UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-20627
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JAIME J. MACINNIS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(H-94-CV-1469 (H-91-CR-5))

(June 7, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:[1]

Jaime MacInnis (Appellant), appeals pro se from the final judgment of the district court granting the government's motion for summary judgment, and denying Appellant relief on his 28 U.S.C. § 2255 motion.[2] We affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

[2] The district court denied Appellant's motion to proceed in forma pauperis on appeal. Appellant subsequently paid the filing fee and filed a brief addressing the merits of his 28 U.S.C. § 2255 motion. Based on the Appellant's financial resources, and the largely frivolous nature of this appeal, we find that the district court did not abuse its discretion by denying Appellant's motion to

I. BACKGROUND

In August 1991, Appellant plead guilty to aiding and abetting possession with intent to distribute in excess of 100 kilograms of marijuana in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A) and 18 U.S.C. § 2, and to aiding and abetting money laundering in violation of 18 U.S.C. § 1956(a)(1)(A) and 18 U.S.C. § 2 (respectively counts 2 and 4 of a 5 count indictment). Appellant was sentenced to concurrent terms of 78 months incarceration, four years of supervised release and a $25,000 fine.

Under the terms of his plea agreement, the government agreed, inter alia, to:

> (a) Dismiss counts 1, 3 and 5 of the indictment; and
>
> (b) File a motion for a downward departure, pursuant to U.S.S.G. § 5K1.1, if Appellant provided "substantial assistance" and in the event that the motion is "necessary to fulfill its obligations under Paragraph 13(d). Paragraph 13(d) provides that "the Government will recommend that I be sentenced to no more than eight (8) years confinement in the custody of the Attorney General of the United States for Counts Two (2) and Four (4) of the Indictment."

(emphasis supplied). In a handwritten addendum, the government agreed to:

> (a) "[R]ecommend that, for guideline calculations, I be credited with only the amount of drugs I possessed, 632.8 lbs or 287.7 kilograms of marijuana and not the full amount possessed by the co-conspirators"; and
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> (b) Stipulate that Appellant "accepts responsibility for his conduct."

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appeal in forma pauperis. Cf. Carson v. Polley, 689 F.2d 562, 586 (5th Cir. 1982).

In a subsequent addendum to the plea agreement, the government further agreed to:

> (a) Stipulate "that for guideline calculations, that Defendant be credited with $196,000.00 rather than the amount of money involved in the total conspiracy."
>
> (b) "[A]bandon its intent to enhance the Defendant's punishment based upon his prior convictions."

Appellant raises two issues on appeal. First, Appellant contends that the government breached the plea agreement when:

> a) it requested an upward departure based on conduct outside the offense of conviction, outside the conduct expressly stipulated by the government, and based on dismissed counts;
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> b) it requested a sentence of 8 years of incarceration and 4 years supervised release in direct contravention to the written plea agreement which called for no more than 8 years confinement;
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> c) it entered information through the presentence report from which one could infer more extensive involvement than expressly agreed to and stipulated in the plea agreement;
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> d) the Assistant United States Attorney at sentencing filed a motion for downward departure and then in the same breath and sentence stated that in his opinion it was not necessary but that he was doing so, so that the Government could not be accused of breach of plea;
>
> e) the government failed to inform the court of the nature, value, and extent of Movant's cooperation;
>
> f) the government argued for a more severe sentence based on prior convictions in direct contravention to the written plea agreement;
>
> g) the government through the presentence report and at the sentencing hearing argued against granting Movant acceptance of responsibility.

Appellant next contends that he receive ineffective assistance of counsel "when his attorney failed to press the plea breach claim to

the district court and at appeal." Although Appellant's contentions warrant little discussion, we shall address them seriatim.

II. ANALYSIS

Pursuant to 28 U.S.C. § 2255,

> A prisoner in the custody under sentence of a court established by an Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum allowed by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

The government has conceded that the alleged breaches of the plea agreement, if true, would constitute a denial of due process and would result in a manifest miscarriage of justice. Appellees thereby concede that the breach of plea agreement claims are cognizable in a § 2255 proceeding.[3]

A. Breach of Plea Agreement

Whether the conduct of the government violated the terms of a plea agreement is a question of law. See United States v. Watson, 988 F.2d 544, 548 (5th Cir. 1993), cert. denied, 114 S.Ct. 698 (1994). Appellant bears the burden of proving the underlying facts establishing a breach of the agreement by a preponderance of the evidence. Id. "In determining whether the terms of a plea agreement have been violated, the court must determine whether the

[3] As discussed more fully below, Appellee asserts a procedural bar to Appellant's contention that the government breached the plea agreement by failing to describe the value, nature and extent of Appellant's cooperation.

government's conduct is consistent with the parties' reasonable understanding of the agreement." United States v. Valencia, 985 F.2d 758, 761 (5th Cir. 1993).

a) Request for upward departure based on conduct outside the offense of conviction, outside the conduct expressly stipulated by the government, and based on dismissed counts.

Appellant first argues that the government breached the terms of the plea agreement by urging the district court to apply a four level "leader or organizer" increase pursuant to U.S.S.G. § 3B1.1. We have previously held that a "challenge to a sentencing judge's technical application of the sentencing guidelines may not be raised in a § 2255 proceeding....such questions are capable of being raised on direct appeal and, further, do not implicate any constitutional issues." United States v. Faubion, 19 F.3d 226, 233 (5th Cir. 1994)(footnote omitted).

In addition, we have already addressed this matter on direct appeal and found that the district court properly applied the guidelines. United States v. MacInnis, No. 91-6319 (5th Cir. Aug. 20, 1992)(per curiam). Appellant cites us to no portion of the plea wherein the government agreed that it would not seek an enhancement for Appellant's role in the offense, and has therefore failed to show that the government breached the plea agreement. The district court properly granted summary judgment on this issue.

b) Request for sentence of 8 years of incarceration and 4 years supervised release.

Appellant next contends that the government breached the plea agreement by requesting eight years of incarceration followed by four years of supervised release. Under Appellant's reading of the

plea agreement, the language specifying "the Government will recommend that I be sentenced to no more than eight (8) years confinement in the custody of the Attorney General of the United States" was intended to define an aggregate maximum for incarceration and supervised release.

Appellant's present reading of the plea agreement is nothing more than a post hoc attempt to escape the terms of his plea. By any reasonable definition, the term "confinement" contemplates a term of imprisonment. Black's Law Dictionary defines "confinement" as the "[s]tate of being confined; shut in; imprisoned." Black's Law Dictionary 270 (5th ed. 1979). Appellant has fallen well short of the burden required to show that the parties to the plea agreement intended the term "confinement" to have anything other than its ordinary meaning.[4] We find that the district court properly granted summary judgment on this issue.

c) Information in the presentence report inferring more extensive involvement.

Appellant next contends that the government breached the plea agreement by participating in the preparation of a presentence investigation report (PSR) that fully reported Appellant's role in the conspiracy. Appellant's argument relies on United States v. Nelson[5] wherein the Eleventh Circuit held that "the government

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[4] See United States v. Cates, 952 F.2d 149, 154 (5th Cir. 1992)("This failure to complain of what he now contends is the fundamental provision in the plea agreement suggests that Cates, his attorney, and the prosecutor all shared an interpretation of the plea agreement which comports with that reached by the magistrate here.")(emphasis in original).

[5] 837 F.2d 1519 (11th Cir. 1988).

breached the respective plea agreements by submitting a Statement of Facts in the presentence investigation reports which represented the culpability of the appellants beyond the facts stipulated to in the plea agreements." Id. at 1527.

Appellant misapprehends the application of Nelson to his case for at least two reasons. First, the pleas in Nelson contained specific recitations of fact that conflicted with subsequent recitations of fact contained in the respective PSRs. In contrast, Appellant's plea contained no stipulation of facts. Instead, the government agreed that a specific quantity of marijuana and a specific amount of money would be used for sentencing purposes. In other words, the government merely agreed to a particular base offense level, it never stipulated to any facts relevant to the Appellant's conduct. Second, we have previously held that the government cannot agree to withhold factual information from the district court. See United States v. Rivera, 879 F.2d 1247, 1252-53 (5th Cir. 1989), cert. denied, 493 U.S. 998 (1989). Therefore, it is clear that the government could not contract to limit the disclosure of relevant conduct in the PSR. The district court properly granted summary judgment on this issue.

d) Failure to zealously advocate motion for downward departure, and Failure to inform the court of the nature, value, and extent of Movant's cooperation

Appellant next argues that the government eviscerated the force and effect of its U.S.S.G. § 5K1.1 motion by virtue its conduct at sentencing. Specifically, Appellant contends that the government breached the plea agreement by stating, inter alia,

> We believe that the facts are that it is not necessary to file the 5K1.1. But, in an abundance of precaution, and in order that the government cannot be accused of not fulfilling its obligations pursuant to this negotiated plea, I will now file a 5K1.1 motion for downward department [sic] with the government--and that is kind of an idea of wearing belts and suspenders both.

Appellant's argument ignores the plain language of his plea agreement. The government's obligation to file a § 5K1.1 motion arose only if two conditions were satisfied. 1) That Appellant substantially cooperated, and 2) that such a motion was necessary to keep Appellant's sentence within the agreed eight-year cap.

The government was of the impression that neither of these conditions had occurred. It was not satisfied that the Appellant had provided substantial assistance, and based on the guidelines calculations and findings of the PSR, Appellant's maximum guideline range was 97 months. On these facts, the government reasonably questioned whether the motion was necessary. In fact, the government's filing of the motion put the Appellant in a better position than he would have otherwise been. Under the terms of the plea agreement, "the United States has the sole discretion to determine whether or not disclosure and testimony amounts to full cooperation within the terms of the Agreement." In other words, the government could easily have persisted in its belief that Appellant had not fully cooperated, and thereby refused to submit the 5K1.1. Instead, by filing the motion and remaining silent as to its belief, the government gave the court discretion to downward depart if it saw fit to do so.

In addition, the government contends that this issue is procedurally barred because it is raised for the first time on appeal. We have previously held that collateral relief under § 2255 cannot do service for an appeal.

> A defendant can challenge his conviction after it is presumed final only on issues of constitutional or jurisdictional magnitude, and may not raise an issue for the first time on collateral review without showing both "cause" for his procedural default, and "actual prejudice" resulting from the error. This cause and actual prejudice standard presents "a significantly higher hurdle" than the "plain error" standard that we apply on direct appeal.

United States v. Shaid, 937 F.2d 228, 232 (5th Cir. 1991)(en banc)(citations and footnotes omitted). Even assuming, ad arguendo, that Appellant can show cause, Appellant has failed to establish actual prejudice.

As stated previously, the record makes clear that the government was of the opinion that Appellant had not provided substantial assistance to the government, and therefore any recitation of his cooperation would have been to his detriment. Appellant's lack of cooperation is further exemplified by the probation officer's conclusions in the PSR. In support of her recommendation that Appellant not be credited with acceptance of responsibility, the probation officer reported "[Appellant] minimized his involvement to a degree that his admission of guilty only vaguely resembles the investigative findings." Because the failure to detail the extent of his cooperation worked to his benefit rather than his prejudice, Appellant cannot show actual

prejudice. The district court correctly granted summary judgment on this issue.

f) Argument for a more severe sentence based on prior convictions

Under the terms of the addendum to the plea agreement, the government agreed that,

> If the Defendant persists in his plea to Count II and IV of the indictment and fully cooperates in good faith with the Government, the Government will abandon its intent to enhance the Defendant's punishment based upon his prior convictions.

Appellant argues that the government breached the plea agreement by referring to the prior convictions while arguing that Appellant should be sentenced to 96 months, the maximum agreed sentence under the plea agreement. In the first instance, as previously discussed, the government was of the opinion that Appellant had not fulfilled his obligation of "full cooperation" under the plea agreement, therefore it is questionable whether the government's obligation ever arose.

Second, assuming ad arguendo that the obligation arose, the government's conduct can only be characterized as an immaterial breach of the plea agreement. It is plain from the PSR, and the motion filed by the government prior to the addendum, that the court was aware of the prior convictions. It is also plain from the PSR that the prior convictions had no bearing on Appellant's guideline range--Appellant was sentenced using a criminal history category of I. The government stipulated to a maximum sentence of 96 months, and never argued that Appellant should receive a sentence above the maximum. Implicit in the plea agreement is the

government's intention that Appellant be sentenced at or near the maximum, therefore the government's technical violation of the addendum had no actual affect on Appellant's expectations under the plea agreement. Because the plea agreement does not appear to "rest[] to any significant degree on [the] promise or agreement of the prosecutor [to not refer to the previous convictions] so that it can be said to be part of the inducement or consideration,"[6] any breach caused by the government's action was simply immaterial. We find no error in the district court's grant of summary judgment on this issue.

g) Acceptance of responsibility.

Appellant's final allegation of a breach of the plea agreement rests on his assertion that the government breached the plea agreement by urging the district court not to give him a two point reduction for acceptance of responsibility. Pursuant to a handwritten addition to the plea agreement, the government stipulated that if Appellant "persists in his plea that he accepts responsibility for his conduct." At sentencing, the government made the following comment regarding Appellant's acceptance of responsibility,

> And whether or not he is given two points for acceptance of responsibility, the Court should consider that. At the very lease [sic], the amount should be a Level 28, and maybe 30, and that's the government's position and we believe the facts warrant that Your Honor.

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[6] Santobello v. New York, 404 U.S. 257, 262, 92 S.Ct. 495, 499 (1971).

In the first instance, we do not find that the above cited language amounted to a repudiation of the terms of the plea agreement. The government never expressed or implied that Appellant should not be given a two point reduction for acceptance of responsibility, but rather simply indicated that the district judge should consider whether or not the credit should be given. Such consideration was plainly within the terms of the plea agreement.[7] Furthermore, the court in fact gave the Appellant a two point reduction for acceptance of responsibility, thus, any breach of the agreement was plainly not material. The district court correctly granted summary judgment on this issue.

B. Ineffective Assistance of Counsel

In Appellant's second argument, he asserts that he was denied his Sixth Amendment right to effective assistance of counsel. To show ineffective assistance of counsel, Appellant must show that 1) his counsel's performance fell below an objective standard of reasonableness; and 2) counsel's deficient performance prejudiced his defense. See Strickland v. Washington, 466 U.S. 668, 687-94

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[7] We note that the plea agreement, by its terms, is not binding on the district court.

> I understand that any statement made by my attorney, by the attorney for the United States, or by any other person concerning what sentence I might receive IS NOT BINDING on the Court and that this plea is made pursuant to Rule 11(e)(1)(B) of the Federal Rules of Criminal Procedure. I understand that the Court may assess any lawful sentence, including the maximum sentence, for each of the offenses charged against me in the Superseding indictment.

(emphasis supplied).

(1984). To prove prejudice, Appellant must show that counsel's errors "rendered the result of the trial unreliable or the proceeding fundamentally unfair." Lockhart v. Fretwell, 113 S.Ct. 838, 844 (1993). In the non-capital sentencing context, Appellant must show that "there is a reasonable probability that but for trial counsel's errors the defendant's non-capital sentence would have been significantly less harsh." Spriggs v. Collins, 993 F.2d 85, 88 (5th Cir. 1993). Failure to establish either deficient performance or prejudice defeats the claim. Strickland, 466 U.S. at 697.

Appellant's claim of ineffective assistance of counsel relies on his assertion that his attorney failed to make any objection--either at sentencing or on direct appeal--to the government's numerous breaches of the plea agreement. As shown above, however, no breach of the plea agreement occurred, so Appellant cannot show cause. Furthermore, Appellant cannot show prejudice. In fact, Appellant's attorney negotiated a very favorable plea agreement. As stated by the trial court,

> If you [Appellant] had gone to trial and been found guilty just on Count Two, the marijuana case, you would have been facing 235 months to serve, which is, according to my mathematics, nineteen years and seven months. And because you've got a good lawyer, who was able to work out a really generous plea agreement with the government, the maximum you're facing is 96 months.

In fact, the district court sentenced Appellant to 78 months, the low end of the guideline range. Appellant affirmed his satisfaction with his attorney's representation at both the plea and sentencing hearings, and his attorney's performance was lauded

by the trial court. Under the facts of this case, Appellant cannot show either cause or prejudice, and the district court properly granted summary judgment in favor of the government.

III. CONCLUSION

We find that Appellant has failed to show that the district court erred in granting summary judgment in favor of the government on his 28 U.S.C. § 2255 claim. We further find that because Appellant's claims are largely frivolous, and because he has failed to show sufficient evidence of his indigent status, the district court did not abuse its discretion by denying Appellant's motion to appeal in forma pauperis. The judgment of the district court is AFFIRMED.