

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED

April 16, 2008

No. 07-40267
Summary Calendar

Charles R. Fulbruge III
Clerk

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

ABEL C LUCIO

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 5:06-CR-963-1

Before KING, DAVIS, and CLEMENT, Circuit Judges.

PER CURIAM:*

Abel C. Lucio appeals his 95-month sentence following his guilty-plea conviction for two counts of distribution of material involving sexual exploitation of minors. Lucio argues that the Government breached the plea agreement by recommending a sentence within the applicable guidelines range and then arguing in support of a sentence above that range.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Because Lucio did not raise this argument in the district court, review is for plain error. See *United States v. Brown*, 328 F.3d 787, 790 (5th Cir. 2003). Lucio has not borne his burden of establishing that there was a breach of the plea agreement. See *United States v. Cantu*, 185 F.3d 298, 304-05 (5th Cir. 1999). Assuming that there was a breach of the plea agreement, however, Lucio has not demonstrated that any such error affected his substantial rights. See *United States v. Vasquez*, 216 F.3d 456, 459 (5th Cir. 2000). It is evident from the two sentencing transcripts in this matter that the district court was intent on sentencing Lucio above the applicable guideline range despite the Government's recommendation that he be sentenced within the applicable guideline range. There is no indication that the district court's decision to sentence Lucio above the guideline range was influenced in any way by the prosecutor's comments. Because any assumed error was not prejudicial, it did not affect Lucio's substantial rights. See *United States v. Puckett*, 505 F.3d 377, 384 (5th Cir. 2007).

The judgment of the district court is AFFIRMED.