UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10235
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DAVID NOEL CARD,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(4:93 CR 15 A (4))

March 21, 1995

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

PER CURIAM:*

David Noel Card pleaded guilty pursuant to a written plea agreement to one count of wire fraud in violation of 18 U.S.C. § 1343. He was sentenced to 46 months imprisonment, three years supervised release and a $10,000 fine. He appeals two sentencing issues and the government's failure to request a downward departure for substantial assistance. Finding no error, we affirm.

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

1. Card first argues that the district court erred by refusing either to order the Government to file a § 5K1.1 motion for downward departure or to allow Card to withdraw his guilty plea. He contends that the Government breached the plea agreement by failing to file the § 5K1.1 motion.

Whether the government's conduct violates the terms of a plea agreement is a question of law. U.S. v. Valencia, 985 F.2d 758, 760 (5th Cir. 1993). Card, as the party alleging a breach of the plea agreement, bears the burden of proving the underlying facts that establish a breach by a preponderance of the evidence. U.S. v. Hernandez, 17 F.3d 78, 81 (5th Cir. 1994). In determining whether the Government has violated the plea agreement, the Court must determine "whether the government's conduct is consistent with the defendant's reasonable understanding of the agreement." Valencia, 985 F.2d at 761.

Card's plea agreement conditioned the Government's obligation to file a § 5K1.1 motion on Card's substantial assistance "in investigating and prosecuting criminal matters." The district court concluded, however, that Card had not provided substantial assistance to the Government.

Card has not met his burden of proving the underlying facts that establish a breach of the plea agreement by a preponderance of the evidence. Card presented no evidence to the district court regarding the amount of assistance he had rendered to the Government; although he made an argument to the district

court, he did not support his assertions with any testimony or other evidence.

On appeal, Card asserts that the government's complaints about three aspects of his testimony on direct examination were ill-founded. The government, for no obvious reasons, did not respond to these assertions. Nevertheless, by simply challenging part of the government's presentation, Card has not proven that he rendered substantial assistance. The government characterized Card as unhelpful in investigating the scam and said his testimony was largely cumulative. The district court observed that Card's testimony seemed to help the defense almost as much as the prosecution.

The district court thus did not err in concluding that because the assistance provided by Card was not substantial, the Government did not breach the plea agreement.

Further, even if Card had testified as to his substantial assistance, he still had no reasonable expectation that the Government would file a § 5K1.1 motion. Card conceded at the sentencing hearing that "the government did not bargain away their discretion to file a 5K1 letter, and at this point it is still a matter left to the U.S. attorney's discretion."

2. Card next argues that the district court erred by enhancing his offense level pursuant to § 2F1.1(b)(3)(B) for working in furtherance of the scheme in violation of an administrative cease and desist order. Card contends that he did not violate the cease and desist order issued by the Texas State

Securities Board (Board) ordering him not to participate in the sale of securities in Texas for five years because there was no evidence that the "oil well drilling ventures" in which he participated were securities required to be registered with the Board. This contention is meritless.

At the sentencing hearing, Inspector Rex Whiteaker testified that the Texas State Securities Board had deemed the interests being sold to be securities. Whiteaker testified that Card consented to the cease and desist order in December 1990, and that he "voluntarily consented to withdraw his application to get the licensing for Foxridge Securities as a broker/dealer, as well as to cease and desist from public solicitation of unregistered securities by means of the Twin Elephant program and the Silver Fox program." Whiteaker testified that in the spring of 1991, Card "received override commissions of sales brokers selling, again, on the Twin Elephant for what he signed the cease and desist for." These sales occurred under Card's supervision as sales manager.

The district court found that Card had violated the cease and desist order that prohibited him from participating in the sale of securities in the State of Texas for five years, and overruled his objection. Based upon Inspector Whiteaker's testimony at the sentencing hearing, the district court's finding was not clearly erroneous.

3. Finally, Card argues that the district court erred by attributing to him 4.4 million dollars as the amount of the loss and thereby increasing his offense level pursuant to §

2F1.1(b)(1)(N) by thirteen levels. Blue brief, 26. Card contends that 4.4 million dollars in fraudulent sales was not reasonably foreseeable to him. The calculation of the amount of loss is a factual finding reviewed for clear error. Palmer, 31 F.3d at 261.

Section 2F1.1(b)(1)(N) provides for a thirteen-level enhancement if the amount of the loss was more than $2,500,000, but less than $5,000,000. The PSR stated that the Cushman companies, Card's employer, completed more than 4.4 million dollars in fraudulent sales, and that Card was aware of the fraudulent activities and took part in the jointly undertaken criminal activity. Further, in the Factual Resume, Card stipulated that as a sales broker, he solicited interests in the "Twin Elephant" project and the "Slover-Beever well." He assisted in sales of interests by providing sales support and managing sales brokers. He "agreed to and assisted in [the] scheme to defraud investors and others by fraudulently selling interests" in the wells, and made sales presentations or "pitches" to individuals throughout the country by telephone "cold calls" to persons thought to be potential investors.

He stipulated to fraudulent sales of $4.5 million in connection with the scam during his tenure. The district court found that Card "jointly undertook . . . to do various things as a salesperson, personnel employee, and computer employee to facilitate and cause to be accomplished the receipt from investors of monies by means of fraudulent activities." The court further

found that Card "could have reasonably foreseen throughout the time he was a participant in the jointly-undertaken criminal activity, that is, the scheme, that as a part of such activities, monies would be obtained from investors through mail fraud and wire fraud and the total amount of those monies would be in excess of $2,500,000."

The court concluded that the thirteen-level enhancement in the PSR was correct and overruled Card's objection. Card offered no controverting evidence.

The judgment and sentence of the district court are **AFFIRMED**.