United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
April 4, 2022
Lyle W. Cayce
Clerk

No. 21-60703
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

MICHAEL ALLEN LONG,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:20-CR-96-1

Before DAVIS, JONES, and ELROD, *Circuit Judges.*

PER CURIAM:*

Michael Allen Long pleaded guilty, pursuant to a written plea agreement, to two counts of production of child pornography, and the district

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

APPENDIX 2

court sentenced him to two consecutive terms of 360 months in prison to be followed by a total life term of supervised release. On appeal, Long challenges his sentence, arguing that it is substantively unreasonable because the district court improperly balanced the 18 U.S.C. § 3553(a) sentencing factors.

Invoking the waiver of appeal provision in Long's plea agreement, the Government moves for dismissal of the appeal or, in the alternative, for summary affirmance, contending that the waiver is valid and enforceable and precludes Long from challenging his conviction or sentence on any ground. Long opposes the Government's motion, arguing that the waiver provision in the plea agreement is not enforceable because the Government breached the terms of the agreement. The motion for summary affirmance is DENIED because the summary affirmance procedure is generally reserved for cases in which the parties concede that the issues are foreclosed by circuit precedent. *Cf. United States v. Houston*, 625 F.3d 871, 873 n.2 (5th Cir. 2010) (noting the denial of summary affirmance where an issue was not foreclosed).

The validity of an appeal waiver is a question of law that we review de novo. *United States v. Keele*, 755 F.3d 752, 754 (5th Cir. 2014). The record indicates that Long read and understood the plea agreement, which contained an "explicit, unambiguous waiver of appeal." *United States v. McKinney*, 406 F.3d 744, 746 (5th Cir. 2005). Thus, Long's appeal waiver was knowing and voluntary. *See United States v. Higgins*, 739 F.3d 733, 736 (5th Cir. 2014); FED. R. CRIM. P. 11(b)(1)(N). Accordingly, he is bound by it unless the Government breached the plea agreement. *See United States v. Gonzalez*, 309 F.3d 882, 886 (5th Cir. 2002).

Because Long did not allege that the Government breached the plea agreement in the district court, review is for plain error only. *See United States v. Kirkland*, 851 F.3d 499, 502-03 (5th Cir. 2017). In the plea

supplement, the Government agreed to recommend the imposition of a sentence within the lower 50% of the applicable guidelines range. The Government also agreed to inform the court of all of Long's activities that might be relevant to his sentencing. The presentence report (PSR) noted the Government's agreement to recommend a sentence within the lower 50% of the guidelines range. Moreover, when asked to respond to Long's request for leniency by imposing a below-guidelines sentence, the Government explicitly and unequivocally stated that it stood by its recommendation of a sentence within the lower 50% of the guidelines range. Accordingly, the Government's required recommendation was sufficiently before the district court and cannot serve as the basis of a breach. *See United States v. Reeves*, 255 F.3d 208, 210 (5th Cir. 2001) ("To the extent the recommendation serves as a promise to recommend, the promise was satisfied by the plea agreement's inclusion in the PSR."); *see also United States v. Cates*, 952 F.2d 149, 153-54 (5th Cir. 1992).

Contrary to Long's assertions, the Government did not provide any ambiguous statements or make any statements in contravention of its promise to recommend a sentence in the lower 50% of the guidelines range. "The Government does not breach a plea agreement by disclosing pertinent factual information to a sentencing court." *United States v. Casillas*, 853 F.3d 215, 218 (5th Cir. 2017). Moreover, although the Government stated that a within-guideline sentence was appropriate, the statement was not an express recommendation but was made in direct response to Long's request for a below-guidelines sentence. The plea agreement allowed the Government to provide the court with relevant information and did not require the Government to advocate in support of Long's request for a below-guidelines sentence. Furthermore, despite Long's reliance on *United States v. Grandinetti*, 564 F.2d 723, 726 (5th Cir. 1977), for the assertion that it was reasonable for him to expect the Government to "strongly recommend" the

agreed upon sentence, there is no such requirement in the instant case. "Absent some provision in the plea agreement, there is no level of enthusiasm the Government must display when making a recommendation." *Casillas*, 853 F.3d at 218.

The Government did not breach the plea agreement; therefore, the waiver of appeal provision is valid and enforceable, *see Gonzalez*, 309 F.3d at 886, and bars Long's challenge to his sentence, which does not fall within an exception to the waiver, *see Higgins*, 739 F.3d at 736-37; *United States v. Walters*, 732 F.3d 489, 491 (5th Cir. 2013).

Accordingly, IT IS ORDERED that the Government's motion for dismissal is GRANTED, and the appeal is DISMISSED.

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JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

IT IS ORDERED and ADJUDGED that the appeal is DISMISSED.