

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

No. 19-60019
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

August 7, 2019

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

CALVIN ALLEN,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 1:15-CR-36-1

Before WIENER, HAYNES, and COSTA, Circuit Judges.

PER CURIAM:*

Calvin Allen, federal prisoner # 18222-043, is serving a 188-month prison sentence following his 2015 guilty-plea conviction for possessing with the intent to distribute a controlled substance. Allen appeals from the district court's denial of his pro se motion requesting a reduction of sentence pursuant to Federal Rule of Criminal Procedure 35(b). The Government has filed a

* 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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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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motion to dismiss the appeal or, in the alternative, for summary affirmance in light of *Wade v. United States*, 504 U.S. 181, 185-86 (1992).

This court reviews “de novo whether the district court had jurisdiction to resentence.” *United States v. Bridges*, 116 F.3d 1110, 1112 (5th Cir. 1997). Resentencing under Rule 35(b) “is permitted only on the Government’s motion.” *United States v. Early*, 27 F.3d 140, 141 (5th Cir. 1994). Thus, to the extent that Allen’s motion sought resentencing pursuant to Rule 35(b), the motion “was unauthorized and without a jurisdictional basis.” *Id.*

To the extent that Allen’s motion sought review of the Government’s failure to file its own Rule 35(b) motion, the district court likewise had no authority to grant relief. “The government’s refusal to file a Rule 35(b) motion is not reviewable unless that refusal is based on an unconstitutional motive,” as discussed in *Wade*, 504 U.S. at 185-86, or “the government has ‘bargain[ed] away’ its discretion.” *United States v. Grant*, 493 F.3d 464, 467 (5th Cir. 2007) (quoting *United States v. Price*, 95 F.3d 364, 368 (5th Cir. 1996)). Allen has not shown that either circumstance was present here.

In sum, Allen’s Rule 35(b) motion was unauthorized, and the district court lacked jurisdiction to consider it or to review the Government’s failure to file its own Rule 35(b) motion. *See Grant*, 493 F.3d at 467; *Early*, 27 F.3d at 141. The judgment is AFFIRMED on that basis. The Government’s motion to dismiss the appeal or, alternatively, for summary affirmance is DENIED as moot.