

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED

February 2, 2009

Charles R. Fulbruge III
Clerk

No. 08-40577
Summary Calendar

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

BRIAN KEITH AKERS

Defendant-Appellant

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:07-CR-54-1

Before HIGGINBOTHAM, BARKSDALE, and ELROD, Circuit Judges.

PER CURIAM:*

Brian Keith Akers appeals from his conviction and sentence for being a felon in possession of a firearm. He first argues that the district court erred in denying his motions for acquittal because the evidence presented at trial failed to prove beyond a reasonable doubt that he possessed the firearm. Viewing the evidence in the light most favorable to the jury's verdict, a rational trier of fact could have found that the Government proved beyond a reasonable doubt that

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Akers had possession of the firearm. *United States v. Lankford*, 196 F.3d 563, 575 (5th Cir. 1999).

Akers also contends that the district court erred by including two Indiana sentences for being a habitual traffic violator in his criminal history score because his status as a habitual traffic violator could have been based upon minor traffic infractions, which are never counted towards the criminal history score under U.S.S.G. § 4A1.2(c)(2). We review the district court's application of the Sentencing Guidelines *de novo*. *United States v. Lamm*, 392 F.3d 130, 131 (5th Cir. 2004). The challenged Indiana sentences were for felony offenses and were therefore properly counted pursuant to § 4A1.2(c).

Akers also argues that the district court was required to prove the facts underlying his sentence utilizing the beyond-a-reasonable-doubt standard. This court has specifically rejected identical arguments from other defendants. See *United States v. Valles*, 484 F.3d 745, 759–60 (5th Cir.), cert. denied, 127 S. Ct. 3025 (2007); *United States v. Thompson*, 454 F.3d 459, 467–68 (5th Cir. 2006).

The district court's judgment is **AFFIRMED**.