

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40137
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JOHN H. POWELL,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana
(93-CR-30016(1))

(July 15, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:*

This is John Powell's second appeal of sentences imposed under a plea agreement. We **AFFIRM**.

I.

In 1993, Powell was charged with perjury and entered into a plea agreement under which the Government, *inter alia*, agreed to recommend a particular sentence. It did so when Powell entered his plea of guilty, at which time the plea agreement was made a part of the record. The agreement was also referenced in the presentence

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

report. When Powell was sentenced, however, the Government did not make a verbal recommendation of any sentence; but Powell did not make any objection to its silence. Powell did, however, immediately appeal his sentence, which included imprisonment for 12 months and a fine of \$5,000.

On appeal, Powell contended that, by failing to make a verbal recommendation at sentencing, the Government had failed to comply with its obligations under the plea agreement. At the request of the district court, the case was remanded for resentencing.

On remand, the district court denied Powell's motion to withdraw his guilty plea and vacated the original sentence. At the second sentencing, the Government verbally recommended the sentence set out in the plea agreement, and the court imposed a sentence of, *inter alia*, six months imprisonment and a fine of \$10,000. Powell appealed again, asserting that the district court erred in denying his motion to withdraw his plea.

II.

This case turns on whether the Government breached the plea agreement by failing to make a verbal sentence recommendation at the first sentencing. If it did, Powell was entitled to either specific performance of the agreement or withdrawal of his guilty plea. ***United States v. Palomo***, 998 F.2d 253 (5th Cir. 1993). The defendant bears the burden of establishing a breach of the agreement. ***United States v. Hernandez***, 17 F.3d 78, 81 (5th Cir. 1994).

The district court had the case remanded to address the error claimed from the first sentencing. In short, it is arguable that the claimed error was cured on remand, at the second sentencing.

But, in any event, and as Powell concedes, even if there was error, we review only for plain error, inasmuch as Powell did not object to the Government's silence at the first sentencing hearing. In order to prevail under plain error review there must be an "error" that is both "plain" and affects substantial rights. ***United States v. Rodriguez***, 15 F.3d 408, 415-16 (5th Cir. 1994). And, even when those factors are present, whether to take notice of an error not raised below rests within the discretion of the district court. ***Id.*** Needless to say, under the circumstances of this case, we find no plain error.

III.

For the foregoing reasons, the sentence is

AFFIRMED.