

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

92-3609

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

DAVID OLIVER,

Defendant-Appellant.

Appeal from the United States District Court
For the Eastern District of Louisiana
(CR-90-498-M)

(February 18, 1993)

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Defendant, David Oliver, appeals a district court's order denying Oliver's Rule 35 Motion for reduction of sentence. See Fed. R. Crim. P. 35(b). He argues that because information he gave the government resulted in a subsequent indictment and conviction, he is entitled to a sentence reduction. The district court))finding that Oliver had finished his prison term))denied his motion as moot. Oliver appeals.

* 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Because Oliver is still on supervised release, Oliver is correct that his motion is not moot. *See United States v. Valdez-Gonzalez*, 957 F.2d 643, 646-47 (9th Cir. 1992) (defendants' appeal is not moot where))having served their sentences and deported))defendants could be subject to conditions of supervised release upon reentry). The government, nonetheless, contends we can affirm the district court on other grounds. *See Sojourner T. v. Edwards*, 974 F.2d 27, 30 (5th Cir. 1992) ("We can, of course, affirm the district court's judgment on any grounds supported by the record." (citing *Mangaroo v. Nelson*, 864 F.2d 1202, 1204 n.2 (5th Cir. 1989)), *petition for cert. filed*, 61 U.S.L.W. 3481 (Dec. 21, 1992)). Rule 35 states that "[t]he [district] court, on motion of the Government . . . may reduce a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense." Fed. R. Crim. P. 35(b). By its plain language, a government's motion is required, and substantial assistance rendered after sentencing is mandatory. *See United States v. Mitchell*, 964 F.2d 454, 461 (5th Cir. 1992) ("[U.S.S.G.] §5K1.1 operates at sentencing, while . . . Rule . . . 35(b), under which the Government may move to resentence a defendant to reflect substantial assistance rendered after the original sentence, operates after sentence has been imposed.").

Oliver acknowledges that the government has not moved for reduction of sentence, but he contends, nonetheless, that *Wade v. United States*, ___ U.S. ___, 112 S. Ct. 1840, 118 L. Ed. 2d 524

(1992) permits a district court to reduce, on its own authority, a defendant's sentence where the government has committed constitutional violations in refusing to file a substantial-assistance motion. See Brief for Oliver at 5. Citing *Santobello v. New York*, 404 U.S. 257, 262-63, 92 S. Ct. 495, 498-99, 30 L. Ed. 2d 247 (1971), Oliver contends that the government unconstitutionally breached the plea agreement because information he gave resulted in an indictment and conviction. We disagree.

The record reveals that the government did not breach the plea agreement. The agreement explicitly stated that the government was "under no obligation whatsoever to file a motion." Record on Appeal at 82. As we previously opined, "[t]he government [has] acted within its authority as expressly reserved in the plea agreement." *United States v. Oliver*, No. 91-3611, slip op. at 4 (5th Cir. March 19, 1992), included in Record on Appeal at 30.

Because Oliver cannot claim that the government breached the plea agreement, Oliver's challenge to the government's refusal to file a substantial-assistance motion is based solely on the extent of his assistance to the government. That contention cannot survive the framework established by *Wade*, assuming that *Wade* even applies.¹ In *Wade*, the Supreme Court expressly excluded any argument based on "a claim that a defendant merely provided substantial assistance." See *id.* at 1844; see also *United States*

¹ Oliver's reliance on *Wade* may be misplaced, as *Wade* did not involve a Rule 35 resentencing. See 112 S. Ct. at 1843 (dealing only with a prosecutor's refusal to file a motion for downward departure, as contemplated by U.S.S.G. §5K1.1).

v. Urbani, 967 F.2d 106, 109 (5th Cir. 1992) (holding that defendant's contentions based solely upon the extent of his assistance to the government, could not survive *Wade* framework). Furthermore, the record reveals no unconstitutional motive on the part of the government))Oliver's race or religion was not a motivating factor. See *id.* ("[A] defendant would be entitled to relief if a prosecutor refused to file a substantial-assistance motion, say because of the defendant's race or religion."). Thus, Oliver's contentions lack merit.

Accordingly, we **AFFIRM**.