IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50619
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EFRAIN CALDERON,
a/k/a Efren Calderon,

Defendant-Appellant.

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Appeal from the United States District Court
for the Western District of Texas
USDC No. EP-93-CR-372-2
- - - - - - - - - - -
(March 22, 1995)

Before GARWOOD, BARKSDALE, and STEWART, Circuit Judges.

PER CURIAM:[*]

Efrain Calderon asserts that he did not knowingly and voluntarily waive his right to appeal because the district court "did not explain to [Calderon] the consequences of his waiver, but also failed to inquire as to whether [Calderon] knew he was waiving his right to appeal." The Government contends, inter alia, that Calderon waived his right to appeal. Because Calderon did not object to the district court's failure to question him regarding the voluntariness of his waiver of his right to appeal

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

his sentence, or move to withdraw the plea, this court reviews the district court's determination whether Calderon's plea was knowing and voluntary for plain error. United States v. Palomo, 998 F.2d 253, 256 (5th Cir.), cert. denied, 114 S. Ct. 358 (1993).

Under Fed. R. Crim. P. 52(b), this court may correct forfeited errors only when the appellant shows the following factors: (1) there is an error, (2) that is clear or obvious, and (3) that affects his substantial rights. United States v. Calverley, 37 F.3d 160, 162-64 (5th Cir. 1994) (en banc) (citing United States v. Olano, 113 S. Ct. 1770, 1776-79 (1993)), cert. denied, 1994 WL 36679 (Feb. 27, 1995) (No. 94-7792). If these factors are established, the decision to correct the forfeited error is within the sound discretion of the court, and the court will not exercise that discretion unless the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. Olano, 113 S. Ct. at 1778.

"To be valid, a defendant's waiver of his right to appeal must be informed and voluntary." United States v. Portillo, 18 F.3d 290, 292 (5th Cir.), cert. denied, 115 S. Ct. 244 (1994). "A defendant must know that he had a right to appeal his sentence and that he was giving up that right." Id. (internal quotations and citation omitted). If 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," this court will hold the defendant to the bargain to which he agreed regardless "whether the court

specifically admonished him concerning the waiver of appeal." Id. at 293.

Calderon's plea agreement indicated in two separate provisions that he was waiving his right to appeal. The Rule 11 colloquy indicates, and nowhere does Calderon dispute, that he read and understood the terms of the plea agreement and that he raised no question regarding the waiver-of-appeal provision. Calderon's argument is grounded solely on the district court's failure to admonish him specifically concerning the waiver of appeal. This court rejected that argument in Portillo and held that it will hold a defendant to the bargain to which he agreed regardless "whether the court specifically admonished him concerning the waiver of appeal." Calderon's reliance on United States v. Baty, 980 F.2d 977, 978-79 (5th Cir. 1992), cert. denied, 113 S. Ct. 2457 (1993), is misplaced as that case involved confusion over a waiver paragraph which defense counsel requested be deleted but was not, and which Baty asked the court on "more than one occasion" to explain, but no explanation was made. No such confusion or requests for clarification are present here. See also United States v. Mendiola, 42 F.3d 259, 260 n.1 (5th Cir. 1994). Accordingly, Calderon has not demonstrated that the district court plainly erred.

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.