

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60134
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILL REED, JR.,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Mississippi
USDC No. CR-3:93-31

March 28, 1996
Before JOLLY, JONES, and STEWART, Circuit Judges.

PER CURIAM:*

Will Reed, Jr., appeals his conviction and sentence for possession of a firearm by a convicted felon. Reed contends that he was misinformed about the interstate-commerce nexus required to prove his offense; that the district court lacked jurisdiction to accept his plea because the government did not prove a sufficient interstate-commerce nexus; and that his indictment was defective

*Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

because it did not allege that he knew that his firearm had traveled in interstate commerce. Reed also contends that the government was incapable of performing the provision of the plea agreement requiring it to request that his sentence be imposed to run concurrently with his state-court sentences; that the district court wrongly participated in plea negotiations by discussing at the plea hearing whether it could impose concurrent sentences; and that the district court at sentencing changed its requirements for granting Reed a downward departure to concurrent sentences, again impermissibly participating in plea negotiations and rendering Reed's plea involuntary.

The government need not have shown that Reed knew that his firearm had traveled in interstate commerce. United States v. Walden, 707 F.2d 129, 132 (5th Cir. 1983). Reed's contentions regarding the interstate-commerce nexus therefore are unavailing.

The government recommended that the district court depart downward from the consecutive sentences directed by the sentencing guidelines to impose Reed's sentence to run concurrently with his state-court sentences and persisted in the recommendation. The district court could have accepted the government's recommendation and sentenced Reed accordingly had it so chosen. United States v. Miller, 903 F.2d 341, 349 (5th Cir. 1990). Reed's contention that

the government placed a provision in the agreement that could not be satisfied is unconvincing.

At the plea hearing, the district court did not impermissibly participate in plea negotiations; rather, the district court explained its understanding that Reed must actually be serving a state sentence when the district court imposed sentence so that the federal sentence could be concurrent with the state sentence. Reed has not provided us with a transcript of the first phase of his sentencing hearing, nor does he request a copy of that transcript. We cannot review the district court's actions at that phase of the sentencing hearing. United States v. O'Brien, 898 F.2d 983, 985 (5th Cir. 1990). The transcript of the second phase of the sentencing hearing does not indicate that the district court impermissibly participated in plea negotiations; rather, the district court rejected the government's recommendation and declined to depart downward from the sentence directed by the guidelines, as it was free to do. See United States v. Miles, 10 F.3d 1135, 1139-41 (5th Cir. 1993).

Because we find no reversible error, we AFFIRM Reed's conviction and sentence. Because Reed's appeal is not frivolous, the government's motion to reconsider the grant of leave to proceed in forma pauperis and to dismiss Reed's appeal is DENIED.

A F F I R M E D.

