

742 Fed.Appx. 859 (Mem)

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5. United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff-Appellee

v.

Samuel Gregg ALLEN, Defendant-Appellant

No.

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Summary Calendar

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Filed November 16, 2018

Appeal from the United States District Court for the Southern District of Mississippi, USDC No. 3:17-CR-23-I

Attorneys and Law Firms

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Samuel Dennis Joiner, Esq., Federal Public Defender, Thomas Creager Turner, Jr., Esq., Federal Public Defender's Office, Southern District of Mississippi, Jackson, MS, for Defendant-Appellant

Before KING, SOUTHWICK, and ENGELHARDT, Circuit Judges.

Opinion

PER CURIAM:

- Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

*860 Samuel Gregg Allen appeals his 94-month sentence imposed following his guilty plea to assault with a dangerous weapon with the intent to do bodily harm while located on a Choctaw Indian Reservation. He argues that the district court erred in departing upward based on his criminal history in the Choctaw Tribal Court.

The Government argues that it complied with its obligations under the plea agreement supplement and, therefore, that the appeal waiver in the plea agreement is enforceable. Allen argues that the Government breached the plea agreement by failing to recommend to the district court that it impose a sentence within the lower 50% of the applicable sentencing guidelines range computed by the district court.

Generally, whether the Government has breached a plea agreement is a question of law that the court reviews de novo. *United States v. Reeves*, 255 F.3d 208, 210 (5th Cir. 2001). Allen failed to object at sentencing, and therefore, our review is for plain error. *Id.* To establish plain error, Allen must show a forfeited error that is clear or obvious and that affects his substantial rights. See *Puckett v. United States*, 556 U.S. 129, 135, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009). If he makes such a showing, the court has the discretion to correct the error, but we shall do so only if such error seriously affects the fairness, integrity, or public reputation of judicial proceedings. See *id.*

The Government's sentencing recommendation was incorporated into the presentence report, and the district court was aware of the recommendation. Therefore, the Government did not breach the plea agreement by not explicitly requesting a sentence in the lower 50% of the guidelines range at the sentencing hearing. See *Reeves*, 255 F.3d at 210; *United States v. Davenport*, 286 F.3d 217, 221 (5th Cir. 2002). The appeal waiver bars review of Allen's sentencing issue, and we therefore dismiss the appeal. See *United States v. Purser*, 747 F.3d 284, 294-95 (5th Cir. 2014).

APPEAL DISMISSED.

All Citations

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