

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-30626
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

THU NGOC NGUYEN, also known as Teo,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 98-CR-147-1

February 21, 2002

Before JOLLY, JONES, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Thu Ngoc Nguyen, federal prisoner No. 25975-034, appeals the district court's denial of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. The district court granted Nguyen a certificate of appealability on the issues whether the failure of the indictment to specify a drug quantity deprives the trial court of jurisdiction because an element of the offense is lacking and whether the failure to specify a drug quantity in the indictment prevents the imposition of an enhanced sentence under the Sentencing Guidelines.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

In 1999, a jury convicted Nguyen of conspiracy to possess with the intent to distribute an unspecified quantity of cocaine. At sentencing, the district court found that Nguyen was responsible for at least five kilograms of cocaine and sentenced him to a 121-month term of imprisonment, the lowest applicable sentence under the Sentencing Guidelines. We affirmed the district court's sentencing findings on direct appeal.

We reject Nguyen's argument that his conviction and sentence are invalid under Apprendi v. New Jersey.** We have not yet decided whether § 2255 relief is retroactively available under Apprendi, and we find it unnecessary to do so in this case. Even if Apprendi may be applied retroactively, there is no Apprendi error as Nguyen's sentence is less than the 20-year statutory maximum sentence applicable to a defendant who possesses any quantity of cocaine in violation of 21 U.S.C. § 841(a). 21 U.S.C. § 841(b)(1)(C); see United States v. Garcia, 242 F.3d 593, 599 (5th Cir. 2001). Apprendi is not violated if enhancements imposed under the Sentencing Guidelines do not increase the sentence beyond the statutory maximum applicable to the offense. United States v. Randle, 259 F.3d 319, 322 (5th Cir. 2001).

AFFIRMED.

** 530 U.S. 466 (2000).