UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10195
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRED MENDOZA VERA,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:93-CR-301-G)

(July 5, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:*

Appellant Vera was recently sentenced to serve twelve months and one day imprisonment, together with other penalties, after he pled guilty to aiding and abetting bank larceny. He was also ordered to pay restitution pursuant to 18 U.S.C. § 3663(a) in the amount of $11,000 jointly and severally with his two co-defendants. He appeals the district court's failure to allow him

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

to testify at the sentencing hearing and the assessment of restitution. Finding no error, we affirm.

Vera's brief alleges that when he and his counsel arrived for the sentencing hearing, they were prepared to present Vera's testimony to dispute the PSR's finding, based on statement from his co-defendants, that Vera was an organizer or leader in the offense, leading to a two-level increase for sentencing purposes. Although the trial court's scheduling order did not say so, the judge informed defense counsel that he would receive affidavits but not testimony at the sentencing hearing. Vera states that the court indicated that while Vera could proffer evidence of his proposed testimony, the court would not consider the proffer in pronouncing sentence and would not grant a continuance for Vera to supply affidavits. Vera did, however, have an objection to the PSR on file, which the court did consider and overrule.

This court has held that sentencing courts have considerable flexibility in determining how to receive evidence. See United States v. Henderson, 919 F.3d 917, 927 (5th Cir. 1994). Vera does not dispute this but contends that the court was obliged to provide advance notice of its preferences. We agree that the court should give counsel advance notice whether it will receive affidavits or testimony at a sentencing hearing.

The court's apparent vagueness about its requirements does not, however, amount to reversible error in this case. Vera does not dispute that he could have submitted evidence in the form of affidavits or exhibits but chose not to do so. In any other

kind of evidentiary dispute, the proponent of the admission of evidence has the burden to proffer the evidence in the record, yet Vera's counsel expressly declined to do that here. Appellant does not assert that the court's finding on the point at issue was clearly erroneous, nor does he suggest how the outcome of the hearing would have been any different if his testimony had been admitted. We are not persuaded that appellant was deprived of a fundamentally fair sentencing hearing.

Appellant also complains that he should not have been awarded restitution when the court found he was too indigent to pay a fine and had no evidence on which to base its "prediction" that he would earn more money in the future than the paltry sums he had earned in the past. These objections do not comport with Fifth Circuit law. See, United States v. Plewniak, 947 f.2d 1284, 1289 (5th Cir. 1991); United States v. Stafford, 896 F.2d 83, 84 (5th Cir. 1990); United States v. Ryan, 874 F.2d 1952 (5th Cir. 1989).

The sentence of imprisonment and restitution is AFFIRMED.