

June 2, 2003

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 02-61078  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GREG THOMAS,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Northern District of Mississippi  
USDC No. 02-CR-80-ALL  
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Before DAVIS, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:\*

Defendant-Appellant Gregory Thomas appeals the sentence imposed following his guilty plea to distribution of 50 grams or more of cocaine base. Thomas argues that the district court clearly erred by enhancing his offense level pursuant to U.S.S.G. § 2D1.1(b)(1) based on the court's determination that Thomas possessed a firearm in connection with the controlled substance offense. Without expressing any opinion as to the facts of the case, we hold that the district court erred as a matter of law by

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

requiring Thomas to prove that the § 2D1.1(b)(1) enhancement did not apply. Instead, the court should have required the government prove, by a preponderance of the evidence, that Thomas's sentence should be enhanced. See United States v. Cooper, 274 F.3d 230, 245 (5th Cir. 2001).

Accordingly, Thomas's sentence is VACATED and the case is REMANDED for proceedings consistent with this opinion.  
VACATED AND REMANDED.

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