

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8427
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RONALD HUTSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(A-92-CR-195)

(December 20, 1993)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:¹

Ronald Hutson, having pleaded guilty to conspiracy to manufacture methamphetamine, appeals from his sentence, challenging the denial of a reduction for acceptance of responsibility and the calculation of the quantity of drugs involved. But, because Hutson waived the right to appeal his sentence, we **DISMISS** the appeal.

I.

Pursuant to a plea agreement, Hutson pleaded guilty to conspiracy to manufacture methamphetamine, in violation of 21

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 Pursuant to that rule, the court has determined that this opinion should not be published.

U.S.C. §§ 846 and 841(a)(1). He was sentenced, *inter alia*, to 70 months imprisonment.

II.

The Government asserts that, as part of the plea agreement, Hutson waived the right to appeal his sentence. Hutson neither challenged the waiver in his opening brief, nor filed a reply brief.

"[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). Such a waiver must be "informed and voluntary". ***Id.*** "[A] defendant's waiver of [the] right to appeal deserves and, indeed, requires the special attention of the district court". ***United States v. Baty***, 980 F.2d 977, 979 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2457 (1993). "It is up to the district court to insure that the defendant fully understands [the] right to appeal and the consequences of waiving that right". ***Id.*** Our review of whether the waiver was knowing and voluntary is *de novo*. ***Melancon***, 972 F.2d at 567. The "most important" consideration in determining whether a waiver is informed and voluntary is that the defendant "knew that he had a `right to appeal his sentence and that he was giving up that right'". ***Id.*** at 568.

Hutson's plea agreement contained the following provisions regarding waiver of the right to appeal:

6. Defendant is aware that his sentence will be imposed in conformity with the Federal Sentencing Guidelines and Policy Statements. The Defendant is also aware that a sentence imposed

under the Guidelines does not provide for parole. Knowing these facts, Defendant agrees that this Court has jurisdiction and authority to impose any sentence within the statutory maximum set for his offense, including a sentence determined by reference to the Guidelines, and *he expressly waives the right to appeal his sentence on any ground, including any appeal right conferred by 18 U.S.C. § 3742, unless the sentencing court departs from the sentencing guidelines.*

7. The Defendant is also aware that his sentence has not yet been determined by the Court. The Defendant is aware that any estimate of the probable sentencing range that he may receive from his counsel, the government or the probation office, is a prediction, not a promise, and is not binding on the government, the probation office or the Court. *Realizing the uncertainty in estimating what sentence he will ultimately receive, the Defendant knowingly waives his right to appeal the sentence or to contest it in any post-conviction proceeding in exchange for the concessions made by the government in this agreement.*

(Emphasis added.)

The above stated exception for taking an appeal is not applicable, because the district court did not depart from the guidelines. Hutson's sentence of 70 months is at the bottom of the guideline range (70 to 87 months for a total offense level of 27 and a criminal history category of I). The district court "f[ound] no reason to depart from the sentence called for by application of the guidelines".²

At Hutson's arraignment hearing, his counsel expressed no doubts as to his competence, and stated further that Hutson had a

² The district court refused to grant a reduction in Hutson's offense level for acceptance of responsibility, but it lowered Hutson's base offense level from 28 to 27 in response to his objection to the presentence report's calculation of the drug quantity involved.

factual as well as a rational understanding of the proceedings. Hutson also was questioned by the district court, and stated that he was competent to understand the proceedings against him. The Government summarized the plea agreement, including the provision that Hutson "has waived any appeal of the sentence imposed by the court unless the court departs upward from the sentencing guideline range". Hutson's counsel concurred with the Government's summary of the plea agreement, and Hutson stated that he understood the agreement and agreed to its terms. Hutson did not express any confusion with respect to the waiver, see **Baty**, 980 F.2d at 979, and stated that he was satisfied with the representation of his attorney. The district court informed him that he faced a maximum possible penalty of 20 years imprisonment, a fine of \$1 million, and supervised release of at least three years; and Hutson acknowledged that he understood. And, after referring to the provision of the plea agreement "in which you waive your right to appeal except with an upward departure", the court advised Hutson that "under certain circumstances, you may have the right to appeal a sentence that's imposed by this court". Hutson acknowledged that he understood. He also stated that he freely and voluntarily signed the plea agreement.

The record reflects that Hutson understood the terms of the plea agreement and that he entered into it with the advice of counsel. We conclude that his waiver of the right to appeal was informed and voluntary.

III.

For the foregoing reasons, the appeal is

DISMISSED.