

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED

September 11, 2008

Charles R. Fulbruge III
Clerk

No. 07-40718
Summary Calendar

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

GUSTAVO VILLARREAL

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 5:05-CR-1640-6

Before SMITH, STEWART, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

Gustavo Villarreal appeals the 188-month sentence following his guilty plea conviction for conspiracy to possess with intent to distribute over five kilograms of cocaine. He contends that he was entitled to a downward departure for substantial assistance and that the Government's failure to file a motion pursuant to Section 5K1.1 of the Sentencing Guidelines revealed bad faith. Villarreal also contends that his within-Guidelines sentence is unreasonable.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Villarreal was not entitled to a Section 5K1.1 motion. He has neither established that the Government negotiated away its discretion to choose not to file a motion, nor that the Government's failure to file a motion was based on an unconstitutional motive. See *United States v. Aderholt*, 87 F.3d 740, 742-43 (5th Cir. 1996). Villarreal has not even shown that he did actually provide substantial assistance. *Id.*

Villarreal's unreasonable-sentence argument also fails. Villarreal has not established procedural error in the district court's sentencing process. See *Gall v. United States*, 128 S. Ct. 586, 597 (2007). Nor has he established that the district court abused its discretion by imposing a sentence within the applicable Guidelines range, which is presumptively reasonable. See *United States v. Cisteros-Gutierrez*, 517 F.3d 751, 766 (5th Cir. 2008).

The judgment of the district court is **AFFIRMED**.