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205 F.3d 1342 (6th Cir. 2000)

UNITED STATES of America, Plaintiff-Appellee,

v.

Leweje L. MAXWELL, Defendant-Appellant.

No. 98-5815.

United States Court of Appeals, Sixth Circuit

February 8, 2000

Editorial Note:

This opinion appears in the Federal reporter in a table titled "Table of Decisions Without Reported Opinions". (See FI CTA6 Rule 28 and FI CTA6 IOP 206 regarding use of unpublished opinions)

On Appeal from the United States District Court for the Western District of Tennessee.

Before GUY, RYAN, and MOORE, Circuit Judges.

RYAN, Circuit Judge.

Leweje L. Maxwell appeals from the 262 month sentence imposed following his plea of guilty to one count of possession with intent to distribute 195 grams of cocaine base, in violation of 21 U.S.C. § 841(a)(1). Maxwell's guilty plea was pursuant to a written plea agreement in which the government promised to drop a second charge, failure to appear for a scheduled court date, in violation of 18 U.S .C. § 3146(a)(1). The government strictly complied with the terms of its bargain, dismissing the indictment for failure to appear; however, the fact of the failure to appear remained a significant factor in Maxwell's sentencing under the United States Sentencing Guidelines, resulting in a two-level enhancement for obstruction of justice and denial of a three-level reduction for acceptance of responsibility. The five-level difference corresponded to a sentence range increase from 151-188 months to 262-327 months.

I.

On February 12, 1997, members of the Memphis Police Department arrested Maxwell after executing a search warrant of his father's home. Following the arrest, Maxwell was ordered to report for a courtroom hearing on August 22, 1997. Maxwell did not report as directed, and a warrant was issued for his arrest for this failure to appear.

After being taken back into custody, Maxwell entered into a plea agreement with the government whereby Maxwell would plead guilty to the narcotics possession charge, and the government would dismiss the newly filed failure to appear charge. The government's written promise was strictly limited to dismissal of the failing to appear indictment, reading as follows:

The government agrees to dismiss the indictment pending in 97-20221 at sentencing.

At sentencing, the government complied with its promise by moving to dismiss the failure to appear *charge*. However, Maxwell and his counsel apparently failed to appreciate the effect the *fact* of Maxwell's failure to appear would have upon his sentence for possession of narcotics under the Sentencing Guidelines, and the government did not mention the matter until after the guilty plea was entered. In fact, Maxwell's sentence for possession was significantly lengthened thereby, because his failure to appear amounted to obstructing justice under U.S.S.G. § 3C1.1; it provided the basis for a two-level enhancement *and* precluded a three-level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1. *See also* U.S.S.G. § 3E1.1, comment. (n.4). The result for Maxwell, who has a criminal history category IV, is an offense level of 36 which corresponds to a guideline sentencing range of 262-327 months. Had Maxwell benefitted from the three-level reduction and not suffered the two-level enhancement, his offense level would have been 31, corresponding to a guideline sentencing range of 151-188 months. In the words of Maxwell's defense counsel, Maxwell's failure to appear was attributable to the fact that he was, at the time, "out of his head" on drugs. As it turns out, the price for that day's drugging was an increase of nine years in the time he would spend in prison.

On appeal, Maxwell challenges this application of the Sentencing Guidelines. He also challenges the government's refusal to allow him to provide information regarding other criminal activity, which he sought to provide in hopes of earning a sentence reduction pursuant to U.S.S.G. § 5K1.1.

II.

A.

This court reviews for clear error a district court's decision to impose an enhancement for obstruction of justice, *seeUnited States v. Hill*, 79 F.3d 1477, 1486-87 (6th Cir.1996), or not to grant a reduction for acceptance of

responsibility, *seeUnited States v. Corrigan*, 128 F.3d 330, 336 (6th Cir.1997).

Maxwell's appeal is essentially a plea for equitable relief. He contends that a calculation of his sentence that takes into full account his failure to appear fails to give him the benefit of the bargain he made in his plea agreement. That is to say, when he agreed to plead guilty to the possession charge, he relied upon the government's promise to dismiss the charge of failing to appear, and in addition (apparently) upon an implied promise that he would in no other way be punished for his failure to appear. He contends that to punish him with what in effect is an additional nine years of confinement for an offense that was dismissed is a violation of the plea agreement. He requests remand to a different district judge to determine whether he should be resentenced or, in the alternative, be permitted to withdraw his guilty plea.

B.

We do not agree with Maxwell's sentencing guideline mathematics, but we do find that the government's promise in its plea agreement with Maxwell was illusory.

The 1997 Sentencing Guidelines provide that "[i]f the defendant willfully obstructed or impeded ... the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels." U.S.S.G. § 3C1.1. The Guidelines provide further that "willfully failing to appear, as ordered, for a judicial proceeding" constitutes an act of obstruction under this Section. U.S.S.G. § 3C1.1, comment. (n.3(e)).

U.S.S.G. § 3E1.1(a) provides that a defendant's offense level should be decreased if he "clearly demonstrates acceptance of responsibility for his offense." The Guidelines instruct that while "[e]ntry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction ... will constitute significant evidence of acceptance of responsibility," this evidence may nonetheless "be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility." U.S.S.G. § 3E1.1, comment. (n.3). "Thus, merely pleading guilty does not entitle a defendant to an adjustment 'as a matter of right.' " *United States v. Childers*, 86 F.3d 562, 563 (6th Cir.1996) (citations omitted). In fact, the Appllcation Notes make clear that

[c]onduct resulting in an enhancement under § 3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§ 3C1.1 and 3E1.1 may apply.

U.S.S.G. § 3E1.1, comment. (n.4).

The plain language of the Guidelines indicates that the trial court's application of the enhancement and denial of the reduction were not clearly erroneous. The trial court was well within its discretion to impose the enhancement for obstruction of justice, as requested by the prosecution, and to deny the reduction for acceptance of responsibility for the same underlying reason. However, there remains the question whether the enduring effect of the defendant's failure to appear, surviving the nominal dismissal of the indictment for failure to appear, constituted a breach of the plea agreement. Whether the government's conduct breached the agreement is a question of law appropriate for *de novo* review.

C.

"Plea agreements are contractual in nature. In interpreting and enforcing them, we are to use traditional principles of contract law ." *United States v. Robison*, 924 F.2d 612, 613 (6th Cir.1991). Here, careful analysis reveals that there can be no question that the government's promise is illusory.

Had Maxwell pleaded guilty to *both* charges, he would not, with regard to the charge of possession, have received the two-level enhancement for the obstruction of justice, but still would have been denied the three-level reduction for acceptance of responsibility. This would have resulted in a total offense level of 34 for the possession charge.

Section 2J1.6, Failure to Appear by Defendant, establishes a base offense level of six for a defendant who fails to appear after being released pending trial or sentencing. In Maxwell's case, this base level is raised by nine, to a total of 15, because the underlying offense for which Maxwell was originally arrested was punishable by more than 15 years. U.S.S.G. § 2J1.6(b)(2)(A).

When a defendant has been convicted of more than one count, the court shall: ... [g]roup the counts resulting in conviction into distinct Groups of Closely Related Counts ("Groups") by applying the rules specified in § 3D1.2. [;d]etermine the offense level applicable to each Group by applying the rules specified in § 3D1.3. [; and d]etermine the combined offense level applicable to all Groups taken together by applying the rules specified in § 3D1.4.

U.S.S.G. § 3D1.1(a). Under U.S.S.G. § 3D1.2, the violation of 21 U . S.C. § 841(a)(1), Possession of a Controlled Substance with Intent to Distribute, is not a "Closely Related Count" to the violation of 18 U.S.C. § 3146(a)(1), Failure to Appear at a regularly scheduled court date, because they do not involve "substantially the same harm." Possession of a Controlled Substance is classified as

an offense involving drugs, and Failure to Appear is classified as an offense involving the administration of justice. Each count, then, constitutes its own "Group." The offense level for the drug "Group" is 34, and the offense level for the administration of justice "Group" is 15.

U.S.S.G. § 3D1.4(c) instructs that "any Group that is 9 or more levels less serious than the Group with the highest offense level" should be disregarded. Therefore the total offense level that would have been used had Maxwell been convicted of both counts is 34, two levels less than that actually used in his case.

Had Maxwell pleaded guilty to both offenses, as an offender in criminal history category IV he would have faced a sentencing range of 210-262 months; the range used in sentencing him was 262-327 months. In other words, in exchange for Maxwell's guilty plea, the government, in effect, promised to *increase* his sentencing range by 52-65 months.

To the best we can ascertain from the record of the proceedings below, neither party invited the attention of the district judge to the reality underlying the government's promise, namely, that in exchange for Maxwell's guilty plea the prosecution would recommend a sentence up to 65 months in excess of what he might receive should he refuse to enter into the agreement. Rather than require the enforcement of an illusory promise, we elect to remand this case to the district judge for reconsideration.

D.

In light of our disposition of the plea agreement issue, we need not reach the issue of the government's refusal to accept Maxwell's offer to cooperate. However, in the interest of facilitating dispute resolution, we will address this simple question.

Maxwell apparently made repeated offers to provide the government with "important" information which would assist it in criminal investigations. The government declined to meet with Maxwell.

Briefly put, there exists no law in this circuit to support the proposition that the government can be compelled to accept a defendant's offer to cooperate. Whether, because it is not interested in the defendant's information, does not credit his statements, or for any other reason, the government is free to decline the offer. We therefore affirm the district court's judgment with regard to this issue.

III.

For the foregoing reasons, we REMAND this case for reconsideration in accordance with the principles discussed in this opinion.