

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50178
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LEROY MARSHALL,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Western District of Texas
USDC No. MO-93-CR-58-4

- - - - -
(November 15, 1994)

Before JONES, DUHÉ, and PARKER, Circuit Judges.

PER CURIAM:*

A defendant may waive his statutory right to appeal his sentence as part of a valid plea agreement if the waiver is knowing and voluntary. United States v. Melancon, 972 F.2d 566, 568 (5th Cir. 1992). "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."

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

United States v. Portillo, 18 F.3d 290, 293 (5th Cir.), cert. denied, 113 S. Ct. 244 (1994).

Appellant, Leroy Marshall ("Marshall"), failed to timely dispute the validity of the plea agreement,¹ and a review of the Rule 11 hearing reveals that his waiver of appeal was informed and voluntary. Marshall's plea agreement provided, in three separate passages, that he knowingly and expressly waived the "right to appeal his sentence, including[] any appeal right conferred by 18 U.S.C. § 3742, unless the judge makes a substantial departure upwards from the Sentencing Guidelines." At his arraignment, both the government and the district court noted that his plea agreement contained a waiver of the right of appeal. Marshall and his counsel each indicated to the court that they understood the terms and conditions of plea agreement. Marshall told the court that the matters contained in the agreement were true and correct and that he entered into the agreement voluntarily. Although the district court stated during sentencing that Marshall had the "right to appeal," this comment, made nearly two months after Marshall pleaded guilty, could not have influenced his decision to plead guilty and, thus, does not affect the determination that the waiver was knowing and voluntary. Melancon, 972 F.2d at 568.

¹ Marshall contends that he did not waive his right to appeal any sentence imposed within the statutory maximum set for his offense and, in particular, that he did not waive his right to appeal the court's incorrect application of the sentencing guidelines. Reply Brief at 2. It is well-settled in this Circuit that we do not ordinarily consider arguments raised for the first time in a reply brief. N.L.R.B. v. Cal-Maine Farms, Inc., 598 F.2d 1336, 1342 (5th Cir. 1993).

Because Marshall has not shown that his waiver of the right to appeal was invalid, this appeal is DISMISSED.