IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8489

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DAVID A. TERRELL,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(A-90-CR-81-01/A-93-CV-122-WS/a-89-CR-117-01/A-93-CV-121)

(June 6, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

I.

David Terrell pleaded guilty to possession of less than 50 kilograms of marijuana with intent to distribute, making a misstatement on a tax return, and contempt of court. Because the district court had erroneously imposed 5 years of supervised release for the possession count, we vacated the sentence on that

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

count. On remand, the district court imposed 3 years. Terrell filed motions to vacate, set aside, or correct his sentences. The district court denied the motions. Terrell appealed. We affirm.

II.

A defendant may not raise an issue for the first time on collateral review without showing cause for the procedural default and actual prejudice from the error. U.S. v. Shaid, 937 F.2d 228, 232 (5th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 978 (1992). We reach the merits of Terrell's claims because the Government did not expressly invoke the procedural bar in the district court. See U.S. v. Drobny, 955 F.2d 990, 994-95 (5th Cir. 1992).

III.

Terrell argues that his Fifth and Sixth Amendment rights were violated because an FBI agent provided hearsay testimony at his sentencing hearing. Hearsay is admissible for sentencing purposes. U.S. v. Young, 981 F.2d 180, 187 (5th Cir. 1992), cert. denied, 113 S. Ct. 2454, cert. denied, 113 S. Ct. 2983 (1993). Information used to determine a sentence must only be sufficiently reliable and rationally related to the decision to impose the sentence. Id. The agent's testimony met these criteria.

IV.

Terrell contends that he should be permitted to withdraw his guilty plea. His sentence was calculated on the basis of 280 pounds of marijuana. Terrell notes that the information to which he pleaded guilty referred to a specific date and only one pound of marijuana. He contends that he pleaded guilty only to a one pound

quantity and that, because he was sentenced for the larger amount, his guilty plea was not knowing and voluntary.

Terrell also argues that sentencing him on the basis of 280 pounds violated his plea agreement. Because this issue is raised for the first time on appeal and does not involve a purely legal question, we will not consider it. Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991) (per curiam). However, Terrell did argue in the district court that he was misinformed and that he had entered his plea to a one pound quantity believing that he would be sentenced for that amount. This argument goes to the voluntariness of the plea and not to the question whether the Government breached the plea agreement.

The plea agreement stated that the Government had made no guarantee to Terrell about a possible sentence. The district court, which may sentence for all relevant conduct, including facts not alleged in an information, U.S. v. Puma, 937 F.2d 151, 156 (5th Cir. 1991), cert. denied, 112 S. Ct. 1165 (1992), stated:

> No one can tell you, at this point in time, with any degree of certainty, what [the sentence under the Sentencing Guidelines] may be. There are several reasons for that. The first is, that particularly in drug cases, matters are unknown which have to be determined by the Probation Office. The Guidelines in drug cases are primarily determined by the amount of drugs involved in the offense. Now, each of you have amounts of drugs mentioned in your plea agreement, but the Probation Office is not bound by that and neither is the Court. The Court may find it necessary, depending on what the report reflects, to make a determination as the amount--as to the amount of drugs involved. And if that's the case, then certainly no one can tell you what the Guidelines are going to be, because that determination has not been made.

Terrell may have misunderstood the technical application of the guidelines, but that misunderstanding did not render his guilty plea unknowing or involuntary. He had adequate information concerning the possibility of a longer sentence calibrated to the amount of drugs involved in the offense.

Terrell argues that he received no benefit from the plea agreement because he received the same prison sentence that he would have received had he been convicted at trial. Terrell ignores the fact that he was sentenced below the guideline range because the district court was limited to the statutory maximum sentence under 21 U.S.C. § 841(b)(1)(D). If Terrell had been convicted for the entire 280 pounds of marijuana, a quantity greater than 50 kilograms, Terrell would have been subject to a sentence within the guideline range of 63 to 78 months. Terrell benefited from the plea agreement.

V.

Terrell contends that he received ineffective assistance of counsel. He must show that counsel's performance was so deficient that it prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). Terrell must demonstrate that counsel's deficient performance caused the proceeding to be unreliable or fundamentally unfair. Lockhart v. Fretwell, 113 S. Ct. 838, 844 (1993). To show prejudice in the context of a guilty plea proceeding, Terrell must demonstrate that, but for counsel's errors, he would not have pleaded guilty and would have gone to trial. U.S. v. Kinsey, 917 F.2d 181, 183 (5th Cir. 1990).

Terrell contends that his lawyer failed to explain that he would be sentenced for all relevant conduct. If true, the district court's admonition at the arraignment cured this error. Terrell argues that his lawyer should have negotiated an agreement that explicitly bound the Government, but he has not shown that the Government was not bound or that it breached the agreement. As the district court did not reject the agreement, Terrell could not have been prejudiced by this omission. Terrell contends that his attorney should have called Coulter to testify, but does not suggest how Coulter's testimony would have helped him or why the decision not to call Coulter was an unreasonable strategic decision.

AFFIRMED.