

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-2530
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JUAN DE LOS SANTOS-VILLARREAL,

Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Texas
(CR-H-91-132-13)

February 25, 1993

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

Juan De Los Santos-Villarreal was charged in four counts of a 28-count indictment with various drug and money-laundering offenses. Pursuant to a plea agreement, De Los Santos-Villarreal entered guilty pleas to two counts, and the remaining two counts

*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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

were dismissed by the court. The plea agreement included provisions concerning the Government's willingness to recommend a grant of acceptance of responsibility and that it would also file a § 5K1.1 motion for downward departure should De Los Santos-Villarreal provide substantial assistance.

During the sentencing hearing, De Los Santos-Villarreal indicated that he thought he was pleading guilty to counts which would result in a 5-year term of imprisonment; he conceded that during the Rule 11 proceeding, he did not indicate to the court that anyone had promised him that he would receive such a sentence. At that time, the Government indicated that it did not intend to file the motion for § 5K1.1 departure. The Government continued that, although the possibility of a § 5K1 departure motion was included in the plea agreement, it was not satisfied that De Los Santos-Villarreal was cooperating or that he was being candid during the debriefing. De Los Santos-Villarreal raised no objection to the Government's intention not to file a § 5K1 motion during the proceeding.

Based on the Presentence Report's (PSR) recommended total offense level of 24 and a criminal history category of I, the court imposed concurrent sentences of 120 and 63 months and concurrent supervised release terms of 5 and 3 years on counts 6 and 8, respectively. PSR ¶¶ 74, 80, 81.

OPINION

De Los Santos-Villarreal asserts that the Government breached the plea agreement by not filing a § 5K1.1 motion for downward

departure. He contends that the Government should be required to recommend the departure because its promise to file the motion induced him to plead guilty. De Los Santos-Villarreal argues that he was willing to testify before the grand jury or at trial but that he was never called. He argues that the Government should have advised him that it did not believe he was being candid and therefore would not recommend that he was eligible for the § 5K1.1 motion.

The Government argues that De Los Santos-Villarreal waived his right to appellate review of this issue because he did not raise it before the district court. Alternatively, the Government argues that De Los Santos-Villarreal failed to make a threshold showing that its refusal to file a § 5K1.1 motion was attributed to an unconstitutional motive. Instead, the Government contends that De Los Santos-Villarreal is not entitled to relief because he did not provide candid and substantial assistance.

The plea agreement provided in pertinent part:

Further, I agree to cooperate in good faith with the Government by providing truthful and complete information concerning this and all other offense[s] about which I might be questioned by agents of law enforcement.

. . .

Upon fulfillment of this promise to cooperate fully, completely and truthfully, the Government may, in its sole discretion, file a motion with the Court recommending departure under § 5K1.1 from the application of the Sentencing Guidelines in the Court's assessment of my punishment. The Government alone will decide if any assistance I provide is "substantial assistance." If the Government believes I have provided substantial assistance; it will ask the Court to sentence me to not more than 130 months in prison.

I understand that neither my attorney or the attorney for the United States will determine what my sentence will be. If I have fulfilled my agreement as set out above, the United States Attorney at his sole discretion, will recommend the Court sentence me below the recommended range provided by the U.S. Sentencing Guidelines.

"[T]he condition limiting the court's authority [under both 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1] gives the Government a power, not a duty, to file a motion when a defendant has substantially assisted." Wade v. United States, ___ U.S. ___, 112 S. Ct. 1840, 1843, 118 L. Ed. 2d 524 (1992). District courts should review a prosecutor's decision not to file a § 5K1.1 motion only if the refusal was based on an unconstitutional motive such as race or religion. Id. at 1843-44.

If a guilty plea is entered as part of a plea agreement, the Government must strictly adhere to the terms and conditions of its promises. United States v. Kerdachi, 756 F.2d 349, 351-52 (5th Cir. 1985). When a guilty 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. 257, 262, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971). The measure of compliance is the expressed terms of the agreement. United States v. Cates, 952 F.2d 149, 152-53 (5th Cir.), cert. denied, 112 S. Ct. 2319 (1992).

To determine whether the Government breached the plea agreement, the Court must determine whether the Government's conduct is consistent with the defendant's reasonable understanding of the agreement. United States v. Huddleston, 929 F.2d 1030, 1032

(5th Cir. 1991). De Los Santos-Villarreal's counsel acknowledged, without objection, that De Los Santos-Villarreal would not get the benefits of a § 5K1.1 motion. Because De Los Santos-Villarreal did not object, the plain error standard applies. United States v. Lopez, 923 F.2d 47, 49 (5th Cir. 1991). At that time, the court proceeded to question the Government about its reasons for not filing the motion. The following colloquy took place:

THE COURT: Was it part of a plea agreement that if he cooperated, that a 5K would be filed?

MR. MCCORMICK: Yes, sir, if he provided substantial assistance to the Government.

THE COURT: Was it the Government's position that he did not, or was it that you had all the evidence that you could receive from the others?

MR. MCCORMICK: It was our position that he did not provide substantial assistance, Your

Honor. The plea agreement addresses that. . . .

. . .

Mr. MCCORMICK: In our sole discretion, if we felt that he had provided substantial assistance. Following the debriefing of this individual, we were not satisfied based on the debriefing of others and the cooperating witnesses we had before any of the pleas were taken. I communicated to Counsel that his client was not, in my opinion, cooperating and being candid and forthcoming in the debriefing. . . ., and there never was a change in the defendant's position.

THE COURT: All right. And, as I recollect, he did not testify?

Mr. MCCORMICK: That's correct, he did not.

In our view the language of the plea agreement is clear and unambiguous that it was within the government's "sole discretion" as to whether De Los Santos-Villarreal's cooperation constituted

"substantial assistance" and as to whether the government would file "a motion recommending departure under § 5K1.1. The rationale in Wade was applied to a case involving a plea agreement, United States v. Urbani, 967 F.2d 106 (5th Cir. 1992), and the court upheld the provision in the agreement which stated that the "defendant's cooperation does not automatically require the Government to request a departure from the sentencing guidelines for substantial assistance." 967 F.2d at 107 n.2, 108-10. In light of Wade and Urbani, De Los Santos-Villarreal is not entitled to specific performance of the plea agreement as he not only failed to raise in the district court an objection to the Government's decision not to file the §5K1.1 motion, but on appeal, he does not allege an unconstitutional reason for the failure to file the motion. The Government stated that De Los Santos-Villarreal's cooperation was limited and not, in its opinion, deserving of a § 5K1.1 motion. There was no plain error.

Judgment of the trial court is AFFIRMED.