

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2568
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EMMANUEL EPERE OPURUM,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas
(CR-H-91-193-2)

(September 20, 1993)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:¹

Having pleaded guilty, Emmanuel Epere Opurum appeals his sentence, contending that the district court failed to comply with Fed. R. Crim. P. 32(c)(3)(D)(i), by not addressing a factual inaccuracy that was raised regarding his role in the offense. The appeal is **DISMISSED** as frivolous, pursuant to Local Rule 42.2.²

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 Pursuant to that rule, the court has determined that this opinion should not be published.

² The district court denied Opurum's request to proceed IFP on appeal, finding that the appeal was not taken in good faith. Opurum's counsel filed a motion to withdraw, which was denied. Although counsel was ordered to file either a statement of issues to be raised on appeal in the form of an IFP motion, or a motion to withdraw and a brief in accordance with *Anders v. California*, 386

I.

Opurum pleaded guilty to possession with the intent to distribute in excess of one kilogram of heroin. The applicable sentencing guideline range was between 121 and 151 months imprisonment. Based on Opurum's substantial assistance, the Government filed a motion for a downward departure below the statutory minimum, pursuant to U.S.S.G. § 5K1.1. Opurum was sentenced to 72 months imprisonment.

After the district court pronounced sentence, Opurum's court-appointed counsel informed the district court that he had prepared both a notice of appeal and a "Waiver of Right of Appeal" form. Counsel advised the court that he had discussed both options with Opurum in preparation for the sentencing hearing, and asked Opurum to state on the record whether he wished to appeal or to waive his right to an appeal. The following discussion transpired:

THE COURT: All right. Mr. Opurum, the question is, do you want to go to the Appeals Court at no cost to yourself, or do you want to simply accept your sentence and begin serving it?

THE DEFENDANT: Accept my sentence, Your Honor.

THE COURT: And waive the right to appeal? Give up the right to appeal?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right, sir. You may sign that if you like.

U.S. 738 (1967), within 30 days, counsel did neither. Instead, after the 30-day period had expired, counsel filed a brief, contending that the district court failed to make findings of fact as required by Fed. R. Crim. P. 32. We construe Opurum's brief as a request for leave to proceed IFP, and grant the request.

[OPURUM'S COUNSEL]: Your Honor, may the record reflect that he's signing the document in open court at this time?

THE COURT: Yes sir....

In the signed waiver form, Opurum acknowledged that:

I understand that I have the right to appeal in this case, and to have the assistance of appointed counsel on the appeal if I am unable to afford retained counsel. I also understand that if I am financially unable to pay the costs of appeal, that I have the right to prosecute the appeal without payment of costs. I have discussed my rights in the matter of my appeal with my attorney. Knowing all of this, I do not wish to file a Notice of Appeal in this case.

Nevertheless, Opurum filed an out-of-time *pro se* notice of appeal, alleging that his sentence was based on an erroneous presentence report. Our court remanded the case to the district court for a determination whether Opurum's untimely filing was the result of excusable neglect. The district court granted him leave to file an out-of-time appeal.

II.

A criminal defendant may waive his right to appeal, but such "waiver must be informed and voluntary." ***United States v. Melancon***, 972 F.2d 566, 567 (5th Cir. 1992). A defendant's waiver of his right to appeal "requires the special attention of the district court." ***United States v. Baty***, 980 F.2d 977, 979 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2457 (1993). "It is up to the district court to insure that the defendant fully understands h[is] right to appeal and the consequences of waiving that right." ***Id.***

The record demonstrates that Oपुरum unequivocally waived his right to appeal his sentence after the sentence was imposed. As reflected by the written waiver signed by Oपुरum, he fully understood his right to appeal. Because Oपुरum waived his right to appeal *after* the sentence had been imposed, there can be no doubt that he was aware of the consequences of the waiver. See **Melancon**, 972 F.2d at 567-68 ("the uncertainty of Appellant's sentence does not render his waiver uninformed"); cf. **id.** at 571 (Parker, J., concurring specially) (a waiver of a right to appeal a sentence that has yet to be imposed "is inherently uninformed and unintelligent"). Accordingly, this appeal is frivolous and entirely without merit. See Local Rule 42.2.

III.

The appeal is, therefore,

DISMISSED.