

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-2231  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

PEDRO ANGEL LUGO-CUERO,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
(No. CR-H-92-0269)

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(December 20, 1993)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:<sup>1</sup>

After pleading guilty to a charge of illegal re-entry after deportation, Pedro Lugo-Cuero moved for specific enforcement of the terms of the plea agreement he entered into with the government. That motion was denied. Contending that the government breached the agreement, Lugo-Cuero appeals his conviction and sentence. We

**AFFIRM.**

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<sup>1</sup> 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

While investigating a drug-trafficking conspiracy in the Lake Charles, Louisiana, and Houston, Texas, areas, DEA agents received a tip that Pedro Lugo-Cuero was involved. DEA agents searched his home on September 25, 1993. Lugo-Cuero was arrested; during a subsequent interview, he admitted that he had re-entered the United States illegally after having been deported. He was indicted on charges of illegal re-entry after deportation, in violation of 8 U.S.C. § 1326.<sup>2</sup>

Pursuant to a written plea agreement, Lugo-Cuero pleaded guilty to the re-entry charge. The agreement stated in part that, in exchange for the plea, the United States would not prosecute Lugo-Cuero in the Southern District of Texas in relation to the drug conspiracy. While awaiting sentencing on the re-entry charge in the Southern District of Texas, Lugo-Cuero was indicted in the Western District of Louisiana on charges arising from the drug conspiracy investigation. Lugo-Cuero moved for specific enforcement of the plea agreement on the re-entry charge, contending that it was intended to bar any federal prosecution relating to the drug conspiracy, including the one initiated by the indictment from the Western District of Louisiana. The motion was denied, and Lugo-Cuero was sentenced, *inter alia*, to 87 months

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<sup>2</sup> The indictment on the re-entry charge was handed down in the Southern District of Texas. The ongoing drug conspiracy investigation, however, also involved drug trafficking in the Western District of Louisiana.

imprisonment (later corrected, on Lugo-Cuero's motion, to 70 months).

## II.

Lugo-Cuero appeals his conviction and sentence, contending that the government did not honor the plea agreement and that, therefore, it should be specifically enforced. Alternatively, he contends he should be allowed to withdraw his plea and re-plead. He bases these contentions on the claim that the government promised he would not be prosecuted by any federal agency on the drug charges under investigation.<sup>3</sup> He contends also that his guilty plea was not voluntary, because it was made in reliance on the same promise, which the government failed to fulfill.

The government's compliance with the terms of a plea agreement is a question of law, *United States v. Watson*, 988 F.2d 544, 548 (5th Cir. 1993), *petition for cert. filed*, No. 93-5407 (U.S. July 29, 1993), which we review de novo. *United States v. Valencia*, 985 F.2d 758, 760 (5th Cir. 1993). Where a guilty plea is entered as part of an agreement, the government must, of course, comply strictly with the terms and conditions of its promises. *Id.* at 760 (citations omitted). Furthermore, "when a guilty plea `rests in any significant degree on a promise of agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such [a] promise must be fulfilled.'" *Id.* at 761 (quoting *Santobello v. New York*, 404 U.S. 257, 262 (1971)).

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<sup>3</sup> As stated, the drug conspiracy investigation involved activities in both the Southern District of Texas (Houston) and the Western District of Louisiana (Lake Charles).

In determining whether a plea agreement has been breached, we must consider more than the written terms of the plea agreement; our inquiry examines whether the government's conduct was consistent with the defendant's reasonable understanding of the agreement. *Id.*; see also **United States v. Palomo**, 998 F.2d 253, 256 (5th Cir.), *cert. denied*, \_\_\_ U.S. \_\_\_, 114 S. Ct. 358 (1993) (citing **Valencia**). The party alleging the breach bears the burden of proving the underlying facts by a preponderance of the evidence. **Watson**, 988 F.2d at 548. As stated, Lugo-Cuero's sole basis for appeal is his claim that the government promised him that, in exchange for his guilty plea on the re-entry charge, he would "be protected" from any prosecution in federal court on the drug conspiracy charges that were under investigation when he was arrested. This interpretation of the plea agreement, however, does not comport with either the plain language of the agreement, or the interpretation of the agreement which Lugo-Cuero's trial attorney confirmed he relayed to his client.

The agreement states in relevant part:

The United States agrees that it will not further criminally prosecute defendant *in the Southern District of Texas* for offenses arising from conduct charged in the indictment. This plea agreement binds *only the United States Attorney's Office for the Southern District of Texas* and the defendant; *it does not bind any other United States Attorney.*

(Emphasis added.) The agreement further states that it constitutes the entire agreement between Lugo-Cuero and the government. This language is unambiguous.

Moreover, Lugo-Cuero's trial counsel confirmed this interpretation of the agreement at an evidentiary hearing on Lugo-Cuero's motion for specific enforcement of the agreement. Lugo-Cuero's counsel testified as follows:

[COUNSEL:] [The Assistant United States Attorney] was very clear in saying that if the State prosecutors ended up indicting Mr. [Lugo-Cuero] for that, that he could not control what their actions were. And I relayed that information to Mr.--

THE COURT: Did you get a guarantee that there would be no Federal indictments coming down in this case aside from the immigration violation?

[COUNSEL:] No express guarantees, no, sir.

Lugo-Cuero's counsel also testified that he and the Assistant United States Attorney handling the case had discussed the possibility that the agreement would not cover indictments from other jurisdictions arising from the investigation, because the government "may not know what other things could be out there." Finally, Lugo-Cuero's counsel conceded that the Assistant United States Attorney had told him that he "could specifically only control what the Southern District of Texas would do".<sup>4</sup>

The language of the plea agreement is unambiguous; and Lugo-Cuero's counsel not only communicated to his client the possibility of other prosecutions arising out of the investigation, but also testified that he realized that the plea agreement was binding only on the United States Attorney for the Southern District of Texas.

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<sup>4</sup> Lugo-Cuero was present at the hearing, but did not testify.

Accordingly, we hold that the government did not breach the agreement.<sup>5</sup>

III.

Accordingly, the judgment is

**AFFIRMED.**

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<sup>5</sup> As noted, Lugo-Cuero contends also that, because the government failed to honor its alleged promise, his plea was involuntary. Because he did not raise this in the district court, we review only for plain error. *Palomo*, 998 F.2d at 256. Ordinarily, this standard requires the defendant to make a specific showing of prejudice, to show that the error affected a substantial right. *United States v. Olano*, \_\_\_ U.S. \_\_\_, 113 S. Ct. 1770, 1778. As stated above, Lugo-Cuero's trial counsel informed him of the possibility of other prosecutions. Further, the court at re-arraignment asked Lugo-Cuero whether "anyone [had] made any other different promise or assurance to you of any kind such as possible leniency or an offer of probation in order to get you to plead guilty", and he responded that no one had done so. Our review of the record reveals no plain error.