

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-20235

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TERRELL HILLEBRAND,

Defendant-Appellant..

Appeal from the United States District Court
For the Southern District of Texas
(CR H 93-178-2)

(October 24, 1994)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:*

Defendant Terrell Hillebrand pled guilty to one count of conspiracy to commit wire and mail fraud in violation of 18 U.S.C. § 371 (1988). In exchange, the government agreed to drop counts two through fifty-two. The court sentenced Hillebrand to thirty-three months incarceration, two years supervised release, and a \$50 special assessment. Hillebrand now appeals his sentence, complaining that the trial court erroneously calculated his

* Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

sentence and that he was denied effective assistance of counsel. Because we reach neither of these contentions, we DISMISS Hillebrand's appeal.

I

Hillebrand signed a plea agreement in open court in which he pled guilty to conspiracy to commit mail and wire fraud in exchange for the government's promise to drop all other charges against him. One of the explicit terms of the plea agreement was a waiver of the right to appeal his sentence unless it exceeded the statutory maximum or included an upward adjustment not requested by the Government.¹

Before Hillebrand signed the plea agreement, the judge questioned him extensively. In response to the court's inquiries, Hillebrand testified that he had read the plea agreement and understood it. He also signed a separate written statement to that effect. Hillebrand further responded that the written agreement constituted his entire plea agreement. Lastly, Hillebrand testified that pleading guilty according to the terms of the plea

¹ In pertinent part the plea bargain reads:

The defendant is aware that [18 U.S.C. § 3742] affords a defendant the right to appeal the sentence imposed. Knowing that, the defendant waives the right to appeal the sentence or the manner in which it was determined on the grounds set forth in [§ 3742], except that the defendant may appeal a sentence imposed above the statutory maximum or an upward departure from the Sentencing Guidelines, which upward departure had not been requested by the United States.

Record on Appeal, vol.2, at 133-34.

bargain was his own free choice, that he had not been promised anything by anyone other than those promises made part of the written agreement, and that he had not been threatened in any way.

The court also queried Hillebrand's attorney, W.E. Herman, III, to ascertain whether he was satisfied that the defendant was capable of understanding the rights he was waiving by signing the plea bargain. Herman confirmed that he had discussed the plea agreement with his client and was confident that Hillebrand fully understood the effect of his plea agreement. Herman also signed a written statement affirming that he had "carefully reviewed" each part of the plea agreement with the defendant and that, to his knowledge, the defendant's decision to sign the plea agreement was informed and voluntary.

During the hearing, the court notified Hillebrand on more than one occasion that the maximum statutory punishment that could be imposed was five years imprisonment and/or a \$250,000 fine. It also explicitly informed Hillebrand that although the court could accept the recommendations of the parties regarding sentencing it was not obligated to do so. The court found that Hillebrand understood the consequences of his guilty plea and that he had freely and voluntarily entered into the agreement. As a result, it found Hillebrand guilty.

At sentencing, the court accepted the factual findings of the Presentence Investigation Report and sentenced Hillebrand within the Guidelines to thirty-three months incarceration, two years supervised release, and a \$50 special assessment. Hillebrand now

appeals his sentence on the grounds that he was deprived of his Sixth Amendment right to counsel and that the trial court erroneously calculated his sentence under the Sentencing Guidelines.²

II

Whether we must address the merits of Hillebrand's challenges to the district court's calculation of his sentence depends on whether he waived his right to appeal when he accepted the plea agreement. "To be valid, a defendant's waiver of his right to appeal must be informed and voluntary." *United States v. Portillo*, 18 F.3d 290, 292 (5th Cir. 1994), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. July 14, 1994) (No. 94-5280). A defendant must know he has the right to appeal his sentence and that by signing the plea bargain he gives up that right. *Id.* Hillebrand argues that he did not knowingly waive his right to appeal because his right to appeal was not specifically mentioned at his Rule 11 hearing. However, "when the record of the Rule 11 hearing clearly indicates that a defendant has read and understands his plea agreement, and that he raised no question regarding a waiver-of-appeal provision, the defendant will be held to the bargain to which he agreed, regardless of whether the court specifically admonished him concerning the waiver of appeal." *Portillo*, 18 F.3d

² Specifically, Hillebrand argues that the court erroneously: (1) increased the base offense level for his role in the offense, (2) refused to reduce his offense level for acceptance of responsibility, (3) attributed the loss incurred by all victims during the entire life of the enterprise to him, and (4) double-counted his conduct by increasing his offense level under both U.S.S.G. § 2F1.1(b)(2) and U.S.S.G. § 3B1.1(c).

at 293. Hillebrand testified that he had read the agreement and understood its consequences.³ He also testified that he voluntarily signed the agreement. We hold that Hillebrand knowingly and voluntarily waived the right to appeal his sentence and we therefore express no opinion on his various challenges to the sentence itself.

Neither do we reach Hillebrand's ineffective assistance of counsel claims. "The general rule in this circuit is that a claim of ineffective assistance of counsel cannot be resolved on direct appeal when the claim has not been [raised] before the district court since no opportunity existed to develop the record on the merits of the allegation." *United States v. Thomas*, 12 F.3d 1350, 1368 (5th Cir.) (quoting *United States v. Higdon*, 832 F.2d 312, 313-14 (5th Cir. 1987), *cert. denied*, 484 U.S. 1075, 108 S. Ct. 1051, 98 L. Ed. 2d 1013 (1988)), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1861, 128 L. Ed. 2d 483 (1994). The only exception to this rule is the rare case in which the record is fully developed in the trial court. *Higdon*, 832 F.2d at 314. Because Hillebrand did not complain of ineffective assistance of counsel in the trial court, and the record was not sufficiently developed below, we do not address his Sixth Amendment claims.

III

For the foregoing reasons, Hillebrand's appeal is **DISMISSED**.

³ At the time of his plea bargain, Hillebrand was forty-five years old and had earned a masters degree in art history.