

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-60583
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

MAURICIO DOMINIC CARRIZO,

Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Texas

(CR-C-94-50-1)

(April 26, 1995)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

Mauricio Dominic Carrizo pleaded guilty to conspiracy to possess with intent to distribute more than 100 kilograms of marijuana. In exchange for the plea, the Government agreed to move to dismiss Count Two, to refrain from using information Carrizo

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

provided in the calculation of his sentencing range, to recommend that Carrizo receive a three-level credit for acceptance of responsibility, and to recommend that Carrizo receive a sentence at the low end of the guideline range. Additionally, the Government agreed that if Carrizo provided substantial assistance and cooperation, it would move for a downward departure commensurate with the degree of assistance that Carrizo provided.

Carrizo provided information regarding participants in other drug conspiracies. However, prior to and at sentencing, Carrizo changed his statement regarding the quantity of drugs involved in, and the duration of, the present conspiracy. The Government contended that the inconsistencies in Carrizo's story would make Carrizo an impeachable witness and prosecution of the other conspirators impossible. Thus, the Government refused to move for a downward departure on the ground that Carrizo's conduct did not comport with substantial assistance.

At the sentencing hearing, the district court considered Carrizo's argument in support of his entitlement to the U.S.S.G. § 5K1.1 motion. However, the court declined to grant Carrizo relief, and instead, allowed Carrizo to file a post-sentencing motion disputing the Government's refusal to move for a downward departure. The court then denied that motion. Although the court doubted that the change in Carrizo's story affected his credibility to the extent that the Government could not prosecute those implicated by him, the court found that the plea agreement reserved

the Government's discretion to make a § 5K1.1 motion and that the Government, by refusing to make the motion, did not breach the plea agreement.

Judgment was entered on August 17, 1994, sentencing Carrizo to 63 months in prison, four years supervised release, a \$500 fine, and a \$50 special assessment. Carrizo filed a "Motion for Reconsideration or in the Alternative Motion for Downward Departure under Section 5K1.1" on August 19, 1994. As a "precautionary measure," Carrizo filed a notice of appeal on August 22, 1994, subject to his motion for reconsideration. The court denied Carrizo's motion for reconsideration on August 23, 1994. Carrizo filed an application to proceed in forma pauperis on September 1, 1994.

Carrizo's motion for reconsideration, although similar in intent to those enumerated in Fed. R. App. P. 4(b), is not specifically listed, and therefore, may not suspend the effectiveness of a notice of appeal filed prior to the district court's decision on the motion. However, even if Carrizo's motion for reconsideration did not suspend the time for filing his notice of appeal, Carrizo's IFP application evidenced his intent to appeal and was filed within the prescribed time limit imposed by Fed. R. App. P. 4(b). Stevens v. Heard, 674 F.2d 320, 322 (5th Cir. 1982); see Smith v. Barry, 502 U.S. 244, 248-49 (1992). Furthermore, the issues presented for appellate review relate only to those issues raised in Carrizo's motion for reconsideration. Thus, we can reach the merits of Carrizo's appeal as stated below.

OPINION

Carrizo asserts that he provided substantial assistance to the Government, and that by failing to move for a downward departure pursuant to § 5K1.1, the Government breached the plea agreement. Carrizo argues that the Government did not retain discretion to refuse to move for a downward departure even if he provided substantial assistance, and that at sentencing, the Government did not contend that he failed to provide substantial assistance.

"[W]hen a guilty plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." United States v. Valencia, 985 F.2d 758, 761 (5th Cir. 1993) (internal quotations and citation omitted). Carrizo, as the party alleging a breach of the plea agreement, bears the burden of proving the underlying facts establishing a breach by a preponderance of the 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 consider "whether the government's conduct is consistent with the parties' reasonable understanding of the agreement." Id. (internal quotations omitted). This inquiry is a question of law to be reviewed de novo. Id.

The Government's decision to seek a reduction of the defendant's sentence is discretionary. See Wade v. United States, 504 U.S. 181, 112 S. Ct. 1840, 1843-44 (1992). The Government nevertheless may bargain away this discretion in a plea agreement.

United States v. Watson, 988 F.2d 544, 552-53 (5th Cir. 1993), cert. denied, 114 S. Ct. 698 (1994). This court reviews the language of the plea agreement to determine whether the Government has retained discretion to file a § 5K1.1 motion. See Garcia-Bonilla, 11 F.3d at 47 (Government retained discretion to move for downward departure in plea agreement providing that decision rests within "sole discretion" of Government); United States v. Wilder, 15 F.3d 1292, 1295 (5th Cir. 1994) (agreement stating Government will file motion "in the event it is determined that [Wilder] provides substantial assistance" bound Government to file motion).

Carrizo's plea agreement provides that:

if the Defendant provides substantial cooperation and assistance to the Government as defined by Section 5K1.1 of the Sentencing Guidelines, then the Government further agrees to move for a downward departure commensurate with the degree of the Defendant's assistance. . . . This agreement does not obligate the Government Attorney to make a motion for downward departure if in the Government Attorney's evaluation the Defendant has not provided substantial assistance. Substantial assistance is understood by both parties to require good faith during all phases of the cooperation period, and to include complete and honest debriefing which assists in the investigation or prosecution of other individuals, and complete and truthful testimony at subsequent trials when needed. . . . the Defendant is required to cooperate with the authorities in the investigation of the individuals he identified during the debriefing on May 17, 1994 as being involved in the conspiracy and to provide truthful testimony at their trials if the Government is able to obtain an indictment from the grand jury.

In United States v. Urbani, 967 F.2d 106, 107 n.2 (5th Cir. 1992), the Government reserved the right to evaluate the defendant's cooperation without obligating itself to move for a downward departure. However, the following language in Urbani strongly supported the court's conclusion that the Government

retained its discretion to move for a departure: "The defendant further understands that the Government is under no obligation whatsoever to file a motion with the Court at any time for the departure from the Sentencing Guidelines." Id.

In Watson, 988 F.2d at 549, the Government conditioned its obligation to submit a § 5K1.1 motion on the defendant's substantial assistance and on the defendant giving truthful and complete information about his participation in illegal activities. The agreement provided in part that "Watson shall cooperate with the Government, by giving truthful and complete information. . . . The Government agrees that if the defendant complies with section 5K1.1 of the sentencing guidelines, the Government will file a motion with the Court asking for a downward departure." Id. at 548. Subsequent to the time he agreed to cooperate with the Government, the defendant engaged in additional criminal activity and concealed information that might have been valuable to the Government. Id. Because the defendant failed to provide substantial assistance and truthful information, the court held that the Government did not breach the plea agreement by refusing to submit a § 5K1.1 motion. Id.

Arguably, the plain language in Carrizo's plea agreement indicates that the Government bargained its discretion to file for a downward departure on the condition that Carrizo provided substantial assistance. However, as the district court found, and the terms of the agreement indicate, the Government reserved to itself the power to determine whether Carrizo provided substantial

assistance. The agreement defined substantial assistance "to require good faith during all phases of the cooperation period, and to include complete and honest debriefing which assists in the investigation or prosecution of other individuals, and complete and truthful testimony at subsequent trials."

At sentencing, the AUSA announced that the Government would not move for a downward departure because, given Carrizo's current lack of candor, it did not feel that Carrizo's conduct constituted substantial assistance. The Government explained that the inconsistencies in Carrizo's statements and Carrizo's change of story regarding the duration of the conspiracy and the quantity of drugs involved in the conspiracy made him an impeachable witness and substantially diminished the value of the information he provided.

The district court considered testimony at the sentencing hearing to substantiate Carrizo's claims of a conspiracy of lesser duration. Despite that testimony, the court found that the conspiracy involved twenty pounds of marijuana delivered each month for two years. On appeal, Carrizo does not dispute this finding. Thus, Carrizo's statement that the conspiracy lasted only eight months could make him an impeachable witness in subsequent proceedings.

Like the defendant in Urbani, Carrizo has failed to meet his burden to show that the Government breached the plea agreement. To provide substantial assistance by the terms of his own agreement, Carrizo had to act in good faith during all phases of the

cooperation period. Further, he had to provide completely honest debriefing that aided in the investigation or prosecution of other individuals and truthful testimony at subsequent trials. Carrizo's statements are inconsistent; one or the other is untrue. The Government showed that Carrizo's statements were inconsistent and thus, not completely truthful. Further, because Carrizo's information is contradictory, the information he provided did not result in the prosecution of others involved in criminal activity.

The Government retained the discretion to determine whether Carrizo provided substantial assistance, and therefore, to refuse to move for a downward departure. Carrizo has not shown that the Government breached the plea agreement.

Carrizo argues that the Government's refusal to move for a downward departure violated his constitutional rights to equal protection and due process. He argues that the Government's action is arbitrary, retaliatory, in bad faith, and not rationally related to any legitimate Government end.

The Government's refusal to file a substantial assistance motion is reviewable and remediable if that refusal is based on an unconstitutional motive such as race or religion. Wade, 112 S. Ct. at 1843-44. However, a mere claim that a defendant provided substantial assistance does not warrant a remedy. Id. at 1844. Generalized allegations of an improper motive are insufficient to establish a constitutional violation. Id.

Carrizo does not allege that the Government refused to move for a § 5K1.1 departure for suspect reasons or because he is a member of a protected class. Rather, he asserts generally that the Government's action was violative of his equal protection and due process rights and was "not rationally related to any legitimate end, but [was] arbitrary, retaliatory and . . . in bad faith." The Government offered an explanation for its refusal to move for a downward departure: Carrizo did not provide substantial assistance according to the terms of the plea agreement. Carrizo's inconsistent statements made him an impeachable witness in subsequent proceedings against the persons implicated by the information he provided, thereby making prosecution of such persons impossible. Carrizo's arguments indicate nothing more than disagreement with the Government's decision. Carrizo's generalized allegations do not establish a constitutional violation and provide no grounds for relief. See Wade, 112 S. Ct. at 1844; Urbani, 967 F.2d at 110.

AFFIRMED.