

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-4913
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JAMES L. PEDDIE,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Louisiana
CA 92 0462(CR 88 20006 02)

March 29, 1993

Before KING, DAVIS, and WIENER, Circuit Judges.

PER CURIAM:¹

James L. Peddie challenges his sentence under 28 U.S.C. § 2255 on the ground that the district court incorrectly applied the sentencing guidelines, causing a disparity between the sentences of Peddie and his codefendants. We conclude that Peddie's motion is not cognizable under § 2255, and we affirm the judgment of the district court denying relief.

I.

James L. Peddie and fifteen others were charged in a five-

¹Local Rule 47.5 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

count indictment with various drug offenses. In accordance with a plea agreement, Peddie pleaded guilty to one count--conspiring to import seven tons of marijuana. The court sentenced Peddie to a term of 151 months imprisonment, five years supervised release, and a \$50 special assessment, and assessed \$1,221 per month to cover the cost of incarceration and \$83.33 for the cost of supervised release.

Proceeding **pro se**, Peddie filed a 28 U.S.C. § 2255 motion requesting the court to apply the same guidelines that it used in sentencing his codefendants and to vacate the fine and cost of incarceration assessment. The court granted in part and denied in part Peddie's motion, ruling that (1) Peddie's motion for departure based on his substantial assistance was untimely; (2) Peddie's sentence is independent of his codefendants' sentences, and he has no standing to contest the sentences given his codefendants; but (3) if Peddie is indigent for purposes of imposing a fine under § 5E1.2(a), Peddie should be deemed indigent for purposes of paying costs of incarceration and supervised release under § 5E1.2(i).

Peddie appeals the denial of § 2255 relief, arguing that the district court incorrectly applied the sentencing guidelines in imposing disparate sentences on Peddie and his codefendants. In addition, Peddie contends that he is entitled to relief under Rule 35, because some of his codefendants' sentences were reduced in accordance with timely Rule 35 motions. Peddie also requests us to expedite his appeal, because he would have served 60 months, the reduced sentence which he seeks, in December 1992.

II.

Peddie challenges his sentence of 151 months incarceration on the ground that his codefendant, who was more involved in the conspiracy, was sentenced by the same court to only 60 months. Specifically, Peddie argues the court erroneously departed downward under U.S.S.G. § 5K1 on behalf of codefendant Lomax Smith without a motion from the government.

Peddie's challenge to the application of the guidelines is not cognizable in a § 2255 proceeding. "Nonconstitutional claims that could have been raised on direct appeal, but were not, may not be asserted in a collateral proceeding. . . . A district court's technical application of the Guidelines does not give rise to a constitutional issue." **United States v. Vaughn**, 955 F.2d 367, 368 (5th Cir. 1992). Peddie's claim is not cognizable in § 2255 "because it is not of constitutional dimension, could have been raised on direct appeal, and there has been no showing as to why it was not." **Id.**

The government moved for a downward departure for Lomax Smith's substantial assistance under U.S.S.G. §5K1.1, but did not so move on behalf of Peddie. "[T]he condition limiting the court's authority [under § 5K1.1] gives the Government a power, not a duty, to file a motion when a defendant has substantially assisted." **Wade v. United States**, ___ U.S. ___, 112 S.Ct. 1840, 1843, 118 L.Ed.2d 524, 531 (1992). District courts should review a prosecutor's decision not to file a § 5K1.1 motion only if the refusal was based on an unconstitutional motive such as race or religion. 112 S.Ct. at 1843-44. A claim that a defendant provided

substantial assistance does not entitle a defendant to a remedy.
Id. at 1844.

Because Peddie has not alleged that the government had an unconstitutional motive for not filing the motion, the decision not to recommend the departure is not subject to § 2255 review.

Peddie further challenges the fact that the government failed to file a timely Rule 35 motion on his behalf. Peddie argues that the government's failure resulted in a disparity between his sentence and his codefendants' sentences. This issue is not cognizable under § 2255. **See Vaughn**, 955 F.2d at 368. Therefore, we do not address it.

Peddie's challenge to his sentence is not one that may be brought under § 2255. Therefore, we affirm the judgment of the district court.

AFFIRMED.