UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-1876
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROY LEE DANIELS,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(4:92-CR-109-Y-(1))

(June 2, 1994)

Before POLITZ, Chief Judge, DAVIS and SMITH, Circuit Judges.

PER CURIAM:[*]

Convicted on a guilty plea of conspiracy to commit theft of an interstate shipment of goods, Roy Lee Daniels appeals his sentence. We affirm.

Background

Daniels and the government reached a plea agreement and

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Daniels pleaded guilty to conspiracy to steal the cargo of an interstate 18-wheeler. His sentencing was continued pending prosecution efforts against his coconspirators. This provided Daniels an opportunity to cooperate with the government in hopes of obtaining a downward departure from the guideline sentence. The Presentence Report recommended a two-point reduction in offense level for acceptance of responsibiity and a four-level increase for Daniels' leadership role. Daniels cooperated with the prosecutor but the government did not file a section 5K1.1 letter recommending a downward departure because he committed additional crimes while released on bond pending sentencing. At sentencing Daniels expressly waived all objections to the PSR except his contention that acceptance of responsibility entitled him to a three-point reduction. The district court overruled this objection, adopted the PSR, and sentenced Daniels to 51 months imprisonment, three years supervised release, and the mandatory assessment. Daniels timely appealed.

Daniels contends that the government improperly refused to file the section 5K1.1 letter. He maintains that he was of substantial assistance to the prosecution. These prosecutorial recommendations are discretionary,[1] but the government may become obligated to request a 5K1.1 departure if it commits to do so in a plea agreement.[2] Daniels suggests that such an obligation impliedly existed herein because the government sought and

[1]**Wade v. United States**, 112 S.Ct. 1840 (1992).

[2]**United States v. Garcia-Bonilla**, 11 F.3d 45 (5th Cir. 1993).

facilitated his cooperation. To succeed in this argument Daniels must establish by a preponderance of the evidence that the government affirmatively limited its 5K1.1 discretion and obligated itself to seek a downward departure upon his providing substantial assistance.[3] Daniels has failed to make such a showing.[4]

Daniels also maintains that the district court erred in failing to afford him a three-point reduction for acceptance of responsibility. That three-point reduction was not available in the November 1988 Guidelines under which Daniels was sentenced.[5] Given that the district court was required to apply the 1988 Guidelines in their entirety,[6] Daniels' request for a three-point reduction is without foundation.

Finally, Daniels maintains that the district court erred in adopting the PSR recommendation of a four-level increase for his leadership role. Because Daniels waived this objection at sentencing, we review for plain error.[7] Daniels presented no evidence to controvert the PSR findings on this issue. The

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[3]**Id.**

[4]Daniels' plea agreement makes no mention of 5K1.1. Further, it specifically states that its terms constitute the complete agreement. Although the government told Daniels it was considering a 5K1.1 letter, there is no indication that the government firmly committed to issue one if Daniels rendered substantial assistance. Daniels does not allege that any government representation induced him to plead guilty.

[5]U.S.S.G. § 3E1.1 (1988).

[6]See U.S.S.G. 1B1.11(b)(2) & cmt. (1993); see also **United States v. Anderson**, 5 F.3d 795 (5th Cir. 1993), cert. denied, 114 S.Ct. 1118 (1994) (applying 1B1.11 retroactively).

[7]**United States v. Rodriguez**, 15 F.3d 408 (5th Cir. 1994).

district court was free to adopt it and did not err in doing so.[8]

Daniels argues for the first time on appeal that he was denied effective assistance of counsel. We decline to address this claim; the record is not sufficiently developed for a proper disposition.[9]

AFFIRMED.

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[8]**United States v. Thomas**, 932 F.2d 1085 (5th Cir. 1991), cert. denied, 112 S.Ct. 264 (1992).

[9]**United States v. Rinard**, 956 F.2d 85 (5th Cir. 1992). Our declining to review Daniels' ineffective assistance claim works no prejudice to his right to raise it in a proper 28 U.S.C. § 2255 petition.