

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7140

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JESUS RAMIREZ-GALVAN,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-B-91-235-01)

(January 5, 1994)

Before HENDERSON,* SMITH, and EMILIO M. GARZA, Circuit Judges.

JERRY E. SMITH, Circuit Judge:**

Jesus Ramirez-Galvan ("Ramirez") appeals the district court's denial of the government's motion for a downward departure from the Sentencing Guidelines (the "guidelines") range for his conviction of one count of conspiracy to possess with intent to distrib-

* Circuit Judge of the Eleventh Circuit, sitting by designation.

** 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 Pursuant to that rule, the court has determined that this opinion should not be published.

ute in excess of 100 kilograms of marihuana. Finding that the government did not breach its plea agreement with Ramirez and that the district court did not err in rejecting the government's motion, we affirm the sentence.

I.

After attempting to sell marihuana and cocaine to an undercover officer, Ramirez was charged, along with two other defendants, in a five-count indictment involving marihuana and cocaine and carrying a firearm during a drug trafficking crime. Ramirez pled guilty to conspiracy to possess with intent to distribute in excess of 100 kilograms of marihuana, and the remaining charges were dismissed on motion by the government.

Under U.S.S.G. § 2D1.2(a)(3), Ramirez's base offense level was 28. The district court refused to increase the offense level based upon the possession of a firearm but agreed to a two-level increase for a supervisory role under U.S.S.G. § 3B1.1(c) and a two-level decrease for acceptance of responsibility, resulting in an offense level of 28. Ramirez's criminal history points were zero, placing him in criminal history category I, carrying an imprisonment range of 78-97 months. The district court sentenced Ramirez to 78 months' imprisonment, five years' supervised release, and a \$50 special assessment.

On appeal, Ramirez claimed he was entitled to a downward departure, based upon substantial cooperation, under U.S.S.G. § 5K1.1. He argued that the government had breached its

plea agreement by failing to recognize his substantial assistance, and he requested specific performance. The plea agreement provided, in relevant part,

The United States agrees to file the appropriate motions for a reduction of sentence based on substantial cooperation, pursuant to § 5K1 of the Sentencing Guidelines and 18 USC 3553. The departure [sic] requested by the United States will be at the sole option of the United States based on the nature, level, and extent of the defendant's cooperation prior to sentencing.

The Defendant agrees to be debriefed and to cooperate fully with the United States prior to sentencing. The Defendant fully agrees to testify truthfully regarding the participation of fugitive Lazaro Vega-Sanchez. The Defendant proffers that such testimony would inculcate said Lazaro Vega-Sanchez. No agreement has been reached regarding the appropriate guideline "score."

At the time of the presentence report ("PSR"), Ramirez had not been interviewed by the Drug Enforcement Administration ("DEA"). He subsequently was interviewed and, as a result of his lack of cooperation, the government refused to move for a downward departure.

This court vacated Ramirez's sentence, see United States v. Ramirez-Galvan, No. 92-7210 (5th Cir. Oct. 14, 1992) (unpublished), finding that the sentencing statement was inadequate. We remanded to the district court for an evidentiary hearing as to whether the debriefing of Ramirez by the DEA reached the level of inculpatory testimony against Vega-Sanchez.

An evidentiary hearing was held, and a DEA agent testified that Ramirez had not been forthcoming with any information. Although the agent conceded that he had not asked Ramirez about his knowledge of Vega-Sanchez's participation in the offense, the

agent explained that Ramirez did not want to cooperate, and a recess was taken to give him the opportunity to do so.

After the questioning, the government concluded that the information supplied by Ramirez was merely cumulative. Nevertheless, the government moved for a one-level downward departure "to satisfy the Fifth Circuit." Considering the government's motion, the risk at which Ramirez placed himself by giving the information, the PSR, and the evidentiary hearing, the district court rejected the motion and resentenced Ramirez to his original 78-month sentence, four years' supervised release, and a \$50 special assessment.

II.

Ramirez challenges his sentence on two grounds. First, he argues that the government breached the plea agreement by moving for only a one-level departure. Second, he contends that the district court erred in rejecting that motion.

Because Ramirez failed to object to the district court's decision, we review only for plain error. United States v. Lopez, 923 F.2d 47, 49-51 (5th Cir.), cert. denied, 111 S. Ct. 2032 (1991). Nevertheless, "[d]istrict courts are accorded no deference for legally incorrect applications of the sentencing guidelines." United States v. Barbontin, 907 F.2d 1494, 1497 (5th Cir. 1990). Furthermore, "a prosecutor's breach of a plea agreement can amount to plain error." United States v. Goldfaden, 959 F.2d 1324, 1328 (5th Cir. 1992).

Ramirez contends that the government beached its agreement by moving for a departure of only one level, as he "did his part" by providing inculpatory information about Vega-Sanchez. "[I]n determining whether the terms of the plea agreement have been violated, [the court] must determine whether the government's conduct is consistent with what is reasonably understood by the defendant when entering the plea of guilty." United States v. Huddleston, 929 F.2d 1030, 1032 (5th Cir. 1991).

We have already interpreted one aspect of the plea agreement: It contemplated that "the extent of the requested departure would be based upon 'the nature, level and extent of the defendant's cooperation.' The agreement did not, however, reflect a promise by the Government to file the motion regardless of the nature and extent of assistance" Ramirez-Galvan, slip. op. at 4. In accordance with our prior opinion, we conclude that the government was entitled to limit its requested departure to one level on the ground that the nature, level, and extent of the defendant's cooperation was simply cumulative. See id. at 5.

The district court's decision to reject the requested departure must also be reviewed for plain error. Lopez, 923 F.2d at 49-51. A defendant is not entitled to a § 5K1.1 departure as a matter of right; the district court was free to reject the government's motion. United States v. Damer, 910 F.2d 1239, 1241 (5th Cir.), cert. denied, 498 U.S. 991 (1990).

Since the district court found that the defendant was given ample opportunity to provide substantial assistance but that the

information was merely cumulative, we will not disturb its decision to reject the motion to depart. The fact that Ramirez was incapable of testifying truthfully about more useful information does not mean that the district court applied an erroneous legal standard to make its determination.

Accordingly, Ramirez's sentence is AFFIRMED.