

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 18-10277
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

October 31, 2018

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

BYRON ANTHONY HORN,

Defendant - Appellant

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:16-CR-325-1

Before HIGGINBOTHAM, ELROD, and DUNCAN, Circuit Judges.

PER CURIAM:*

Byron Anthony Horn pleaded guilty to five counts of bank robbery in violation of 18 U.S.C. § 2113. The district court varied upward from the calculated guidelines range and sentenced Horn to 120 months of imprisonment.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

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In his brief, Horn argues that the district court plainly erred under the Fifth and Sixth Amendments by imposing a sentence based on findings that were not pleaded in the indictment and supported by proof beyond a reasonable doubt. The Government moves for summary affirmance or, alternatively, for an extension of time to file a brief on the merits. Horn does not oppose the motion for summary affirmance.

Summary affirmance is proper where, among other instances, “the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case.” *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969). As he concedes, Horn’s argument is foreclosed by *United States v. Tuma*, 738 F.3d 681 (5th Cir. 2013), and *United States v. Bazemore*, 839 F.3d 379 (5th Cir. 2016).

The Government’s motion for summary affirmance is GRANTED, and the judgment is AFFIRMED. The alternative motion for an extension of time to file a brief on the merits as DENIED as unnecessary.