

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20365
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERT SWANSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-H-93-28-2)

(January 10, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

Robert Swanson and several codefendants were charged with conspiracy to commit bank fraud (count one) and with aiding and abetting bank fraud (count two). Swanson pleaded guilty to both counts.

Before Swanson was sentenced, the Government filed a motion to revoke the conditions of Swanson's release because he violated the terms of his release by committing two felonies, namely, making a false statement to a federally insured financial institution and

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

possession of firearms that travelled in interstate commerce. Swanson was later arrested.

The district court held a bond revocation hearing and determined that Swanson had violated the terms of his release. The court authorized Swanson to be released on an amended \$50,000 bond, with an additional \$10,000 deposit. Swanson posted the bond and was released on the same day.

Swanson filed a motion seeking specific performance of the plea agreement, namely that the Government file a motion for downward departure pursuant to U.S.S.G. § 5K1.1. The court held an evidentiary hearing on Swanson's motion for specific performance and denied the same. Swanson was sentenced to concurrent 30-month terms of imprisonment, a concurrent \$6000 fine, and to a three-year term of supervised release.

DISCUSSION

The Government argues that Swanson's appeal should be dismissed because he waived his right to a direct appeal except as to any upward departure not requested by the Government. In his reply brief, Swanson asserts that the operative portion of the plea agreement states that "the defendant waives the right to appeal the sentence or the manner in which it was determined on the grounds set forth in Title 18 [U.S.C. § 3742]" and that he is appealing based on a violation of his Sixth Amendment right to effective assistance of counsel and on the Government's breach of its promise to file a "5k1.1 downward departure," neither of which is contained in § 3742.

The plea agreement contains two references to Swanson's waiver of the right to appeal. The first paragraph of the agreement states that Swanson agrees to plead guilty and "waives his right of appeal except only as to any upward departure not requested by the United States." This provision, standing alone, seemingly would preclude Swanson from appealing for any reason. The next reference to the waiver provision is in paragraph nine and provides:

The defendant is aware that [§ 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 only that he may appeal any upward departure from the [Guidelines], which has not been requested by the United States.

Under this provision, Swanson would seem to be precluded from appealing his sentence only, unless he challenges an upward departure from the Guidelines not requested by the Government. Accordingly, his arguments that he was denied effective assistance of counsel and that the Government breached the plea agreement may be raised on appeal under paragraph nine. The Government cites to both paragraphs in support of its argument that Swanson is precluded from filing any appeal.

As discussed below, Swanson's argument that he was denied effective assistance of counsel cannot be reviewed and his argument that the Government breached the plea agreement challenges the manner in which his sentence was determined, and was therefore arguably waived, even under his interpretation of the plea

agreement.¹ The government has urged that we dismiss the appeal as frivolous based upon the waiver provisions in the agreement. While there is undoubtedly some merit in the government's arguments,² we consider it preferable to bypass the waiver issue and reach the merits, because the outcome remains the same in either event: Swanson's appeal fails.

Swanson asserts that the trial court erred in not enforcing the plea agreement and that the Government should have been ordered to move for a downward departure pursuant to its terms. According to Swanson, the following provision seems to indicate that, should he provide substantial assistance within the meaning of § 5K1.1, the Government will ask for a downward departure:

If circumstances change and the defendant tenders any such "substantial assistance", the United States Attorney's Office for the Southern District of Texas, reserves the right to evaluate the claimed "substantial assistance" and will at its option to seek any departure from the applicable sentencing guidelines, pursuant to Section 5K of the [U.S.S.G.], or Rule 35(b) of the Federal Rules

¹ The Government argued in a Motion to Strike Portions of Appellant's Reply Brief that because Swanson did not argue that the Government breached the plea agreement in his original brief, the portions of his reply brief which raise this argument should be stricken. Swanson's argument that the Government should be ordered to make a motion for a downward departure is a corollary of his argument that the Government's failure to so move is a breach of the plea agreement. Therefore, the Government's motion to strike has been denied.

²Because the waiver provision in paragraph one states that Swanson "waives his right of appeal except only as to any upward departure not requested by the United States," and thus impliedly, in referring to an "upward departure," pertains to the appeal of Swanson's sentence, it is at least arguable that paragraph one could be viewed as a cross-reference to paragraph nine and not as a general waiver of a right to appeal on any basis.

of Criminal Procedure, if in its discretion, it is determined that such a departure should become appropriate.

Swanson argues that the language of the provision is ambiguous because it is unclear whether the Government's discretion applies to determining if substantial assistance has been provided or to determining whether the Government will move for a downward departure once substantial assistance has been given. Swanson reasons that the more logical interpretation is that the Government retains discretion to determine whether substantial assistance has been given and not whether to move for a downward departure.

Swanson asserts that the prosecutor admitted that he had provided substantial assistance but that the prosecutor did not move for a downward departure because Swanson violated the terms of his bond. Swanson argues that the Government was obliged to inform the court of his assistance so that the court could determine what departure, if any, to which he was entitled.

A defendant may waive his right to appeal as part of a plea agreement if that waiver is informed and voluntary. United States v. Melancon, 972 F.2d 566, 567 (5th Cir. 1992). This Court has held that "when . . . a defendant has read and understands his plea agreement, and . . . raised no question regarding a waiver-of-appeal provision, the defendant will be held to the bargain to which he agreed. . . ." United States v. Portillo, 18 F.3d 290, 293 (5th Cir.), cert. denied, 115 S.Ct. 244 (1994).

Swanson does not assert that his guilty plea was uninformed or involuntary. The record of the arraignment hearing indicates

that Swanson, who was college-educated, read and understood the agreement and that he raised no question regarding the waiver-of-appeal provision after the court called it to his attention. Accordingly, Swanson waived his right to appeal his sentence on the basis that the Government failed to file a § 5K1.1 letter. See United States v. Novoselsky, No. 93-2746 (5th Cir. Aug. 25, 1994) (unpublished; copy attached) (knowing and voluntary waiver of right to appeal the sentence or the manner in which it was imposed precludes consideration of issue regarding Government's failure to file a § 5K1.1 letter).

Swanson also argues that he did not receive effective assistance of counsel in deciding whether to enter into a plea agreement and in entering into the plea itself. He asserts that the language of the plea agreement is ambiguous regarding a motion for downward departure and that, therefore, he received no benefit from the bargain.

Ordinarily a claim of ineffective assistance of counsel cannot be resolved on direct appeal when the claim has not been before the district court. United States v. Higdon, 832 F.2d 312, 313-14 (5th Cir. 1987), cert. denied, 484 U.S. 1075 (1988). If the claim is raised for the first time on appeal, the Court will reach the merits of the claim only "in rare cases where the record [allows the court] to evaluate fairly the merits of the claim." Id. at 314. Swanson did not raise this argument in the district court and, in fact, as the Government points out, in his written plea agreement, Swanson asserted that he was satisfied with his

attorney's representation. Also, Swanson acknowledged during the rearraignment colloquy that he was fully satisfied with the counsel and representation and advice given to him by his attorney. Because this claim was not before the district court, it is not appropriate to consider Swanson's ineffective assistance argument on this direct appeal.

CONCLUSION

For the foregoing reasons, we AFFIRM.