IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-5691
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GERARDO GARCIA,

Defendant-Appellant.

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Appeal from the United States District Court
for the Western District of Texas
USDC No. SA-92-CA-534 (SA-90-CR-218-2)

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(October 28, 1993)

Before POLITZ, Chief Judge, and SMITH and WIENER, Circuit Judges.

PER CURIAM:*

"Relief under . . . § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice." United States v. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992). "A district court's technical application of the Guidelines does not give rise to a constitutional issue." Id.

Vaughn argued that his sentence had been incorrectly

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

increased for his discharge of a firearm and for his obstruction of justice. Like Garcia, he did not appeal his sentence. He was barred from raising such issues in a § 2255 proceeding. Id.

Garcia could have, but did not, raise in a direct appeal the issue of the court's compliance vel non with the plea agreement. The court, however, was not bound by the plea agreement. United States v. Shacklett, 921 F.2d 580, 583 n.3 (5th Cir. 1991); United States v. Woods, 907 F.2d 1540, 1542 (5th Cir. 1990), cert. denied, 498 U.S. 1070 (1991). Moreover, the plea agreement did not provide for any particular base offense level, as Garcia has alleged. Furthermore, a base offense level includes relevant conduct. U.S.S.G. § 1B1.3; United States v. Mir, 919 F.2d 940, 943 (5th Cir. 1990). The court's method for calculating the sentence may not be challenged in a § 2255 motion.

To demonstrate ineffectiveness of counsel, Garcia must establish that counsel's performance fell below an objective standard of reasonable competence and that he was prejudiced by his counsel's deficient performance. Lockhart v. Fretwell, ___ U.S. ___, 113 S. Ct. 838, 842, 122 L. Ed. 2d 180 (1993). Counsel could not have been ineffective for not informing the court that the plea agreement provided for a base offense level of 20 because such a provision did not exist. Counsel, though, did vigorously argue for a base offense level of 20.

To be constitutionally valid, a guilty plea must be knowing and voluntary. Harmason v. Smith, 888 F.2d 1527, 1529 (5th Cir. 1989). An unfulfilled promise by defense counsel or a prosecutor taints a plea's voluntariness. Davis v. Butler, 825 F.2d 892,

894 (5th Cir. 1987). When a person seeking post-conviction relief makes allegations of a promise that are contradicted by his own statements and other evidence in the record, he must prove the terms of the alleged promise; when, where, and by whom the promise was made; and the identity of the eyewitnesses. Harmason, 888 F.2d at 1529.

Garcia stated at his guilty plea hearing that no one induced his plea by making any promise that was not in the plea agreement and that no one predicted his sentence. His recitation of how the plea agreement, which makes no mention of any offense level, came into existence does not indicate that a specific offense level was promised.

Accordingly, the district court's denial of post-conviction relief is AFFIRMED.