

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1198
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDWIN ANTON HOSCH,
a/k/a MURRAY,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:86-CR-052-D)

(October 29, 1993)

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

PER CURIAM:*

Pursuant to a plea agreement, Defendant-Appellant Edwin Anton Hosch pleaded guilty to and was convicted of aiding and abetting the possession with intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2, for which he received a

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

sentence of 18 years' incarceration and six years' special parole. On appeal Hosch challenges his sentence, complaining first that he did not waive his right to challenge enhancement, second that the district court erred in considering uncharged conduct in determining the sentence, and third that the government violated the plea agreement by presenting evidence at sentencing concerning the magnitude of Hosch's drug distribution activities. Finding no reversible error, we affirm.

I

FACTS AND PROCEEDINGS

Hosch was charged, by superseding indictment, with (1) conspiracy to possess, with intent to distribute, marijuana, (2) conspiracy to import marijuana, (3) aiding and abetting the possession with intent to distribute marijuana, and (4) aiding and abetting the importation of marijuana.¹ The government filed a notification of punishment enhancement, alleging that Hosch was convicted of possession with intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1) in 1976. Hosch filed a motion to dismiss the notification, arguing that no proper basis for enhancement existed because the 1976 indictment referred to by the government had been dismissed. The government responded that the dismissal had been the result of a clerical error.

Before the district court ruled on Hosch's motion, however, he entered into a plea agreement with the government in which he

¹ Hosch was originally indicted for the offenses in 1986 under the name "Murray" (true name unknown). He was not apprehended on the indictment until 1990.

agreed to plead guilty to aiding and abetting the possession with intent to distribute marijuana in an amount greater than 50 kilograms. He also agreed to admit that he was convicted previously as alleged in the government's notice of enhancement, and to waive any objection to the validity of the 1976 conviction. Hosch also acknowledged that, upon proof of his prior conviction, the offense that he was pleading guilty to carried a maximum penalty of 30 years' imprisonment, but agreed that, with court approval, the maximum term of imprisonment to be imposed would not exceed 18 years. See Fed. R. Crim. P. 11(e)(1)(C). In return, the government agreed to dismiss at sentencing the remaining counts of the superseding indictment and the original indictment.

At arraignment, Hosch indicated that he had carefully reviewed the plea agreement with his attorney. The district court asked Hosch whether he understood that the maximum possible penalty provided by the plea agreement was 18 years' imprisonment, and Hosch answered that he did. The district court also noted that Hosch had originally challenged the government's enhancement and asked Hosch whether he understood that, by pleading guilty pursuant to the plea agreement, he was waiving his right to challenge the enhancement. Hosch again replied that he did. The district court asked Hosch whether he pleaded true to the enhancement allegation and once again Hosch replied that he did. The district court indicated that, pursuant to Fed. R. Crim. P. 11(e)(1)(C), it would defer its decision to accept or reject the plea agreement until it had an opportunity to consider Hosch's presentence investigation

report (PSR). See also Fed. R. Crim. P. 11(e)(3) (if the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement). The court subsequently accepted Hosch's plea agreement.

At sentencing, DEA Agent Don Ware testified regarding Hosch's involvement in the offense. Ware stated that Hosch was a broker and a leader of several individuals who would distribute and "cleanse" marijuana once it was brought into the United States, and prepare it for further distribution. Ware also testified that Hosch had aided the financing and maintenance of aircraft used in smuggling. Addressing Hosch's contention that he was a person of minor culpability in relation to others named in the indictment, Ware testified that "[a] man that can come up with a million dollars to buy three loads of marijuana, a broker of the tonage [sic] of marijuana that Mr. Hosch brokered, I would not consider a minor player."

After addressing Hosch's objections to the PSR, the district court determined that Hosch was "involved in a significant way and that [Hosch was] of a high level of culpability." After the district court imposed sentence, Hosch timely appealed.

II

ANALYSIS

A. Waiver

Both parties agree that, at the time of the offense charged in this case, the maximum sentence for a violation of 21 U.S.C.

§ 841(b)(1)(A) was 15 years. Both parties also agree that § 841(b)(1)(A) contained enhancement language which authorized a maximum sentence of 30 years if the defendant had a previous conviction for an offense under the statute.

Hosch argues that the district court had no jurisdiction to impose an 18-year sentence because the prior conviction used by the government as the basis for enhancing his sentence was dismissed in 1991. He argues that the district court had no jurisdiction to exceed the maximum statutory limit of 15 years' imprisonment as set forth in § 841(b)(1)(A) and that his plea of guilty could not waive this jurisdictional defect. We disagree with Hosch's characterization of the purported defect as jurisdictional.

The district court was not without jurisdiction to sentence Hosch to 18 years' imprisonment. The enhancement portion of the statute authorized a penalty of up to 30 years' imprisonment. See § 841(b)(1)(B). Hosch orally admitted the truth of the enhancement under oath, and in the factual resumé which he signed. In his plea agreement, Hosch waived his right to challenge the prior conviction as the basis for the enhancement. Thus, the district court properly sentenced Hosch under the enhancement portion of the statute.

Hosch nevertheless argues that the waiver in the plea agreement was not valid because "a defendant should not be allowed to waive what amounts to a jurisdictional defect in the proceedings." But Hosch did not waive a jurisdictional defect. He merely waived his right to challenge the basis for the enhancement

of his sentence.

"The Supreme Court has repeatedly recognized that a defendant may waive constitutional rights as part of a plea bargaining agreement." United States v. Melancon, 972 F.2d 566, 567 (5th Cir. 1992). A waiver is not valid, however, if the defendant does not understand its consequences. United States v. Baty, 980 F.2d 977, 979 (5th Cir. 1992), cert. denied, 113 S.Ct. 2457 (1993). Although Baty, id., and Melancon, 972 F.2d at 567, involved the defendants' waiver of their rights to appeal, the guidance we provided in those cases is equally applicable to the waiver issue presently under scrutiny. The district court must give "special attention" to the waiver to ensure that the defendant fully understands the right being waived and the consequences of waiving that right. Baty, 980 F.2d at 979.

As shown by the colloquy between Hosch and the district court during the rearraignment proceeding, Hosch knowingly and voluntarily waived his right to challenge the enhancement; in fact, Hosch does not now contend otherwise. Before accepting Hosch's guilty plea, the district court determined that Hosch was "fully competent and capable of entering an informed plea and that his plea of guilty [was] a knowing and voluntary plea[.]" The district court repeatedly admonished Hosch that he was waiving his right to challenge the enhancement. The district court had jurisdiction to sentence Hosch to 18 years' imprisonment because Hosch had admitted the validity of the charged enhancement offense.

B. Use of Uncharged Conduct in Sentencing

Hosch also argues that the district court violated his due process rights by considering uncharged conduct and charges that were dismissed in determining his sentence. He argues that the plea agreement required that he plead guilty only to an amount greater than 50 kilograms, and that the government's factual resumé indicated that he smuggled approximately 1100 pounds of marijuana. He argues that the district court erred when it considered evidence in the PSR and at the sentencing hearing establishing that he was a participant in the smuggling or attempted smuggling of approximately 45,000 pounds of marijuana.

As Hosch committed the offense prior to November 1, 1987, he was not sentenced under the Sentencing Guidelines. See United States v. Garcia, 903 F.2d 1022, 1025 (5th Cir.), cert. denied, 498 U.S. 948 (1990). We review a pre-guidelines sentence only for "gross abuse of the trial judge's broad discretion." United States v. Galvan, 949 F.2d 777, 784 (5th Cir. 1991) (internal quotations and citations omitted).

Prior to the enactment of the Guidelines, a sentencing court's ability to consider other pertinent conduct in sentencing a defendant was extensive. See United States v. Fulbright, 804 F.2d 847, 853 (5th Cir. 1986) (citing former 18 U.S.C. § 3577 which provided that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."). Due process requires that the information relied on

by the trial judge in sentencing have "some minimal indicium of reliability" and "bear some rational relationship to the decision to impose a particular sentence." Galvan, 949 F.2d at 784 (internal quotation and citation omitted). Hosch's PSR and DEA Agent Ware's testimony at the sentencing hearing were sufficient to merit the court's reliance. The information bore a rational relationship to the decision to impose the sentence.

Hosch's assertion that the court's consideration of the information was in violation of the plea agreement is without merit. A defendant may not bar consideration of conduct relevant to the count to which he pleads by bargaining for dismissal of other counts. United States v. Smallwood, 920 F.2d 1231, 1239 (5th Cir.), cert. denied, 111 S.Ct. 2870 (1991) (discussing application of the Sentencing Guidelines). The plea agreement did not stipulate which information could be relied upon at sentencing. The agreement stated that the government "makes no promises or assurances with regard to what sentence will be imposed." At the plea hearing, the district court advised Hosch that determination of his sentence was completely within its discretion. Further, the plea agreement contemplated a term of 18 years' imprisonment, and the district court advised Hosch at arraignment that it could impose an 18-year sentence. The district court did not err by considering evidence of uncharged conduct in determining Hosch's sentence.

C. Government Violation of Plea Agreement

Hosch also argues that the government violated the plea

agreement by introducing evidence, both in its version of the PSR and at the sentencing hearing, of Hosch's uncharged conduct. Whether the government's conduct violates the terms of the plea agreement is a question of law. United States v. Valencia, 985 F.2d 758, 760 (5th Cir. 1993). A breach of a plea agreement constitutes plain error for which our standard of review is de novo.

In determining whether there has been a breach of the plea agreement, we must determine whether the government's conduct is consistent with the defendant's reasonable understanding of the agreement. United States v. Palomo, 998 F.2d 253, 256 (5th Cir. 1993), petition for cert. filed, (U.S. Sept. 20, 1993) (No. 93-6067). The plea agreement did not contain any stipulations or agreements regarding what evidence could be presented at sentencing. Hosch could not have reasonably understood the agreement to provide such. The government did not breach the plea agreement.

AFFIRMED.