

1IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8868
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANKIE LEROY CONTRERAS,

Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Texas
(P-93-CR-76(1))

(August 30, 1994)

Before GOLDBERG, JOLLY, and JONES, Circuit Judges.

PER CURIAM:*

Frankie Leroy Contreras was indicted for possession with intent to distribute 100 kilograms of marijuana and for conspiracy to distribute the marijuana. As part of a plea agreement, the government agreed to dismiss the conspiracy count in return for a guilty plea on the possession with intent to distribute count, as well as to recommend that the court downwardly depart from the

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

sentencing guidelines in light of Mr. Contreras' assistance in other investigations. Also as part of the plea bargain agreement, Mr. Contreras agreed to waive his right to appeal his sentence.

At the sentencing hearing, the prosecution complied with its promise to recommend that the court downwardly depart from the guidelines. However, the judge disregarded the prosecution's recommendation and sentenced Mr. Contreras to a sentence within the range established by the sentencing guidelines. Mr. Contreras appeals from the sentencing determination, and his appeal presents us with two issues. First, has Mr. Contreras waived his right to appeal his sentence? Second, did the District Court's refusal to comply with the prosecution's recommendation void Mr. Contreras' plea agreement?

WAIVER OF RIGHT TO APPEAL

A defendant may waive her right to appeal, so long as the waiver is voluntary and informed. United States v. Baty, 980 F.2d 977, 978 (5th Cir. 1992), cert. denied, 113 S.Ct. 2457 (1993). A waiver of a right to appeal is permissible absent evidence of confusion on the part of the defendant. United States v. Portillo, 18 F.3d 290, 292 (5th Cir. 1994). Here, although Mr. Contreras assented to a waiver of appeal as part of his plea agreement, the trial judge misinformed him at the sentencing hearing, stating that his sentence could be appealed under certain circumstances. This equivocation is sufficient to make Mr. Contreras' waiver uninformed, and hence his right to appeal his sentence remains intact. Baty, 980 F.2d at 978-79.

WAS THE PLEA BARGAIN BREACHED?

Mr. Contreras argues that the District Court breached the plea bargain agreement by not following the prosecution's recommendation, or alternately, that the judge should have allowed him to withdraw his guilty plea if the prosecutor's recommendation was not going to be followed. If the government breaches its plea agreement, then the defendant is allowed to withdraw her plea or, in the alternative, demand specific performance of the plea agreement. Santobello v. New York, 404 U.S. 257, 263 (1971). Here, however, the prosecution complied with its obligations under the plea agreement. The government dismissed the conspiracy count of Mr. Contreras' indictment, and the prosecution recommended that the judge downwardly depart from the sentencing guidelines.

The presiding judge is not a party to the plea bargain, and is thus not bound by it. Sentencing remains within the constrained discretion of the judge, and the recommendations of the prosecution are merely precatory. United States v. Jones, 905 F.2d 867 (5th Cir. 1990). The record indicates that the district judge made the non-binding nature of the prosecution's recommendation clear to the defendant on several occasions, and the range of possible sentences was also communicated to Mr. Contreras. As such, Mr. Contreras cannot claim that his assent to the plea bargain was uninformed, or that he did not receive the benefit of his bargain.

AFFIRMED.