

UNITED STATES COURT OF APPEALS  
for the Fifth Circuit

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No. 94-20105  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

AMADA ELIZONDO ALVAREZ,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
(CR-H-92-298-1)

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(May 17, 1995)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.

PER CURIAM:<sup>1</sup>

Alvarez appeals his conviction and sentence on drug trafficking charges. We affirm.

I.

Alvarez pleaded guilty to conspiracy and possession with intent to distribute marijuana and cocaine and was sentenced to 262 months' imprisonment and five years' supervised release. The facts of the offense will be discussed as necessary in relation to the issues raised.

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<sup>1</sup> 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 Pursuant to that Rule, the court has determined that this opinion should not be published.

## II.

### A.

Alvarez argues first that the Government breached its plea agreement with him. Alvarez first attempted to enter a guilty plea at his rearraignment hearing on October 8, 1993. As part of an oral plea agreement, which was stated on the record, the Government agreed to recommend that Alvarez be sentenced at the bottom of the Guideline range and receive a three-point downward adjustment for acceptance of responsibility. The district court refused to accept the plea on the basis that Alvarez disagreed with the Government's factual statement.

On October 12, the morning that trial was set to begin, Alvarez again appeared before the district to enter a guilty plea. The district court observed that the plea was being entered without a plea agreement. Alvarez' attorney, Mr. Zakes, stated that was correct. After a co-defendant's attorney expressed some hesitation, the attorneys conferred, and, after a brief discussion, the Government confirmed that there was no agreement. Later in the plea colloquy, Alvarez denied that he was promised anything in return for his plea.

Alvarez now contends that the October 8 oral plea agreement remained in effect at the October 12 proceeding and that, by arguing against a downward adjustment for acceptance of responsibility, the Government breached that agreement. He argues that he is entitled to specific performance and resentencing. Alternatively, he argues that the record is too ambiguous to decide

whether a plea agreement existed, and that this court should remand to the district court for a hearing.

"The existence of a plea agreement is a factual issue to which the clearly erroneous standard of review is applied." United States v. Chagra, 957 F.2d 192, 194 (5th Cir. 1992). In this case, Alvarez did not object to the Government's representation that there was no plea agreement at the October 12 proceeding, but rather agreed with such representation. When a defendant in a criminal case has forfeited an error by failing to object in the district court, this court may remedy the error only in the most exceptional case. United States v. Calverley, 37 F.3d 160, 162 (5th Cir. 1994) (en banc), cert. denied, 115 S. Ct. 1266 (1995); see also United States v. Olano, 113 S. Ct. 1770, 1777-79 (1993).

Once the October 8 plea was rejected, the Government was no longer bound to the terms of its offer. The record is clear that no plea agreement was in existence at the time Alvarez pleaded guilty on October 12. Alvarez has not made any assertion of fact to the contrary. There is no error here, plain or otherwise.

B.

Alvarez argues next that the PSR was too ambiguous to support the district court's adoption of its facts and its application of the Guidelines to the facts in determining his base offense level and his role in the offense. No objections were made to the PSR prior to sentencing. At sentencing, Alvarez' counsel objected to the PSR's recommendation of a two-point upward adjustment for use of a weapon and argued for a two-point downward adjustment for

acceptance of responsibility. After overruling the use of a weapon objection and granting a two-point downward adjustment for acceptance of responsibility, the court adopted the PSR's factual findings and its application of the Guidelines.

Because Alvarez did not object to the alleged ambiguity of the PSR's factual statement of the offense conduct or the district court's adoption of the facts contained therein, we review this claim for plain error as well. The district court sentenced Alvarez at the high end of the Guidelines based on the extensive nature of the conspiracy, his role in the conspiracy, his connection to drug resources in Mexico, and his ability to store large quantities of controlled substances in a pit and shed located on his property in Rio Grande City. Alvarez contends that all of these findings are not supported by the PSR.

Alvarez first contends that the PSR's references to "Alvarez" and the "Alvarez residence" were ambiguous in that the PSR did not always indicate to which Alvarez it was referring.<sup>2</sup> Specifically, he contends that the PSR's statement concerning a shed where the marijuana was stored probably referred to a shed owned by his father, Domingo Alvarez, undermining support for the district court's finding that Alvarez had the ability to store large quantities of marijuana on his property. Even if the PSR is not clear on whether the marijuana was stored at his or his father's

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<sup>2</sup> Alvarez' brother, Raul Alvarez, was a co-defendant. The PSR also mentioned his father, Domingo Alvarez, and his other brother, Jorge Alvarez, all of whom also lived in the Rio Grande Valley.

property, Alvarez admitted at his arraignment that he hid 900 pounds of marijuana at his home.

Alvarez also contends that the facts in the PSR concerning his role as a manager or supervisor were ambiguous. However, Alvarez admitted at the sentencing hearing that he was a manager or supervisor of his own drug distribution operation. Moreover, in arguing for an adjustment for acceptance of responsibility, Alvarez' attorney stated that Alvarez had acknowledged that "he was heavily involved in giving instructions and making arrangements and facilitating delivery of this large amount of marijuana, and also a very large amount of cocaine."

Lastly, Alvarez contends that the PSR was ambiguous with respect to the quantity of drugs for which Alvarez was responsible. The PSR outlines three shipments of marijuana: 762 pounds on October 26, 1992; 720 pounds on November 11, 1992; and 978 pounds of marijuana, along with 37 pounds of cocaine, on November 17, 1992. Alvarez admitted that he took the confidential informant to meet the owners and delivered the drugs three times. This admission supports the district court's adoption of the PSR's recommendation that the court consider Alvarez responsible for the amount of drugs involved in all three shipments.

In sum, the district court did not commit plain error in adopting the facts and guideline applications contained in the PSR.

C.

Alvarez argues next that his attorneys were ineffective because they failed to object to the ambiguities in the PSR and failed to make critical objections at sentencing. He contends that his counsels' failure to object to the PSR's calculation of his base offense level and the upward adjustment for his role in the offense and to argue for a three-point downward adjustment for acceptance of responsibility denied him effective assistance of counsel.

Although this court does not generally consider claims of ineffective assistance of counsel on direct appeal unless it has first been raised in the district court, an exception is made if the record is sufficiently developed to resolve the merits of the claim. United States v. McCaskey, 9 F.3d 368, 380-81 (5th Cir. 1993), cert. denied, 114 S. Ct. 1565 (1994). In this case, the record is sufficiently developed to dispose of the ineffectiveness claim. To prevail on an ineffective assistance of counsel claim, Alvarez must show 1) that his counsel's performance was deficient in that it fell below an objective standard of reasonableness; and 2) that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687-94 (1984).

Alvarez cannot show deficient performance or prejudice due to his counsel's failure to object to ambiguities in the PSR bearing on his role in the offense and the quantity of drugs for which he is responsible, because, as discussed above, Alvarez admitted the facts supporting those findings to the court. A review of the sentencing transcript shows that Alvarez strategically made those

admissions in the anticipation that the court would grant him the downward adjustment for acceptance of responsibility. As part of this strategy, his counsel could have reasonably determined that objections to those factors would not be successful and that the better course would be to admit his involvement. Alvarez alleges no facts sufficient to overcome the presumption that the challenged act or omission of counsel was sound trial strategy. Strickland, 466 U.S. at 689.

Alvarez' argument that his counsel was ineffective for not arguing for a three-point downward adjustment for acceptance of responsibility, rather than a two-point adjustment, similarly fails. Alvarez would have been entitled to the extra point only if he had timely furnished information to the prosecution regarding his involvement in the offense or timely notified the authorities that he would plead guilty, so as to permit the government to avoid preparation for trial and the court to allocate its resources efficiently. U.S.S.G. § 3E1.1(b)(1) and (2); United States v. Tello, 9 F.3d 1119, 1124-25 (5th Cir. 1993). Alvarez has not alleged any facts to show that he would have been entitled to the extra point. Moreover, the record shows that Alvarez filed extensive pretrial motions to which the Government was required to respond, that the Government prepared for trial, and that Alvarez did not plead guilty until the morning of trial.

AFFIRMED.