

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8606
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SONNY PEGUERO,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(A-92-CR-104)

(November 24, 1993)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:*

Sonny Peguero (Peguero) pleaded guilty under the terms of a plea agreement. The probation officer calculated Peguero's offense level by reference to U.S.S.G. § 2K2.1, which governs, inter alia, illegal transportation of firearms. The guideline sentencing range for a level-19, category-one offender, as Peguero was determined to be, is 30-37 months. Based, however, on the

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

probation officer's report, the motion of the government, and an extensive sentencing hearing colloquy, the court departed upward and sentenced Peguero to 60 months imprisonment followed by supervised release. Finding no merit in Peguero's contentions on appeal, we affirm.

Peguero first contends that the plea agreement prohibited the Government from moving for an upward departure. His contention is unavailing. The plea agreement does not explicitly bar the Government from making such a motion, nor could the parties reasonably have understood the agreement to bar such a motion. We have reviewed the plea agreement carefully and find no restriction on the government's right to seek an upward departure.

Significantly, the district court informed Peguero of its inclination to depart upward from the guideline sentencing range and Peguero indicated that he wished to proceed to sentencing despite the court's inclination. Peguero's position at sentencing indicates that he did not understand that the Government's motion violated the terms of the agreement. See U.S. v. Prince, 868 F.2d 1379, 1385 (5th Cir.), cert. denied, 493 U.S. 932 (1989). Even if it might have violated the terms of the agreement, Peguero's position at sentencing indicates that any prohibition on a motion for an upward departure was not a term of the agreement that influenced his decision to plead guilty. See Santobello v. New York, 404 U.S. 257, 262, 92 S. Ct. 495 (1971).

Peguero next contends that the Government's motion for an upward departure violated the plea agreement's provision that the

Government would not prosecute Peguero for any other criminal offenses arising from his actions. This argument confuses non-prosecution with sentencing under the guidelines, which specifically takes into account a defendant's "relevant conduct."¹ Under the relevant-conduct guideline, "[u]nless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level . . . shall be determined on the basis of [inter alia] . . . all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant[.]" § 1B1.3(a)(1)(A). The firearm-offense guideline directs courts to determine offense levels in part according to the number of firearms involved. § 2K2.1(b)(1). Peguero does not challenge the district court's finding that 111 firearms were involved in his offense. The firearm-offense guideline provides a six-level increase to the base offense level for offenses involving 50 or more firearms. § 2K2.1(b)(1). The commentary to the section suggests that "[a]n upward departure may be warranted [if] . . . the number of firearms significantly exceeded fifty[.]" Id., comment. (n.16). The

¹ Under the Sentencing Guidelines currently in effect, "a plea agreement that includes the dismissal of a charge or a plea agreement not to pursue a potential charge shall not preclude the conduct underlying such charge from being considered under the provisions of § 1B1.3 (Relevant Conduct) in connection with the count(s) of which the defendant is convicted." § 6B1.2(a). That guideline provision was not in effect on October 23, 1992, when Peguero was sentenced. Supp. R. 2, 1; U.S.S.G. appx. C, amend. 467. The Sentencing Commission stated that "[t]his amendment clarifies that a plea agreement to dismiss a charge or not to pursue a potential charge does not insulate the conduct underlying such charge from the operation of § 1B1.3[.]" U.S.S.G. appx. C, amend. 467. This Court may consider amendments to the guidelines that solely are intended to clarify guideline application, even when those amendments are not effective at the time of sentencing. U.S. v. Nissen, 928 F.2d 690, 694-95 (5th Cir. 1991). Because the amendment to § 6B1.2 is a clarifying amendment, this Court may consider its application to Peguero's case.

district court based the departure on the number of firearms attributed to Peguero under relevant-conduct standards. This departure did not amount to "further prosecution" of Peguero but to a properly considered sentence according to the guidelines.

Peguero finally contends that the Government's motion for an upward departure was in fact punishment for his failure to cooperate further than the agreement anticipated and therefore was an attempt to add conditions to the plea agreement. Peguero's contention is without merit.

The Government's written motion for an upward departure was based wholly on the nature and number of firearms involved in the offense. Peguero injected the issue of his cooperation into his sentencing when he filed his downward-departure motion. See id. at 41-42. Defense counsel again raised Peguero's cooperation at the sentencing hearing; the prosecutor's comments and questions to ATF agent O'Flaherty regarding Peguero's cooperation were responsive to defense counsel's comments and questions. The record therefore does not support Peguero's contention that the upward departure somehow resulted from an attempt to add to the terms of the plea agreement.

The judgment and sentence imposed by the district court are therefore AFFIRMED.