

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8656
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERT WILLIAM RUSSELL,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Western District of Texas
USDC No. M-93-CR-49-1
- - - - -
(March 24, 1994)

Before KING, DAVIS, and DeMOSS, Circuit Judges.

PER CURIAM:*

Robert William Russell pleaded guilty pursuant to a plea agreement in which he waived his right to appeal all issues related to the sentencing guidelines, unless there is a substantial departure upwards, or to contest the sentence in a post-conviction proceeding. On appeal, Russell challenges the district court's inclusion of two prior misdemeanor theft by check convictions in the calculation of his criminal history score under U.S.S.G. § 4A1.2(c)(1).

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

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). To be valid, the waiver must be informed and voluntary. Id. at 567-68. A defendant's waiver of the right to appeal his sentence requires the special attention of the district court. United States v. Baty, 980 F.2d 977, 979 (5th Cir. 1992), cert. denied, 113 S.Ct. 2457 (1993). The district court should insure that the defendant fully understands his right to appeal and the consequences of waiving that right. Id.

As shown by the plea colloquy, Russell knowingly and voluntarily waived his right to appeal his sentence unless the court departed upwardly in assessing sentence. The district court asked Russell about whether he understood the plea agreement and the provision in the plea agreement waiving the right of appeal of the sentence. The district court also advised Russell that although the sentencing guidelines were applicable to this case, under some circumstances the court had the authority to impose a more severe or less severe sentence than that called for by the guidelines. Finally, the court noted and Russell agreed that if the sentence imposed was more severe than he anticipated, he would still be bound by his plea agreement and have no right to withdraw it.

Russell relies on United States v. Kelly, 974 F.2d 22 (5th Cir. 1992), in which the district court erroneously imposed a five-year term of supervised release in violation of the statutory maximum of three years. He argues that in Kelly, this

Court considered the sentence an appealable issue despite the plea agreement appeal waiver because the sentence was greater than the prescribed maximum. Id.

Kelly is indeterminative of the sentence imposed in this case. The district court in Kelly imposed a supervised release term in excess of the statutory maximum and thus, an upward departure, in contravention of the plea agreement. Kelly, 974 F.2d at 23. In Russell's case, the district court overruled some of Russell's objections to the PSR's calculation of his criminal history score, but complied with the statutory mandates for the sentencing range under the resulting criminal history category. The sentence was within the terms of the plea agreement and not an upward departure.

Because the district court did not depart upwardly in imposing Russell's sentence, because the record indicates that Russell knowingly and voluntarily waived his right to appeal any sentencing issues, and because the district court determined that Russell understood that he was waiving such right, the appeal is DISMISSED. See Melancon, 972 F.2d at 568.