UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-8687

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HOMERO ACEVEDO,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(A-92-CA-410(A-91-CR-03(1))

(November 4, 1993)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

Homero Acevedo ("Acevedo") pled guilty to one count of conspiracy to possess with intent to distribute marihuana, in violation of 21 U.S.C. §§ 841(a)(1) and 846 (1988), pursuant to a plea agreement with the government. The district court sentenced Acevedo to a seventy-two month term of imprisonment, which was within the sentencing range of sixty-three to seventy-eight months.

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

See United States Sentencing Commission, *Guidelines Manual* (Nov. 1991). Acevedo did not directly appeal his conviction or sentence, but instead filed a motion to vacate, set aside, or correct his sentence, pursuant to 28 U.S.C. §2255, based on alleged violations of the plea agreement by the government. The district court found that Acevedo voluntarily pled guilty to the crime charged and that the government did not breach the agreement. Consequently, the district court denied Acevedo's motion, and Acevedo now appeals. We affirm.

I

A prisoner in custody under the sentence of a federal court can obtain relief under § 2255 on four grounds: (1) "that the sentence was imposed in violation of the Constitution or laws of the United States"; (2) "that the court was without jurisdiction to impose such sentence"; (3) "that the sentence was in excess of the maximum authorized by law"; and (4) that the sentence "is otherwise subject to collateral attack." 28 U.S.C. § 2255; *see also Hill v. United States*, 368 U.S. 424, 426-28, 82 S. Ct. 468, 470-71, 7 L. Ed. 2d 417 (1962). "The scope of the remedy under § 2255 is commensurate with that of the writ of habeas corpus." *United States v. Cates*, 952 F.2d 149, 151 (5th Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 2319, 119 L. Ed. 2d 238 (1992). Acevedo contends that his plea of guilty was involuntary because it was based upon conditions and promises unfulfilled by the government. A guilty plea based upon a breached plea agreement is subject to collateral attack under § 2255. *Id.*

Acevedo alleges four separate reasons why his sentence should be vacated, set aside, or corrected. First, he argues that the government breached the plea agreement by failing to file with the district court a motion for downward departure from the sentencing guidelines.[1] Second, he contends that the government coerced his guilty plea by promising him that he would receive only a three year term of imprisonment. Third, Acevedo contends that the plea agreement was invalid because it was conditioned on the determinations of the probation department, which was not bound by the terms of the agreement. Finally, he argues that the district court erroneously relied upon inaccurate information contained in the PSR during sentencing.[2]

The district court, adopting the findings of a magistrate, concluded that the government neither breached or coerced Acevedo into signing the plea agreement. We review the district court's factual findings for clear error. *United States v. Casiano*, 929 F.2d 1046, 1051 (5th Cir. 1991); *Carter v. Collins*, 918 F.2d 1198, 1203 (5th Cir. 1990).

---

[1] The guidelines provide that a court may depart from the guidelines "[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense." U.S.S.G. § 5K1.1.

[2] The district court also rejected two addition allegation raised by Acevedo in his § 2255 motion))that the police illegally searched a van and a motel room in which incriminating evidence was found. Acevedo does not appeal those determinations.

II

A

Acevedo asserts that the government agreed to file a § 5K1.1 motion requesting a downward departure in his sentence, and that the government breached this promise by not filing the motion. A reading of the plea agreement, however, demonstrates that the government did not make any such promise. In the agreement, the government promised only to "*consider* filing a Motion for Downward Departure pursuant to U.S.S.G. §5K1.1 at the time of sentencing *if* [Acevedo] provides substantial assistance in the investigation and prosecution" of other criminals. (Emphasis added). Thus, the government promise was both conditional and limited in scope. It was conditional because the government need not do anything if Acevedo failed to provide substantial assistance to the government; the promise was limited in the sense that the government would consider filing))but was not obligated to file))a motion for downward departure if Acevedo provided substantial assistance. *See United States v. Wade*, ___ U.S. ___, 112 S. Ct. 1840, 118 L. Ed. 2d 1840 (1992) (finding that the filing of a § 5K1.1 motion is discretionary). The government, therefore, did not violate the express terms of the plea agreement by failing to file a § 5K1.1 motion. *See United States v. Benchimol*, 471 U.S. 453, 455, 105 S. Ct. 2103, 2104-05, 85 L. Ed. 2d 462 (1985) (noting that the measure of compliance is the agreement's express terms); *Cates*, 952 F.2d at 152-53 (same); *Johnson v. Beto*, 466 F.2d 478, 480 (5th Cir. 1972) (same).

B

Acevedo next contends that the government coerced his guilty plea by promising him that he would be imprisoned for only three years, not six, if he pled guilty. Acevedo's allegation thus implicates the long-held principle that a guilty plea must be both voluntary and knowing to be constitutionally valid. *Harmason v. Smith*, 888 F.2d 1527, 1529 (5th Cir. 1989). However, a defendant's "`mere understanding' that he would receive a lesser sentence in exchange for a guilty plea will not abrogate that plea should a heavier sentence be imposed." *Id.* Moreover, for a prisoner to receive § 2255 relief on the basis of alleged promises inconsistent with representations made in open court when the guilty plea was accepted, "he must prove (1) exactly what the terms of the alleged promise were; (2) exactly when, where, and by whom such a promise was made; and (3) the precise identity of an eyewitness to the promise." *Id.* (internal quotation marks and citations omitted).

Acevedo provides absolutely no support for his allegation that the government promised him that he would receive a lesser sentence. In fact, the plea agreement states that "[t]he United States Attorney . . . has made no agreement with the defendant or his counsel concerning any possible sentence," that "[t]he defendant is aware that any estimate of the probable sentencing range that he may receive from his counsel, the government or the probation office[] is a prediction, not a promise, and is not binding on the government, the probation office or the Court," and that "any recommendation for a specified sentence made by the

Government will not be binding on the Court." The agreement also states that it "constitutes the entire agreement between the [government], the defendant, and his counsel, and cannot be modified except in a writing signed by all the parties or done in open court." Moreover, during the proceeding in which Acevedo pled guilty, the government stated that it "made no agreement with the defendant or his counsel concerning any possible sentence," and Acevedo stated that he understood the plea agreement and agreed to it. Finally, Acevedo testified that no one had threatened, coerced, or forced him in any way to plead guilty, and that the government made no promises or predictions to him regarding his sentence.

Thus, Acevedo's allegations are refuted by the express language of the plea agreement and his own sworn testimony. *See United States v. Fuller*, 769 F.2d 1095, 1099 (5th Cir. 1985) (noting that a defendant ordinarily will not be heard to refute his testimony given under oath while pleading guilty). Consequently, we find that the evidence supports the district court's determination that the government made no promise to Acevedo regarding his sentence. *See Harmason*, 888 F.2d at 1531 (finding that "an understanding" that a lesser sentence would be imposed did not make a guilty plea involuntary and unknowing); *Smith v. McCotter*, 786 F.2d 697, 701 (5th Cir. 1986) (same); *Self v. Blackburn*, 751 F.2d 789, 793 (5th Cir. 1985) (same).

C

We may easily dispose of the last two issues. Acevedo did not raise before the district court the contentions that the plea agreement was invalid because it did not bind the probation department or that the district court erroneously relied upon inaccurate information contained in the PSR during sentencing. We will not consider for the first time on appeal an argument not presented to the district court. *Cates*, 952 F.2d at 152; *Earvin v. Lynaugh*, 860 F.2d 623, 627-28 (5th Cir. 1988), *cert. denied*, 489 U.S. 1091, 109 S. Ct. 1558, 103 L. Ed. 2d 861 (1989); *United States v. Houston*, 745 F.2d 333, 334 (5th Cir. 1984), *cert. denied*, 470 U.S. 1008, 105 S. Ct. 1369, 84 L. Ed. 2d 388 (1985).

III

We find no clear error in the district court's in the district court's factual findings that the government did not breach the plea agreement or coerce Acevedo to enter it. Accordingly, we affirm the denial of Acevedo's § 2255 motion.