

FILED

September 12, 2003

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-50171
Summary Calendar

UNITED STATES OF AMERICA

Plaintiff-Appellee

versus

PEDRO CARBAJAL-DEPAZ

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas
USDC No. A-01-CR-108-1-SS

Before KING, Chief Judge, and JOLLY and PRADO, Circuit Judges.

PER CURIAM:*

Pedro Carbajal-Depaz, Texas prisoner #15168-180, appeals the district court's dismissal of his postconviction motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 motion and the district court's denial of his postconviction motion to rescind his fine. Carbajal pleaded guilty to conspiracy to possess with intent to distribute more than five kilograms of cocaine in violation of 21 U.S.C. § 846 and money laundering in violation of 18 U.S.C. § 1956(h).

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

As Carbajal argues, the dismissal of his 28 U.S.C. § 2255 motion should be without prejudice. See Stewart v. Martinez-Villareal, 523 U.S. 637, 645 (1998); Fassler v. United States, 858 F.2d 1016, 1019 (5th Cir. 1988). Because the district court did not indicate whether it was dismissing Carbajal's 28 U.S.C. § 2255 motion with or without prejudice, the dismissal is presumed to be with prejudice. See Nationwide Mutual Ins. Co. v. Unauthorized Practice of Law Comm., 283 F.3d 650, 655 n.26 (5th Cir. 2002). The dismissal of Carbajal's 28 U.S.C. § 2255 motion is therefore AFFIRMED but REMANDED to the district court so it can modify its order to dismiss the motion without prejudice.

As the district court did not have jurisdiction to review Carbajal's motion to rescind his order, the denial of this motion is AFFIRMED. See United States v. Early, 27 F.3d 140, 141-42 (5th Cir. 1994); United States v. Hatten, 167 F.3d 884, 886 (5th Cir. 1999); see also 18 U.S.C. § 3582(c)(1); FED. R. CRIM. P. 35; 18 U.S.C. § 3742.

DISMISSAL OF 28 U.S.C. § 2255 MOTION AFFIRMED BUT REMANDED WITH INSTRUCTIONS THAT DISTRICT COURT MODIFY ITS ORDER TO REFLECT DISMISSAL IS WITHOUT PREJUDICE; AFFIRM DENIAL OF MOTION TO RESCIND FINE.