IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8492
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

MANUELA ESTRADA CHAPA,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(A-91-CR-159-8)

(December 27, 1993)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Manuela Chapa appeals her sentence imposed after conviction of engaging in a financial transaction involving proceeds of marihuana distribution, in violation of 18 U.S.C. §§ 2 and 1957. Finding no reversible error, we affirm.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Chapa pleaded guilty of money laundering by using over $10,000 in proceeds from the unlawful distribution of a controlled substance to construct a residence. The probation officer calculated a base offense level of 17 under U.S.S.G. § 2S1.2 and increased it by five levels under § 2S1.2(b)(1)(A) because Chapa knew that the funds were the proceeds of the distribution of marihuana. There were no aggravating or mitigating circumstances; therefore, the total offense level was 22; the criminal history category was I.

Chapa filed objections to the presentence investigation report ("PSR") regarding the absence of reductions for acceptance of responsibility and her role in the offense. The probation officer stated that at the time of the presentence interview, Chapa purposely misled her. Although Chapa later provided accurate information, the probation officer recommended that the offense level should not be reduced under U.S.S.G. § 3E1.1 and determined that Chapa was actively involved in purchasing money orders and planning the house and should not be characterized as a minor participant. The district court overruled the objections and sentenced Chapa at the lower end of the guidelines range to a term of imprisonment of 41 months, a three-year term of supervised release, a fine of $7,500, and a $50 special assessment.

II.

A.

Chapa contends that the government violated the terms of the plea agreement by opposing a decrease in her offense level for acceptance of responsibility, contrary to its agreement not to do so. The government argues that Chapa has waived the argument that the agreement was breached by not raising it in the district court and that the matter may not be urged for the first time on appeal. Alternatively, the government asserts that it did not breach the agreement; and even if it did, the breach was harmless.

We have held squarely that a criminal defendant's argument that the government breached a plea agreement "is deemed waived" when raised "for the first time on appeal." United States v. Campbell, 942 F.2d 890, 893 n.2 (5th Cir. 1991) (citing United States v. Jackson, 700 F.2d 181, 190 (5th Cir.), cert. denied, 464 U.S. 842 (1983)). Accordingly, we do not reach Chapa's assertion regarding the plea agreement.

In United States v. Goldfaden, 959 F.2d 1324, 1327 (5th Cir. 1992), we held that, where a defendant asserts, for the first time on appeal, a breach of the plea agreement, "we review his claim for plain error." "We thus conclude that a prosecutor's breach of a plea agreement can amount to plain error." Id. at 1328.

If we were to review this matter for plain error, we would conclude that none is shown here. In the plea agreement, the government inter alia reserved its right to speak at sentencing and agreed not to oppose a reduction for acceptance of responsibility.

The probation officer did not recommend the adjustment in the PSR.

At sentencing, the probation officer corrected "some possible misstatement" concerning the three "lies" told by Chapa. The government then addressed the district court as follows:

> When we do enter into plea agreements like this, and we do argue about them quite a bit . . ., I suppose, and we go ahead and say things like, "We're not going to oppose acceptance of responsibility", and everybody . . . understands that this defendant or any other defendant has to go to the probation office and tell the truth. You've got to tell the truth.
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> . . . .
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> When they do things like that, they're lying to the court. And to retract it a couple days before sentencing, I think, is a dangerous, dangerous precedent to set in allowing them to get away with it.

The district court invited comment from defense counsel, who argued that the "lies" had nothing to do with taking responsibility for the offense conduct and that Chapa had "corrected the lies."

In Goldfaden, too, the government sought, at the sentencing hearing, to correct factual errors. We held that "[t]o the extent that the Government corrected factual misstatements in Appellant's [PSR], its memoranda were in keeping with our precedent." Id. at 1328. But, we noted, the government "did more than point out factual inaccuracies)) it suggested a base offense level, advocated a ten-level increase, argued for a minimum offense level of thirteen, later advanced a higher base offense level of twenty, and recommended an upward departure." Id. Importantly, we concluded as follows:

> Unlike general descriptions of a defendant's culpability or cooperation, "suggestions" or "positions" on the applicability of certain guidelines, enhancements, and

> departures translate directly into a range of numerical figures representing lengths of prison stay. We hold, therefore, that the Government violated its plea agreement, and that this violation is plain error.

Id.

The most the government did in the instant case was what this court in Goldfaden described as "general descriptions of a defendant's culpability or cooperation." Id. Hence, under Goldfaden, there is no plain error.[1]

B.

Chapa claims the district court did not make specific findings regarding disputed issues of fact contained in the PSR, particularly as to the assertion that Chapa initially had lied to the probation officer as to certain material facts. At the sentencing hearing, however, the court asked the probation officer whether Chapa had lied, and the probation officer answered in the affirmative. Hearing that answer, the court said, "The Court's going to overrule the objection then."

Although the court did not make an explicit finding, its ruling, in context, implies a plain finding in favor of the probation officer's version. There is no reversible error.

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[1] In United States v. Valencia, 985 F.2d 758, 760 (5th Cir. 1993), we stated, citing only Goldfaden, that "[a] breach of a plea agreement constitutes plain error and our review is de novo." That is not what Goldfaden says, however, as it holds that a plea agreement breach is only sometimes plain error. Moreover, to the extent that Goldfaden and Valencia conflict with Campbell, which states that breaches of plea agreements are not reviewable for the first time on appeal, Campbell, as the earlier case, controls. See Texaco Inc. v. Louisiana Land & Exploration Co., 995 F.2d 43, 44 (5th Cir. 1993).

C.

Chapa argues that her "offense level should have been decreased based on her minor role in the offense." She contends that "she was a minor participant in comparison to the others named in the indictment."

The guidelines provide that the sentencing court may decrease the offense level by two levels if the defendant was a minor participant in the offense. See U.S.S.G. § 3B1.2(b). A minor participant is any participant who is less culpable than most other participants but whose role could not be described as minimal. Id. comment. (n.3). Simply being less involved than other participants will not warrant minor-participant status; a defendant must be peripheral to the furtherance of the illegal endeavor. United States v. Thomas, 932 F.2d 1085, 1092 (5th Cir. 1991), cert. denied, 112 S. Ct. 264, 112 S. Ct. 428, 112 S. Ct. 887 (1992).

If a defendant has received a lower offense level by virtue of being convicted of a less serious offense than his actual conduct warranted, no reduction is ordinarily called for, as the defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense. U.S.S.G. § 3B1.2(b), comment. (n.4). Whether a defendant played a mitigating role in an offense as a minor participant is a sophisticated factual determination that enjoys the protection of the "clearly erroneous" standard. United States v. Gallegos, 868 F.2d 711, 713 (5th Cir. 1989) (internal quotations and citations omitted).

In the plea agreement, Chapa and the government stipulated

that she was a minor participant in the money laundering offense. The probation officer reported that Chapa "was actively involved in purchasing items as well as paying for services rendered." She was considered to be an average participant.

In response to Chapa's objection, the probation officer determined that Chapa had the same culpability as her husband in the offense of money laundering. Using money earned from the sale of drugs, she purchased fixtures and appliances for the house, purchased cashier checks using other names, and was skillful at hiding the cash. Once her husband's abuse of alcohol and cocaine became more severe, Chapa took a more active role in constructing the house and managing the money.

At sentencing, Chapa argued that she was less culpable than her husband, who gave her the drug money and instructed her regarding the building of the house. The probation officer agreed with Chapa that, under U.S.S.G. § 6B1.4, the district court was not bound by the stipulation. The probation officer reiterated, however, that, in view of her role in the construction of the house and in managing the drug money, Chapa should not be viewed as a minor participant.

The district court found that Chapa was an average participant and overruled her objection, basing its ruling upon a report following an investigation by an agent of the Internal Revenue Service:

> And according to the agent)) IRS agent)) appeared to know what she was doing in hiding the cash. Her name was found on receipts to various businesses. And after speaking to some of the representatives of these

> businesses, they had indicated)) sales people indicated that they remember that this defendant gave them reasons why she was using cash, basically trying to hide what she was doing, knowing what she was doing.

Moreover, the district court adopted the factual findings of the PSR. The findings of the district court are not clearly erroneous.

AFFIRMED.