

July 10, 2006

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-50829
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSEPH DESALME,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:01-CR-550-1

Before REAVLEY, DAVIS and STEWART, Circuit Judges.

PER CURIAM:*

Joseph Desalme appeals the sentence imposed at his resentencing for his guilty plea conviction for possession of pseudophedrine with intent to manufacture methamphetamine. Desalme was resentenced to a term of imprisonment of 160 months to be followed by a three-year term of supervised release.

Desalme had filed a 28 U.S.C. § 2255 motion which resulted in an order that he be resentenced. Desalme argues, based on the principle of *res judicata*, that the district court erred at

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

resentencing in reconsidering and denying him an adjustment of his offense level for acceptance of responsibility.

Desalme's argument is without merit. Res judicata is applicable only if "the first action concluded with a final judgment on the merits." The Proctor & Gamble Company v. Amway Corporation, 376 F.3d 496, 499 (5th Cir. 2004) (internal quotations and citation omitted). When a § 2255 movant challenges his conviction and sentence, he no longer has a legitimate expectation of finality in the original sentence. United States v. Rodriguez, 114 F.3d 46, 47-48 (5th Cir. 1997). In the absence of a final judgment incorporating Desalme's sentence, his res judicata argument is without merit. The sentence imposed is AFFIRMED.