

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-11065
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DAROLD ELLSWORTH,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:01-CR-30-1-Y

April 10, 2002

Before SMITH, DeMOSS, and PARKER, Circuit Judges.

PER CURIAM:*

Darold Ellsworth appeals his sentence of 139 months' imprisonment and three years' supervised release after pleading guilty to possession of Ephedrin with intent to manufacture methamphetamine. He argues that the district court erred by increasing his offense level based on the quantity of drugs and his possession of a weapon.

This court specifically rejected Ellsworth's argument that Apprendi v. New Jersey, 530 U.S. 466 (2000) rendered 21 U.S.C.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

§ 841(b) facially unconstitutional. United States v. Slaughter, 238 F.3d 580, 582 (5th Cir. 2000). Appendi is not authority for invalidating Ellsworth's sentence for the additional reason that Ellsworth's sentence of 139 months' imprisonment and three years' supervised release does not exceed the statutory maximum of twenty years provided in 21 U.S.C. § 841(d)(1). United States v. Keith, 230 F.3d 784, 787 (5th Cir. 2000) ("[A] fact used in sentencing that does not increase a penalty beyond the statutory maximum need not be alleged in the indictment and proved to a jury beyond a reasonable doubt.")

As the Government correctly points out, Ellsworth's sentence was not determined based on drug quantity and weapon possession as he contends. Ellsworth was determined to be a career offender, and his offense level was determined based on the career offender provisions of U.S.S.G. § 4B1.1, making Ellsworth's arguments on appeal irrelevant.

AFFIRMED.