IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4128
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES MICHAEL DEMILIA,

Defendant-Appellant.

- - - - - - - - - -

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:91-CV-168

- - - - - - - - - -

March 19, 1993

Before KING, DAVIS, and SMITH, Circuit Judges.

PER CURIAM:[*]

Demilia argues that the Government breached its plea agreement "by the Courts [sic] use of the dismissed counts of the indictment being used to establish the offense level for sentencing purposes." He argues that because the count of the indictment to which he pleaded guilty indicated the amount of marijuana attributable to the offense of conviction was 130 pounds, his sentence should not have been based on 1,027 pounds of marijuana.

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

A district court is not bound by the quantity of drugs mentioned in the indictment or in the plea agreement, "but may with the aid of the presentence report, determine the facts relevant to sentencing." United States v. Garcia, 902 F.2d 324, 326 (5th Cir. 1990)(quoting U.S.S.G. § 6B1.4(d)). Further, an examination of the record reveals that Demilia agreed to the 1,027-pound figure in the plea agreement.

Demilia also argues that the district court should not have accepted the plea agreement if it intended to count the dismissed charges in calculating his sentence. The district court accepted a plea agreement which stipulated that 1,027 pounds of marijuana were attributable to Demilia. The court used that amount to sentence Demilia. Demilia's argument is without merit, and the judgment of the district court is AFFIRMED.