

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-10218
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

LESTER HENRY ROBINSON, a/k/a "Ninja",

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:92-CR-365-D)

(November 16, 1994)

Before DUHE, WIENER and STEWART, Circuit Judges.

PER CURIAM:¹

Pursuant to an agreement with the Government, Appellant pleaded guilty to a drug offense and was sentenced. He appeals contending that the Government breached its plea agreement to move for downward departure and that the district court erred in not granting Appellant a three level reduction in offense level for acceptance of responsibility. We affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Plea Agreement:

The Government contends that Appellant failed to raise this issue in the district court and, therefore, we should only review for plain error. We pretermit that issue because Appellant's argument fails even under de novo review.

The Government has discretion under Section 5K1.1 to move for downward departure or not, but it can waive that discretion and obligate itself to so move contingent upon substantial cooperation by the defendant. Wade v. United States, 112 S. Ct. 1840 (1992). When the Government does so, the trial court has authority to determine whether a defendant has provided the assistance he promised. United States v. Watson, 988 F.2d 544, 553 (5th Cir. 1993), cert. denied, 114 S. Ct. 698 (1994). The district court did so in this case and implicitly found that Appellant had not provided substantial cooperation. The evidence at the sentencing hearing, especially the testimony of Detective Storey, fully supports that decision.

Acceptance of responsibility:

Although this court has not "ultimately defined what standard applies in reviewing a district court's refusal to credit acceptance of responsibility...", we have applied a clearly erroneous standard, without foundation standard and a great deference standard and found that there is "no practical difference between the standards". United States v. Cartwright, 6 F.3d 294, 304 (5th Cir. 1993), petition for cert. filed, (U.S. July 19, 1994) (No. 94-5410). Assuming without deciding that the district court

erred, the error does not rise to the required level because even with a three level downward adjustment the Guideline range would still have included the life sentence imposed. See, Addendum to PSR, p.3. Although the trial court apparently accepted the PSR's offense-level calculation, it concluded that Appellant's adjusted base offense level was 44 rather than 46. See, R. 3, 41. Given a three level reduction Appellant's level would have been 41 which results in a sentencing range of 360 months to life.

AFFIRMED.