

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1521
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ANTONIO PRECIADO LOPEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
CR3 89 96 H

March 25, 1993

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Antonio Lopez appeals the dismissal of his federal prisoner's motion, pursuant to 18 U.S.C. § 3742, to appeal sentence out of time, to correct his sentence, and to correct his presentence investigation report (PSI). We affirm with the proviso that the dismissal is without prejudice.

* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Lopez was charged with two counts of using a telephone to facilitate the distribution of heroin and two counts of possessing heroin with intent to distribute it. Pursuant to an agreement with the government, he pleaded guilty on count 3, possession of approximately three ounces of heroin, and the other counts were dismissed. He was sentenced February 15, 1990, to serve seventy months and to three years of supervised release.

Lopez did not take a direct appeal but, on June 28, 1990, filed a motion to "reinstate" his appeal. The district court denied the motion as untimely. On appeal, we held that we lacked jurisdiction of a direct appeal because Lopez had not filed a timely notice of appeal relative thereto. We observed that he could seek an out-of-time direct appeal by filing a 28 U.S.C. § 2255 motion to vacate. Lopez did so on January 31, 1991, and the motion is still pending. Although he does not specifically say so, he seems to be requesting an out-of-time direct appeal in the section 2255 motion.

On October 28, 1991, Lopez filed his subject motion to appeal sentence pursuant to 18 U.S.C. § 3742, to correct his sentence pursuant to Fed. R. Crim. P. 35(a), and to correct his PSI. He alleged that (1) his rights under Fed. R. Crim. P. 11 were violated; (2) he received a sentence greater than the sentencing guidelines permitted, based upon a misstatement in the PSI concerning the quantity of heroin involved; (3) his sentence should not have been enhanced for obstruction of justice; (4) he should

have received sentence credit for acceptance of responsibility; and (5) his criminal history category was improperly based upon invalid prior convictions. He did not, however, state reasons why he should be granted an out-of-time appeal, as he did in his section 2255 motion.

The district court's probation office filed a response to Lopez's motion. The court found that the comments in the response "are supported in the record and are correct. Defendant Lopez's allegations are not supported in the record and are without merit." The court incorporated the response in the order by reference. The record does not include either the plea or the sentencing transcript, however. The district court also correctly stated as a reason for denying relief that Lopez "has therefore not presented grounds to file a notice of appeal of his final sentence."

II.

The grounds alleged in Lopez's "motion to appeal sentence" are of a type that should be presented on direct appeal. See U.S.S.G. § 3C1.1 (obstructing justice), 3E1.1 (acceptance of responsibility); 18 U.S.C. § 3742. His section 2255 motion seeking leave to take an out-of-time direct appeal has been pending in the district court for more than two years.

Therefore, we affirm the district court's denial of relief to Lopez, but we modify the order to provide that the ruling is without prejudice. If the district court denies Lopez's section 2255 motion, he can appeal that ruling; if it is granted,

he can present, upon an out-of-time direct appeal, the grounds alleged in his subject motion. The plea and sentencing transcripts then would be included in the record for full adjudication of Lopez's claims regarding his sentence. See Mack v. Smith, 659 F.2d 23, 25-26 (5th Cir. 1981); Atilus v. United States, 406 F.2d 694 (5th Cir. 1969).

AFFIRMED as modified.