

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1437
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MISTY DARLENE LOPSHIRE,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:92-CR-418-R
- - - - -
(March 25, 1994)

Before KING, DAVIS, and DeMOSS, Circuit Judges.

PER CURIAM:*

Misty Darlene Lopshire argues that the district court erred in denying her an adjustment for the acceptance of responsibility because she pleaded guilty and admitted the commission of the offense conduct.

Lopshire waived her objection to the findings in the presentence report at the time of the sentencing and, thus, the district court's ruling will not be disturbed in the absence of plain error. United States v. Pofahl, 990 F.2d 1456, 1471 (5th

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Cir.), cert. denied, 114 S.Ct. 266 (1993). "There must be an `error' that is `plain' and that `affects substantial rights.'" United States v. Olano, ___U.S.___, 113 S.Ct. 1770, 1776, 123 L.Ed.2d 508 (1993). The decision to correct plain error is discretionary with this Court. Id. Such discretion should not be exercised "unless the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." Id. (internal quotations and citations omitted). "Questions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error." United States v. Lopez, 923 F.2d 47, 50 (5th Cir.), cert. denied, 111 S.Ct. 2032 (1991) (citation omitted).

Section 3E1.1 provides for a two-level reduction of the offense level of a defendant who "clearly demonstrates acceptance of responsibility for his offense." § 3E1.1(a). The defendant bears the burden of showing his entitlement to the downward adjustment. United States v. Lghodaro, 967 F.2d 1028, 1031 (5th Cir. 1992).

In determining whether a defendant qualifies for an adjustment under subsection (a), consideration may be given to whether the defendant truthfully admitted the conduct comprising the offense of conviction and whether he truthfully admitted or did not falsely deny any additional relevant conduct for which he was accountable. § 3E1.1 comment. (n.1(a)).

A defendant who enters a guilty plea is not entitled to an adjustment "as a matter of right." § 3E1.1 comment. (n.3). "Entry of a guilty plea prior to the commencement of trial

combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional conduct for which he is accountable . . . will constitute significant evidence of acceptance of responsibility." Id. Such evidence may be outweighed by the defendant's conduct that is inconsistent with the acceptance of responsibility. Id.

Lopshire has not contested the factual finding in the presentence report that she repeatedly denied any involvement in relevant conduct. The occurrence of the relevant conduct was established by reliable evidence during the investigation of the offense. In light of this admission, the district court did not commit plain error in refusing to reduce Lopshire's offense level for the acceptance of responsibility.

AFFIRMED.