

September 1, 2004

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-40196
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TAI TAN DUONG, formerly known as Tan Tai Duong,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 1:93-CR-16-1

Before DAVIS, SMITH and DENNIS, Circuit Judges.

PER CURIAM:*

Tai Tan Duong, federal prisoner # 04216-078, has appealed the denial of his motion under 28 U.S.C. § 3582(c)(2) for modification of his sentence, in light of Sentencing Guidelines Amendment 591. Because the amendment did not lower the guideline range under which Duong was sentenced, the district court did not have authority under 28 U.S.C. § 3582(c)(2) to reduce his sentence. See United States v. Owens, No. 03-10277, 2003 WL

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

21994002, at **1 (5th Cir. Aug. 20, 2003) (unpublished), cert. denied, 124 S. Ct. 1525 (2004).

Duong contends for the first time on appeal that his sentence was illegal in light of Apprendi v. New Jersey, 530 U.S. 466 (2000). Apprendi has not been applied retroactively. See United States v. Brown, 305 F.3d 304, 310 (5th Cir. 2002).

Because the appeal is frivolous, it is DISMISSED. See Howard v. King, 707 F.2d 215, 220 (5th Cir. 1983); 5TH CIR. R. 42.2.

APPEAL DISMISSED.