

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-9036  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

EMMANUEL B. ESSEL,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Northern District of Texas  
(3:92-CR-161-D)

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July 22, 1993

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:\*

Contending that the government breached his plea agreement, Emmanuel B. Essel appeals his sentence for preparing and presenting false claims to a government agency, in violation of 18 U.S.C. § 287. We **AFFIRM**.

I.

Essel's conviction relates to his activities in preparing and filing false income tax returns on behalf of clients. In September 1992, Essel pleaded guilty. His plea agreement contained the following clause:

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\* 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 Pursuant to that rule, the court has determined that this opinion should not be published.

Defendant shall cooperate with the Government by giving truthful and complete information and/or testimony concerning Defendant's participation in and knowledge of criminal activities. No information provided by the Defendant pursuant to this agreement will be used directly against him, including sentencing in this case.

Essel's presentence report (PSR), upon which his sentence was based (including denial of a reduction for acceptance of responsibility, as discussed below), contained facts allegedly obtained by the government following the plea agreement. The government objected to the PSR's recommendation of a two-level reduction for acceptance of responsibility, and to its omission of a two-level increase for obstruction of justice. Although he did file a response to the government's objection, Essel made no objections.

Based on the government's objections, the probation officer withdrew his acceptance of responsibility recommendation, but declined to recommend the obstruction of justice increase. In November 1992, Essel was sentenced, *inter alia*, to 13 months in prison.

## II.

Essel contends that the government breached his plea agreement by using information obtained pursuant to that agreement against him at sentencing. Essel does not specify, however, how such information impacted his sentence. Furthermore, because Essel (as he concedes) did not object in district court to the alleged breach, we review only for plain error. *See* Fed. R. Civ. P. 52(b); *United States v. Navejar*, 963 F.2d 732, 734 (5th Cir. 1992).

Plain error is that which affects "substantial rights"; the decision to correct it is discretionary with this court. *United States v. Olano*, \_\_\_ U.S. \_\_\_, 113 S. Ct. 1770, 1776 (1993). And, that discretion should not be exercised unless the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings". *Id.* (quoting *United States v. Young*, 470 U.S. 1, 15 (1985)). "Normally, ... the defendant must make a specific showing of prejudice to satisfy the 'affecting substantial rights' prong of Rule 52(b)". *Id.* at 1778.

Essel has not made the requisite showing. Not only has he failed to specify how the alleged breach adversely impacted his sentence, but he has failed also to demonstrate that the information was

plainly based on his statements obtained pursuant to the plea agreement. He devotes only two sentences in his original brief, and two (repetitive) in his reply brief, identifying the information, and makes no attempt to distinguish the source of this information from the various other permissible sources cited by the government. "It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Olano*, 113 S. Ct. 1778.

Although the government concedes in its brief that some post-plea information may have been used, we are not convinced that the fairness, integrity, and public reputation of judicial proceedings are so seriously affected by the government's conduct during Essel's sentencing proceedings as to warrant plain error reversal.

### III.

For the foregoing reasons, the sentence is

**AFFIRMED.**