UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10330
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HENRY HEFNER BETTIS,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(4:93-CR-015-A)

(January 12, 1995)

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

By EDITH H. JONES:[*]

Appellant Bettis pleaded guilty to one count of mail fraud in connection with a scheme to sell worthless interests in oil and gas drilling programs and was sentenced to 37 months imprisonment. His sentence, as requested by defense counsel, was at the bottom of the guidelines range for the offense. On appeal, Bettis attempts to assert a challenge to the government's conduct that he explicitly withdrew from the trial court's consideration.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

This procedure is most undesirable; in any event, no plain error was committed by the district court. The sentence is affirmed.

Shortly before his sentencing, Bettis was informed that the government would not be filing a section 5K1.1 motion for downward departure despite his attempt fully to cooperate with the government pursuant to the plea agreement. Bettis immediately hand-delivered a motion for leave to file an "Objection to the Failure of the Government to File a Motion for Downward Departure as to him under U.S.S.G. § 5K1.1." At the sentencing hearing, however, Bettis specifically withdrew this objection. Instead, he urged the district court to sentence him at the bottom of the Guidelines, a suggestion the court adopted.

Now on appeal, Bettis seeks to urge that issue which he expressly caused the district court not to consider, i.e., the propriety of the government's failure to move for downward departure. Under other circumstances, the government's breach of a plea bargain agreement, if that is what happened here, could be considered for the first time on appeal. United States v. Valencia, 985 F.2d 758 (5th Cir. 1993). The issue could be considered under the rigorous standards applicable to plain error review. United States v. Olano, ____ U.S. ____, 113 S.Ct. 1770, 1777-79 (1993). But the Court noted in Olano that a court of appeals "should correct a plain forfeited error affecting substantial rights if the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" Olano, 113 S. Ct. at 1779 (quoting United States v. Atkinson, 297 U.S.

157, 160 (1936)). Where defendant's own attorney knew of the alleged plea bargain breach by the government, filed an objection to that conduct, and then deliberately withdrew his objection from consideration by the trial court, manifest injustice cannot have been done. Moreover, counsel for Bettis chose to take this course of action at the instance of his client. Having withdrawn his objection to the lack of a motion for downward departure, Bettis may not cry foul in the court of appeals.

AFFIRMED.