as it arises from his counsel's purported failure to secure a debriefing session for his client prior to sentencing, is unripe for review, given our disposition of this appeal. Moreover, Jimenez did not present this claim to the district court in the first instance; as a result, the record has not been adequately developed for us to review the merits of his claim. See United States v. Navejar, 963 F.2d 732, 735 (5th Cir. 1992).

We therefore AFFIRM in part and REVERSE and REMAND in part, for a determination as to whether Jimenez was given an opportunity

to provide substantial assistance to the government.