UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-20341
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ALAN GOLDSMITH,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-H-93-0028-1)

(February 23, 1995)

Before DUHÉ, WIENER, and STEWART, Circuit Judges.

PER CURIAM:[1]

Having pled guilty to bank fraud and conspiracy charges Goldsmith appeals his sentence on numerous grounds. We find no merit in his contentions and affirm.

When plea negotiations failed, Appellant entered an unconditional plea of guilty. He then moved for specific performance of an alleged oral plea agreement with the Government for downward departure. Following a hearing at which both counsel for the Government and for Appellant testified, the district court

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

found that no such agreement had been made and denied the motion. Appellant contends the court erred by not considering what the parties to the agreement meant by "substantial assistance". Since Goldsmith did not raise this issue in the sentencing court, we examine only for plain error. United States v. Calverley, 37 F.3d 160, 162 (5th Cir. 1994) (en banc). We have examined the record and we find not only no plain error, but no error of any kind in the district court's finding that no such plea agreement was made. The testimony of both counsel makes this clear. Finding no agreement, there was no need to consider what its terms mean.

Appellant next argues that the district court erred in not barring the prosecutor (who was a witness) from the hearing room during the hearing on his motion for specific performance. See Federal Rule of Evidence 615. Prejudice must be shown. United States v. Ramirez, 963 F.2d 693, 704 (5th Cir.), cert. denied, 113 S.Ct. 388 (1992). Appellant shows no prejudice. Appellant called the Assistant United States Attorney as his witness so he could control the order of the presentation of the witnesses. He could have called the AUSA first before any other witness testified. Furthermore, there is no prejudice because the record shows that there was no plea agreement.

At the hearing on the motion for specific performance, the Court raised a question about the propriety of AUSA Sledge representing the Government in the matter when he was also a witness in it. The court wished assurances that the U.S. Attorney agreed with the representation. During a recess there was

apparently some ex parte communication with the Court about that. Appellant now argues that this is grounds for resentencing. We disagree. This communication did not in any way affect the fairness, integrity or public reputation of the proceeding. The Court amply spread upon the record what occurred off the record and the Appellant suffered no prejudice.

The Appellant claimed entitlement to downward departure due to his diminished mental capacity and he argues to us that the district court erred in not granting it. The district court found that there was no showing that Appellant had reduced mental capacity or that such reduced capacity, if it existed, played any part in the commission of the crime. We have examined the record carefully and we fully agree. There is no evidence that Appellant suffers from any such condition.

The district court increased Appellant's offense level because he played an organizational role in the conspiracy. Appellant contends this was inappropriate because he lacked control over this codefendants; all the defendants were equally culpable; and he could not have been in a leadership role due to his mental condition. All these objections were overruled by the district court. The presentence report fully supports the district court's conclusion that there were six participants in the check-kiting scheme. Appellant created false invoices to make it appear that the participants were engaging in legitimate transactions. Goldsmith and Robert Swanson calculated the amounts that the checks should be written for and Goldsmith routinely instructed

codefendant Beardsley to send him blank signed checks for use in the conspiracy and explained to the probation officer that he coordinated the check-kiting scheme so that the checks sometimes "formed loops". This is more than adequate to support the increase in offense level. U.S.S.G. § 3B1.1(a). See United States v. Whitlow, 979 F.2d 1008, 1010-11 (5th Cir. 1992).

Finally Goldsmith argues that the district court erred in determining that the entire loss attributable to the scheme should be attributed to him. The presentence report indicated that the loss resulting from the scheme was approximately $1,200,000 but the Government conceded at sentencing that the actual loss was $1,100,000 which was the figure used for sentencing. There was no error because Appellant could properly be held responsible for losses caused by his codefendants. See United States v. Stouffer, 986 F.2d 916, 927 and n.13 (5th Cir.), cert. denied, 114 S.Ct. 115, 314 (1993).

AFFIRMED.