United States Court of Appeals
Fifth Circuit

F I L E D

February 23, 2004

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 03-50932
Summary Calendar

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UNITED STATES OF AMERICA,

                              Plaintiff-Appellee,

versus

HARRY SCHREIBER,

                              Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. A-95-CR-130-1-JN

Before HIGGINBOTHAM, DAVIS and PRADO, Circuit Judges.

PER CURIAM:[*]

Harry Schreiber, federal prisoner # 40454-004, appeals the

district court's denial of his motion to reduce his sentence

imposed following his conviction for conspiracy to commit wire

fraud, five counts of wire fraud, and three counts of bankruptcy

fraud. Schreiber was sentenced to a term of imprisonment of 120

months to be followed by a three-year term of supervised release,

and was ordered to pay a fine of $80,000 and restitution in the

amount of $354,253. On direct appeal, the court vacated two

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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that this opinion should not be published and is not precedent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.

of the wire fraud convictions and remanded the case for
resentencing. The district court imposed the same sentence.

Schreiber argues that the district court erred in
determining that he was precluded from seeking collateral relief
based on a waiver contained in a sentencing agreement reached
with the Government following his guilty plea and the remand for
resentencing.

The court has not addressed the binding effect of a waiver
contained in a posttrial sentencing agreement. However, it is
unnecessary to determine the validity of the waiver because
Schreiber's claims are without merit.

Schreiber argues that he is entitled to have his sentence
reduced pursuant to Amendment 617 to the Sentencing Guidelines
because that amendment merely clarified the applicable guideline.
Because Amendment 617 is not listed as an amendment to be applied
retroactively in U.S.S.G. § 1B1.10(c), Schreiber is not entitled
to take advantage of the change whether it contained substantive
changes or clarified the amendment. United States v. Drath,
89 F.3d 216, 217 (5th Cir. 1996).

Schreiber also argues that his offense level was improperly
raised pursuant to U.S.S.G. § 2F1.1(b)(3) for a violation of
a judicial order because orders of a bankruptcy court were
not included order prior to the enactment of Amendment 597.
He argues that Amendment 597 was improperly applied
retroactively. This argument is not cognizable in a 18 U.S.C.

§ 3582(c)(2) motion. The district court did not abuse its
discretion in denying Schreiber's motion to reduce his sentence.

Schreiber argues that the district court erred in denying
his FED. R. CIV. P. 60(b) motion based on untimeliness and on the
merits. The district court did not grant or deny Schreiber a
certificate of appealability (COA) to appeal the denial of
his FED. R. CIV. P. 60(b) motion. Because he is seeking
reconsideration of the merits of the denial of his 28 U.S.C.
§ 2255 motion, Schreiber should have obtained a COA ruling on
the denial of his FED. R. CIV. P. 60(b) motion. Cf. Dunn v.
Cockrell, 302 F.3d 491, 492 & n.1 (5th Cir. 2002).

However, because this appeal also involved a review of the
denial of the 18 U.S.C. § 3582 motion, Schreiber has had the
benefit of a full appeal without obtaining an order granting COA.
In the interest of judicial economy, the case will not be
remanded to obtain a COA ruling by the district court.

Because Schreiber is challenging the validity of his
underlying fraud convictions, his FED. R. CIV. P. 60(b) motion
should have been construed as a successive 28 U.S.C. § 2255
motion. See Fierro v. Johnson, 197 F.3d 147, 151 (5th Cir.
1999). Prior to filing the successive motion, Schreiber was
required to obtain authorization to file the successive motion.
28 U.S.C. §§ 2244(b)(3)(A), 2255. Because Schreiber failed to
obtain such authorization, the district court did not err in
denying the motion.

AFFIRMED.