

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2611
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TIBERIO JESUS MEJIA, a/k/a
Tiberio Jesus Guzman Mejia,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Southern District of Texas
USDC No. CR-H-93-4
- - - - -

(May 19, 1994)

Before HIGGINBOTHAM, BARKSDALE, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

The Government moves for the dismissal of the appeal based upon the validity of the waiver-of-the-right-to-appeal provision within Tiberio Jesus Mejia's plea agreement. "[A] defendant may, as part of a valid plea agreement, waive his statutory right to appeal his sentence." United States v. Melancon, 972 F.2d 566, 568 (5th Cir. 1992). "[T]he waiver must be informed and voluntary." Id. at 567.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Mejia argues that, because the district court failed to inquire as to the depth of Mejia's understanding of this important waiver, beyond the questions that were asked of Mejia at the arraignment, there was no compliance with Fed. R. Crim. P. 11 as to this waiver, and the waiver was neither knowing nor voluntary. Rule 11 does not address specifically a waiver of the right to appeal a sentence. Moreover, Mejia does not contend that the Rule 11 colloquy was infirm in any respect other than as to this waiver.

The district court elicited from Mejia that he understood, under the terms of the plea agreement, he would be unable to appeal his sentence. A review of Mejia's arraignment indicates that no questions were raised by Mejia concerning the waiver provision. Cf. United States v. Baty, 980 F.2d 977, 978-79 (5th Cir. 1992) (record revealing that defendant did not understand at arraignment the consequences of the waiver provision in the plea agreement), cert. denied, 113 S.Ct. 2457 (1993). Therefore, the district court did not err in ascertaining that Mejia's waiver of his right to appeal his sentence was knowing and voluntary. See United States v. Portillo, 18 F.3d 290, 293 (5th Cir. 1994).

Mejia argues that the sentencing issues he raises on appeal are reviewable, despite the waiver provision, because his sentence was not imposed in accordance with the Sentencing Guidelines as required by paragraph nine of the plea agreement. A plea agreement and its provisions are interpreted with objective standards as to what the two parties reasonably

understood the terms to be at the time of entering the plea. United States v. Chagra, 957 F.2d 192, 194 (5th Cir. 1992). What Mejia describes as not in accordance with the Guidelines are alleged misapplications of the Guidelines, his sentencing issues raised on appeal. By waiving his right to appeal his sentence, a right created by 18 U.S.C. § 3742 and encompassing the right to appeal Guideline misapplications, Mejia waived his right to appeal any alleged misapplication.

To the extent that Mejia argues that the Government violated the plea agreement by failing to recommend the three-point reduction in the offense level for acceptance of responsibility, the argument is misplaced. By Mejia minimizing his role in the offense during his interview with the probation officer, Mejia failed to meet the condition in the plea agreement which would trigger the Government's obligation to recommend the reduction. The plea agreement was not breached. Cf. United States v. Gonzalez, 16 F.3d 985, 988-89 (9th Cir. 1993) (viewing as a breach of the plea agreement the actions by the Government in opposing a tentative finding of the defendant's acceptance of responsibility, in light of plea agreement which called for the Government not to oppose such a finding).

IT IS ORDERED that the Government's motion is GRANTED. Accordingly, the appeal is DISMISSED.