

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4929
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROGER MICHAEL GARSON,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 6:90-CR-58(1)

- - - - -
March 16, 1993

Before KING, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:*

A court may reduce the offense level by two points if the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct. U.S.S.G. § 3E1.1. The standard for review of a district court's finding on whether a defendant has accepted responsibility for his crime is "great deference" which is more deferential than a pure clearly erroneous standard. United States v. Brigman, 953

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

F.2d 906, 909 (5th Cir. 1992) petition for cert. filed (U.S. Aug. 4, 1992) (No. 92-5417).

In determining whether a defendant is entitled to credit for acceptance of responsibility, a factor to be considered is whether the defendant has voluntarily terminated his criminal conduct. § 3E1.1, comment. (n. 1(a)). The fact that Garson tested positive for drug use following his arrest indicates that Garson was not truly remorseful for his crime. See United States v. O'Neil, 936 F.2d 599, 600-01 (5th Cir. 1991) (Although the defendant cooperated with the Government, the fact that he used marijuana and was involved in a burglary while on bail could be considered in determining whether he had accepted responsibility for his crime).

Further, an obstruction of justice enhancement ordinarily precludes a credit for acceptance of responsibility. § 3E1.1, comment. (n. 4). An escape from custody prior to trial constitutes a basis for enhancing a defendant's sentence for obstruction of justice. § 3C1.1, comment. (n. 3(e)). The fact that Garson remained a fugitive for seventeen months also indicated that he had not accepted responsibility for his actions. The district court did not abuse its discretion in determining that Garson had failed to accept responsibility for his offense.

Garson contends that the district court failed to sentence him in accord with the provisions of his plea bargain because his Sentencing Guideline base offense level was based on a quantity of drugs greater than that involved in the offense of conviction.

He contends that the Government promised that his sentence would be based on less than 100 kilograms of marijuana. If "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. 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971).

The plea agreement does not specifically state what amount of marijuana would be used in determining the defendant's offense level. "Under the guidelines, the base offense level can reflect quantities of drugs not specified in the count of conviction if they 'were part of the same course of conduct or part of a common scheme or plan as the count of conviction.'" United States v. Mir, 919 F.2d 940, 943 (5th Cir. 1990) (citations omitted). The plea bargain reflected that Garson was aware that he was to be sentenced under the Sentencing Guidelines and that the Court had not yet determined his sentence. The agreement further stated that "[b]oth parties recognized that nothing herein limits the sentencing discretion of the Court, and no agreement has been made concerning the sentence that will be imposed as that matter is exclusively with the Court." The plea agreement further reflected that any estimate of the probable sentencing range under the Sentencing Guidelines by defense counsel or the Government was "a prediction, not a promise," and that such estimate was not binding on the Government or the Court. Garson acknowledged at his re-arraignment that any discussions that he had with the Government were not binding on the Court and that

the determination of the length of the sentence was exclusively within the province of the Court.

The record reflects that the Government did not promise Garson that he would be sentenced on the basis of the quantity of drugs involved in the offense of conviction and that Garson was aware that the Government had no control over the sentence imposed by the district court. Garson has not shown that his rights under Santobello were violated.

AFFIRMED.