

November 30, 2004

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-20270
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DAVID EARNEST,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:03-CR-401

Before GARZA DeMOSS, and CLEMENT, Circuit Judges.

PER CURIAM:*

David Earnest, federal prisoner # 03721-025, appeals his conviction for assault of a federal correctional officer. He argues that the district court abused its discretion in refusing to instruct the jury on self-defense.

Earnest, however, was not entitled to a self-defense instruction given that there was insufficient evidence for a reasonable jury to find in his favor. See United States v. Branch, 91 F.3d 699, 711-12 (5th Cir. 1996). The evidence

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

supports a conclusion that Earnest resorted to excessive force in response to a use of force that was not excessive, and, therefore, the affirmative defense of self defense was unavailable. See Branch, 91 F.3d at 714-15; United States v. Ochoa, 526 F.2d 1278, 1282 (5th Cir. 1976). Earnest's testimony that he submitted to restraints is but a "single item of evidence overwhelmed by other evidence in the record" and is therefore insufficient to create a factual issue for the jury entitling him to the requested instruction. See Branch, 91 F.3d at 712-13.

AFFIRMED.