UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No.94-20831

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PETER BOMBY ONWUKA,

Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Texas
(CR-H-94-122-1)

November 21, 1995

Before POLITZ, Chief Judge, WISDOM and STEWART, Circuit Judges.

POLITZ, Chief Judge:[*]

Peter Bomby Onwuka appeals his sentence, claiming that the prosecutor violated their plea agreement. Concluding that the government breached its specific agreement to recommend sentencing at the lowest level applicable under the sentencing guidelines, we vacate the sentence and remand for resentencing.

Background

Onwuka, a Nigerian national, pled guilty, pursuant to a plea agreement, to one count

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

of conspiracy to import in excess of one kilogram of heroin into the United States.[1] The plea agreement recited that the offense carried a statutory mandatory minimum term of 10 years imprisonment and stated that "the United States will recommend the lowest end of the [sentencing] guidelines wherever they may fall."

The court allowed a three-level adjustment for acceptance of responsibility, resulting in an offense level of 29 which, with a criminal history category of I, led to a guideline sentencing range of 87 to 108 months imprisonment. The offense carried a mandatory minimum of 120 months. The district court found, however, that Onwuka qualified for relief under 18 U.S.C. § 3553(f), a provision relieving statutory minimums in certain cases and permitting application of the guideline range. Onwuka sought sentencing at the low end of the guideline range. Despite its commitment, the government urged the high end of the guideline range. The court split the difference, sentencing Onwuka to prison for 96 months and imposing a fine of $10,000. Onwuka timely appealed.[2]

Analysis

Onwuka must establish by a preponderance of the evidence the facts underlying the asserted breach of the plea agreement. Whether there has been a violation is a question of law which we consider *de novo*.[3] There being no timely objection, we may notice this

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[1]21 U.S.C. §§ 952(a), 960(b)(1)(A), and 963.

[2]Onwuka also contends on appeal that, given his indigent status, the $10,000 fine was improperly imposed. In light of today's disposition we express no opinion on this issue.

[3]**United States v. Wittie**, 25 F.3d 250 (5th Cir. 1994), aff'd, _____ U.S. _____, 115 S.Ct. 2199, 132 L.Ed.2d 351 (1995).

claimed error only if it rises to the level of plain error.[4]

"In determining whether the terms of a plea agreement have been violated, the court must determine whether the government's conduct is consistent with the parties' reasonable understanding of the agreement."[5] The facts at bar are such that we need not tarry long in our analysis: the government made Onwuka an express promise to "recommend the lowest end of the guidelines wherever they may fall," but at the sentencing hearing urged that he be sentenced at the high end of the guidelines. This action manifestly was inconsistent with any reasonable construction of the plea agreement and clearly breached same.

The government maintains that the plea agreement was not binding because it contemplated that Onwuka would receive the statutory mandatory minimum sentence of 120 months. The government further contends that because Onwuka urged the statutory dispensation provided by 18 U.S.C. § 3553(f), it was free to recommend a sentence at the higher end of the guidelines range. While the language of the plea agreement made reference to the mandatory penalty provision of the instant offense, the agreement did not specify that this sentence was the only sentence which Onwuka could receive. The contention that the plea agreement contemplates the imposition of a particular predetermined sentence is undermined by the language of the agreement which unequivocally states the government's promise to recommend the "lowest end of the guidelines wherever they may fall." That the guidelines, as ultimately applied, did not fall where the government thought they would or ought does not justify a breach of the plea agreement. The plea agreement was drafted by the government. The language at issue was selected by the prosecutor. We find the

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[4]Fed.R.Crim.P. 52(b); **United States v. Calverley**, 37 F.3d 160 (5th Cir. 1994) (*en banc*), cert. denied, _____ U.S. _____, 115 S.Ct. 1266, 131 L.Ed.2d 145 (1995).

[5]**United States v. Hernandez**, 17 F.3d 78, 81 (5th Cir. 1994) (quotations omitted) (citations omitted).

argument that this language should not be binding disingenuous and unpersuasive.

It being apparent from the record that the court imposed a sentence essentially mid-range the sentencing guidelines because of the opposing urgings by Onwuka and the government, and that this constituted a breach of the plea agreement by the government, the sentence must be vacated and the matter must be remanded for a resentencing at which the government's recommendation of the low end of the guideline range is to be presumed. Whether resentencing should be by another member of the district court we leave to the original sentencing judge, exhorting a sensitivity to appearances.

VACATED and REMANDED.