UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-2518
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ISRAEL PINEDA,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas (CR-H-92-0013-01)

June 3, 1993

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Israel Pineda, convicted after pleading guilty to conspiracy to possess with the intent to distribute over five kilograms of cocaine, contends that his plea was involuntary, because the government breached the plea agreement, and because the district court failed to comply with the requirements of Fed. R. Crim. P. 11. We **AFFIRM**.

I.

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[1] 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 Pursuant to that rule, the court has determined that this opinion should not be published.

In a two-count indictment, Pineda was charged with conspiracy to possess with the intent to distribute in excess of five kilograms of cocaine (count one), and aiding and abetting the felony possession of more than five kilograms of cocaine (count two). He agreed to plead guilty to count one in exchange for the government's promises to (1) dismiss count two; (2) recommend that he be granted a reduction in his Sentencing Guidelines offense level for acceptance of responsibility; and (3) recommend that his sentence not exceed 151 months imprisonment. Those terms are reflected in a written plea agreement, signed by Pineda and his attorney.[2]

At the rearraignment hearing, conducted on the day Pineda signed the plea agreement, the district court recited the terms as stated in the written agreement regarding what the Government promised Pineda in exchange for his guilty plea. Pineda acknowledged that he understood the terms of the agreement. At the conclusion of the hearing, the district court accepted the plea, finding that it was knowing and voluntary.

The presentence report also recited the terms of the agreement, and Pineda did not object to this portion of the PSR. At his sentencing hearing, however, Pineda asked to address the court; and the following exchange took place:

> [Pineda]: .... Your Honor, please note that I did cooperate with the DEA, and they promised me that if I would cooperate with them, that they would recommend to you that a -- a decrease in my sentence.

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[2] Pineda is represented by different counsel on appeal.

> They told me if I were to lie, that they would not help me. The prosecutor, the assistant U.S. attorney said if I were to lie, they would not help me. Those are the words of the assistant U.S. attorney....
>
> THE COURT: Well, wait a minute. There is nothing in the plea agreement involving [the] government's agreement to move for a departure under 5K1.1, is there?
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> [Prosecutor]: No, Your Honor. As far as I know, the only ... conversations that were had along that line were if in fact he did debrief and cooperate with the government, the Government would consider that, but that was done--that was mentioned to the Government like the day of the plea.
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> I have not received any information from any agents that he has--in fact I believe it was after the plea, and I have not received any information from any agents or defendant's counsel that he in fact has debriefed or had any contact with any agents from the Government since the day of the plea, Judge. So I'm a little bit at a loss.
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> THE COURT: Mr. DeVictoria [defense counsel], can you shed any light on this?
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> MR. LOPEZ DEVICTORIA: Yes, Your Honor. I was told by my client today that he did met [*sic*] with [DEA] Agent Phoenice. But I don't know what was the extension [*sic*] of the conversation because I was not participating in that.
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> THE COURT: Well, it's not a part of the plea agreement. The Government hasn't filed a motion. If in fact he has cooperated and the government moves for downward departure, I can consider it under Federal Rule of Criminal Procedure 35 even after judgment.
>
> [Prosecutor]: For the Court's information, I certainly will go forward and contact the agent and see, and if appropriate, I would make such a motion, as I would for any defendant.

The alleged promise was not mentioned again, and Pineda neither objected to the imposition of sentence, nor sought to

withdraw his plea. The district court sentenced him to 136 months imprisonment, five years of supervised release, and a $50 special assessment.

II.

A.

We first consider, *sua sponte*, whether Pineda's notice of appeal is sufficient to properly raise the issues he asserts. *See, e.g.*, ***United States v. Winn***, 948 F.2d 145, 153 (5th Cir. 1991) ("when necessary, as here, we must examine the basis of our own jurisdiction *sua sponte*"), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1599 (1992). A defendant who alleges that a plea agreement has been breached has the option of seeking one of two remedies on appeal: (1) specific performance, which requires that the sentence be vacated and the defendant resentenced by a different judge; or (2) withdrawal of the guilty plea, and the opportunity to plead anew, which requires vacation of both the conviction and the sentence. *E.g.,* ***Santobello v. New York***, 404 U.S. 257, 263 (1971); ***United States v. Valencia***, 985 F.2d 758, 761 (5th Cir. 1993); ***United States v. Goldfaden***, 959 F.2d 1324, 1329 (5th Cir. 1992). Rule 3(c) of the Federal Rules of Appellate Procedures provides that a notice of appeal "shall designate the judgment, order or part thereof appealed from".

Pineda's notice of appeal was prepared on a form containing blanks for "Conviction only", "Conviction and sentence", "Sentence only" and "Order". A check appears only in the blank next to "Sentence only". However, he does not request specific performance

of the plea agreement; instead, the relief he seeks -- vacation of his guilty plea -- if granted, would require vacation of both his conviction and sentence.

In ***United States v. Ramirez***, 932 F.2d 374 (5th Cir. 1991), our court noted that, although the first clause of Rule 3(c), which requires that the notice of appeal specify the parties taking the appeal, is jurisdictional, "we broadly construe the second clause ..., which requires that [it] designate the judgment or order from which an appeal is taken." ***Id***. at 375. In that case, the defendant had drawn a line through, and initialed, the portion of the typewritten notice of appeal which stated that he was appealing his sentence, but left intact the portion which stated that he was appealing the judgment. ***Id***. at 375. Concluding that the defendant's intent to appeal his sentence was readily apparent, and that the government had not demonstrated any prejudice, our court granted the defendant's motion to amend his notice of appeal.

The situation we face is the opposite of that addressed in ***Ramirez***: Pineda's notice of appeal designates his sentence, but not his conviction. The ***Ramirez*** court reasoned that "[a] criminal defendant who appeals his sentence but not his conviction is likely acknowledging his guilt and merely contesting his punishment," but the converse was not necessarily true. ***Id***. at 376. Here, that is not the case; Pineda's intent to appeal his conviction is readily apparent in his brief, in which he seeks only vacation of the plea, and not specific performance. The Government has fully responded to Pineda's arguments, and will not be prejudiced by our

consideration of them.[3] Accordingly, we will liberally construe Pineda's notice of appeal to include a challenge to his conviction as well as his sentence.

B.

Pineda contends that the Government promised to recommend a decrease in his sentence if he cooperated, and that the Government's failure to keep this promise rendered his guilty plea involuntary.[4]

"[W]hen 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." ***Santobello v. New York***, 404 U.S. at 262. In determining whether there has been a breach of the plea agreement, we must determine "whether the government's conduct is consistent with the defendant's reasonable understanding of the agreement." ***Valencia***, 985 F.2d at 761.[5]

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[3] In fact, the Government states in its brief that "Pineda timely appealed his *conviction*". (Emphasis added.)

[4] Pineda's argument is rather confusing: although his contention that the plea agreement was breached is premised on an assertion that the alleged promise was part of the plea agreement, he also contends that his plea was involuntary because it "was based on *a promise not a part of the agreement*". Needless to say, there could be no breach unless the alleged promise *was* part of the agreement.

[5] The Government urges us to review Pineda's claim only for plain error. Because "[t]he failure of the Government to fulfill its promise ... affects the fairness, integrity, and public reputation of judicial proceedings[,] ... a prosecutor's breach of a plea agreement can amount to plain error." ***Goldfaden***, 959 F.2d at 1328. Although the Government correctly asserts that Pineda is contending for the first time on appeal that his plea was involuntary, and did not move to withdraw his plea in the district

The first step in our analysis is to determine whether the alleged promise was part of the plea agreement, "a factual issue to which the clearly erroneous standard of review is applied." ***United States v. Chagra***, 957 F.2d 192, 194 (5th Cir. 1992). The written plea agreement does not contain the alleged promise. Instead, it states:

> I have received no promises of leniency, or of any other nature, other than those made a part of this pleading, from my own attorney, the attorneys for the United States or from any other person, to induce me to plead guilty.

In appropriate circumstances, of course, we will look beyond the four corners of a written plea agreement in determining what promises induced the plea. For example, although the plea agreements in ***United States v. Fields***, 906 F.2d 139 (5th Cir.), *cert. denied*, 498 U.S. 874 (1990), and ***United States v. Melton***, 930 F.2d 1096 (5th Cir. 1991), contained language similar to that quoted above, both agreements were transmitted with cover letters from the prosecutor stating that the government would recommend departure based upon the defendant's complete debriefing and substantial assistance to the government. ***Melton***, 930 F.2d at 1098; ***Fields***, 906 F.2d at 141-42 & nn. 1 & 2. Here, however, there is no written evidence, such as the cover letters in ***Fields*** and ***Melton***. In the absence of such evidence, we appropriately accord greater weight to the language of the written agreement.

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court, he did raise the issue of the alleged promise at his sentencing hearing, and the district court found that the alleged promise was not part of the plea agreement.

In any event, our review of the record has uncovered no evidence that the alleged discussion of a downward departure took place *before* Pineda entered his guilty plea, and Pineda points to none. Therefore, the alleged promise could not have induced the plea. Despite being given an opportunity to do so at the rearraignment hearing, neither Pineda nor his counsel mentioned the alleged promise. Pineda specifically acknowledged that he understood the terms of the agreement after the district court recited them to him during that hearing. Moreover, Pineda did not object to the portion of the PSR outlining the terms of the plea agreement. Pineda first referred to the alleged promise at the sentencing hearing, but did not seek to withdraw his plea or object to the imposition of sentence at that time. We conclude that the district court did not clearly err in finding that the alleged promise was not part of the plea agreement.

Furthermore, Pineda's attorney implicitly agreed that it would be appropriate for the prosecutor to look into the matter and file a Rule 35 motion if Pineda had in fact provided substantial assistance to the DEA. Having previously acquiesced in the propriety of that procedure, Pineda cannot now contend, through new counsel on appeal, that the Government violated the plea agreement. *See* ***United States v. Gongora***, No. 92-2265 (5th Cir. Feb. 17, 1993) (unpublished).

C.

Pineda contends that the district court violated Fed. R. Crim. P. 11(d),[6] because it failed to fully address whether his plea was voluntary, and failed to either specifically or indirectly inquire about duress, threats, or outside promises.

We review a district court's failure to comply with Rule 11 for harmless error, unless the court completely fails to address one of the core concerns, in which case automatic reversal is required. ***United States v. Adams***, 961 F.2d 505, 510 (5th Cir. 1992). One of the core concerns of Rule 11 is whether the guilty plea was coerced. ***Id***. Rule 11(d) requires the court to determine whether the guilty plea is voluntary by addressing the defendant personally in open court, and determining that the plea is "not the result of force or threats or of promises apart from a plea agreement". Fed. R. Crim. P. 11(d).

Rule 11(d) does not require the district court to invoke talismanic phrases or to use the exact language of the rule when inquiring into voluntariness. "Even though a district court does not use the exact language of Rule 11(d), it satisfies the specific

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[6] Rule 11(d) provides:

> The court shall not accept a plea of guilty ... without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty ... results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.

requirement of Rule 11(d) when it exposes to public view the terms of any plea agreement and ensures that the plea is voluntary." ***United States v. Andrews***, 918 F.2d 1156, 1162-63 (5th Cir. 1990), *overruled on other grounds*, ***United States v. Bachynsky***, 934 F.2d 1349 (5th Cir.) (*en banc*), *cert. denied*, ___ U.S. ___, 112 S. Ct. 402 (1991).

In open court, the district court went over the plea agreement in detail, stated what the Government had promised, thoroughly explained that the Government's recommendations were not binding on the court, and asked Pineda if he understood the terms of the plea agreement. We conclude that it conducted an adequate inquiry into the voluntariness of the plea.

III.

For the foregoing reasons, the conviction and sentence are **AFFIRMED.**