

CORRECTED

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40251

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BRIAN J. SLOANE, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana
(93-CR-60046-01)

(October 3, 1994)

Before GARWOOD, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:*

Brian J. Sloane, Jr. appeals the sentence imposed by the district court. We find the district court did not err in its calculation of Sloane's sentence and affirm.

I.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Brian J. Sloane, Jr. was charged and pleaded guilty to using a common carrier in interstate commerce to transport video cassettes containing obscene material. The charge arose from an incident in August 1990 when Sloane responded to an advertisement placed in a foreign magazine offering "hard to get" movies, magazines, and videos. Unbeknownst to Sloane, U.S. Customs agents placed the advertisement during an undercover sting operation. The maximum term of imprisonment for the offense is five years. When Sloane pleaded guilty, the district court advised him of the maximum sentence and Sloane stated that he understood. The court also informed Sloane that it was not bound by the government's recommendation for sentencing.

The district court increased the base level offense on the grounds that the video depicted a prepubescent minor or a minor under the age of twelve years. The sentencing guidelines range for Sloane's offense level and criminal history is twelve to eighteen months. When Sloane learned that the presentence report contained references to prepubescent minors, he sought to withdraw his guilty plea. In the alternative, Sloane sought a downward departure on the grounds that the court should ignore or strike the references to child pornography. The district court denied both motions and sentenced Sloane to eighteen months in prison, a three-year term of supervised release, and a special assessment of \$50. The government made no recommendation for downward adjustment at the sentencing hearing; however, in the plea agreement, the government recommended a sentence at the low end of the range.

II.

Sloane raises a number of issues on appeal. Sloane argues that the government breached the plea agreement when it failed to recommend a sentence at the low end of the range and when it failed to advise the court of Sloane's cooperation. Appellant did not raise these arguments in the district court. There is no plain error since any error was not obvious and even if Sloane had raised his claims in the district court, he still would not have prevailed. U.S. v. Olano, ___ U.S. ___, 113 S. Ct. 1770 (1993). In the plea agreement the government recommended a sentence in the low range of the guidelines; the agreement did not obligate the government to make the recommendation at the sentencing hearing. In addition, there is no evidence that Sloane cooperated with the government.

Sloane also challenges the district court's refusal to withdraw his guilty plea on the grounds that he understood the charge against him as concerning adult obscenity and not child pornography. A district court may permit a defendant to withdraw a guilty plea at any time prior to sentencing upon a showing of a "fair and just reason." Fed. R. Crim. P. 32(d). There is no indication in the record that Sloane's plea was anything other than knowing and voluntary. Thus, Sloane has not met his burden of proving that withdrawal is justified. United States v. Daniel, 866 F.2d 749, 752 (5th Cir. 1989).

Sloane further contends that in calculating his sentence, the district court should not have considered the reference to child

pornography in the presentence report. A sentencing court has wide discretion in the source of information it may consider in sentencing and is entitled to rely on the information in the presentence report. United States v. Schmeltzer, 20 F.3d 610, 613 (5th Cir.), petition for cert. filed (U.S. May 24, 1994) (No. 93-9244). The record supports the district court's finding that Sloane knew the video tape depicted minors under twelve; therefore, the court did not erroneously consider the presentence report's information regarding child pornography.

Sloane also contends that the district court erred when it failed to depart from the sentencing guidelines because of his medical history and family needs. This court will not disturb the trial court's decision not to depart downward from the guidelines unless the sentence is imposed in violation of the law or as a result of an incorrect application of the guidelines. United States v. Buenrostro, 868 F.2d 135, 139 (5th Cir. 1989), cert. denied, 495 U.S. 923 (1990). The district court's refusal to depart downward was not based on a violation of the law but on a belief that a departure was unwarranted. United States v. Mitchell, 964 F.2d 454, 462 (5th Cir. 1992).

Finally, Sloane appeals the district court's denial of his motion for release pending appeal. Our disposition of this case renders Sloane's appeal on this issue moot.

AFFIRMED.