

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3719
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EVARISTO F. CALDERON,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Middle District of Louisiana
USDC No. CR-93-48-B-M2
- - - - -

(May 18, 1994)

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

PER CURIAM:*

Evaristo Francisco Calderon argues, without pertinent citation, that the district court's refusal to grant a downward departure was error because he provided substantial assistance to the Government. Calderon did not object to the lack of a § 5K1 motion by the Government, and his lawyer acknowledged that the Government had "no obligation to file a 5K1." Pursuant to U.S.S.G. § 5K1.1, P.S., a sentencing court may not grant a downward departure unless the Government moves the court to do

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

so. United States v. Garcia-Bonilla, 11 F.3d 45, 46 (5th Cir. 1993); moreover, even if the defendant provides substantial assistance, unless the plea agreement provides otherwise or the refusal to file the motion results from an unconstitutional motive, the Government retains sole discretion whether to file the motion. Id. Although Calderon insists that he provided substantial assistance, he does not urge, nor does a review of the record reveal, that the Government waived its discretion in the plea agreement or that the Government's refusal to file was based on an unconstitutional motive. The district court could not have erred in not departing for substantial assistance, because it was never asked to do so.

Calderon contends, also without citation, that the district court abused its discretion by ordering the sentence to run consecutively to Calderon's undischarged term based on a mistaken assumption that it had no discretion under § 5G1.3(a) to order the sentences to run concurrently. A district court's sentence will be upheld so long as it results from a correct application of the guidelines to factual findings that are not clearly erroneous, United States v. Rivera, 898 F.2d 442, 445 (5th Cir. 1990); but its interpretations of the guidelines are conclusions of law subject to de novo review. United States v. Madison, 990 F.2d 178, 182 (5th Cir.), cert. dismissed, 114 S.Ct. 339 (1993). Because Calderon was sentenced on September 17, 1993, the version of the sentencing guidelines in effect from November 1, 1992, through October 31, 1993, applies. Section 5G1.3 provides that if the offense, including escape, was committed while the

defendant was serving a term of imprisonment, the sentence for the new offense "shall be imposed to run consecutively to the undischarged term of imprisonment." § 5G1.3(a). 18 U.S.C. § 3584(a) provides, however, that multiple sentences may run concurrently or consecutively, and the sentencing court has the authority to make the determination after considering the factors set forth in 18 U.S.C. § 3553(a). This Court resolved the apparent conflict between the seemingly mandatory language of § 5G1.3(a) and § 3584 in United States v. Miller, 903 F.2d 341 (5th Cir. 1990), when it held that "sentencing courts retain at least some discretion under § 3584 to impose a concurrent sentence, but that discretion is limited to the district court's power to depart from the Guidelines." United States v. Martinez, 950 F.2d 222, 226 (5th Cir. 1991), cert. denied, 112 S.Ct. 1984 (1992). In the instant case, the district court correctly interpreted §5G1.3(a) to require consecutive sentences, id.; but this Court may also assume that the district court "obviously was familiar with its authority to depart from the Guidelines, having just discussed (and rejected) that possibility when sentencing [Calderon] a few minutes before." Id. The court recognized its ability to depart from the Guidelines. Its imposition of consecutive sentences was not error.

AFFIRMED.