

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50147
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JIMMY DAVID CLARK,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Western District of Texas
USDC No. MO-93-CR-61
- - - - -
(September 23, 1994)

Before KING, SMITH, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Jimmy David Clark argues that the district court erred in the calculation of his offense level by assessing (a) a two-level upward adjustment for obstruction of justice during the investigation, prosecution, or sentencing of the offense pursuant to U.S.S.G. § 3C1.1 for providing a false name at the time of arrest and for escaping while awaiting sentencing; and (b) a two-level upward adjustment for recklessly creating a substantial risk of death or serious bodily injury to another person in the

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

course of fleeing from a law enforcement officer pursuant to § 3C1.2. The Government responded by contending that Clark waived the right to raise the sentencing issues on appeal because the district court sentenced him within the guideline range. Clark's brief does not address whether he waived his appellate rights.

A defendant may waive his right to appeal if his waiver is knowing and voluntary. United States v. Melancon, 972 F.2d 566, 567-68 (5th Cir. 1992). United States v. Portillo, 18 F.3d 290, 293 (5th Cir. 1994) instructs that

when the record of the Rule 11 hearing clearly indicates that a defendant has read and understands his plea agreement, and that he raised no question regarding a waiver-of-appeal provision, the defendant will be held to the bargain to which he agreed, regardless of whether the court specifically admonished him concerning the waiver of appeal.

Clark's plea agreement indicated in three separate provisions that he was waiving his right to appeal except in the event of a substantial upward departure from the guideline range. Clark answered affirmatively when asked if he agreed with the Government's summary of the waiver provision and when the district court asked him twice if he understood that he was waiving his right to appeal. Nothing in the record indicates that Clark's waiver was unknowing or involuntary. Clark does not contend that the waiver of his guilty plea was involuntary or unknowing. The district court did not depart upwardly from the guideline range. Clark waived his right to appeal all issues other than an upward departure. The appeal is without arguable

merit and thus frivolous. Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983). Because the appeal is frivolous, it is dismissed. 5th Cir. R. 42.2.

DISMISSED.