

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40501
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

KENNETH MICHAEL BRACK,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 1:93-CR-201-1
- - - - -

(January 25, 1995)

Before POLITZ, Chief Judge, and HIGGINBOTHAM and DeMOSS,
Circuit Judges.

PER CURIAM:*

Kenneth Michael Brack pleaded guilty to one count of possession of a firearm by a felon. When the Government declined to file a U.S.S.G. § 5K1.1 motion because Brack could not provide substantial assistance unless he was released, Brack filed a motion to withdraw his guilty plea alleging that the Government had breached the plea agreement. The district court denied the motion.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

A district court may permit a defendant to withdraw a guilty plea prior to sentencing upon a showing of "any fair and just reason." Fed. R. Crim. P. 32(d). The defendant bears the burden of establishing a fair and just reason, United States v. Hurtado, 846 F.2d 995, 997 (5th Cir.), cert. denied, 488 U.S. 463 (1988), and this Court will reverse the district court's denial of a motion to withdraw a guilty plea only for an abuse of discretion. United States v. Bounds, 943 F.2d 541, 543 (5th Cir. 1991).

Whether the government breached a plea agreement is a question of law, but the defendant bears the burden of proving the underlying facts that establish the breach by a preponderance of evidence. United States v. Garcia-Bonilla, 11 F.3d 45, 46 (5th Cir. 1993). To determine whether the government breached the plea agreement, the Court must evaluate "whether the government's conduct is consistent with the parties reasonable understanding of the agreement." Id. (internal quotations and citation omitted).

Under the plea agreement the Government retained the discretion to file a § 5K1.1 motion if Brack rendered substantial assistance. The Government determined that the information that Brack provided to the Government was not useful and acted within its discretion to not file the motion. See Garcia-Bonilla, 11 F.3d at 47.

Brack argues, however, that the Government prevented him from providing substantial assistance because the assistant U.S. attorney would not permit his release. The written plea agreement did not provide for Brack's release to provide

substantial assistance, and at the hearing on the motion to withdraw his guilty plea, Brack's attorney admitted that the issue was not discussed prior to the negotiation of the plea agreement. Additionally, the Government had made an unopposed motion for pretrial detention because Brack posed a risk to the safety of the community or another person, and the district court granted the motion. Brack has failed to establish that the Government breached the plea agreement, and the district court did not abuse its discretion by denying Brack's motion to withdraw his guilty plea.

AFFIRMED.