

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-9024
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CRAIG ODELL WILLEBY,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Northern District of Texas
USDC No. 5:92-CV-165-C (5:89-CR-07-C)
- - - - -
(October 28, 1993)

Before POLITZ, Chief Judge, and SMITH and WIENER, Circuit Judges.

PER CURIAM:*

Relief under 28 U.S.C. § 2255 "is reserved for transgressions of constitutional rights and for that narrow compass of other injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice." United States v. Perez, 952 F.2d 908, 909 (5th Cir. 1992) (quoting United States v. Capua, 656 F.2d 1033, 1037 (5th Cir. 1981)). Nonconstitutional claims that could have been raised on direct appeal but were not may not be

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

asserted in collateral proceedings. United States v. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992). A district court's technical application of the guidelines, moreover, does not give rise to a constitutional issue. Id.

Willeby argues that the district court erred in granting the upward departure agreed to by the Government and his trial counsel. Willeby specifically argues that the district court accepted the recommended sentence "without referring to the structure of the sentencing guidelines. . . ." Willeby further contends that the sentencing court should have drawn analogies "to the offense characteristic levels, criminal history categories, and other principles in the guidelines to determine the appropriate degree of departure."

Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure provides, in pertinent part, that the defendant's attorney and the Government may agree that a specific sentence is appropriate. Section 6B1.2(c) of the sentencing guidelines provides that the district court may accept a plea agreement that includes a specific sentence if the district court is satisfied either that: (1) the agreed sentence is within the applicable guideline range or (2) the agreed sentence departs from the applicable guideline range for justifiable reasons. "The controlling decision as to whether and to what extent departure is warranted can only be made by the courts." U.S.S.G. § 5K2.0, p.s.

Pursuant to section 6B1.2(c) of the sentencing guidelines, the district court specifically provided that the agreed sentence departed from the applicable guideline range for justifiable

reasons. Willeby, moreover, agreed to the upward departure, the probation officer recommended a departure in the presentence report (PSR), Willeby did not object to the PSR, the sentencing court provided justifiable reasons for the departure, and Willeby did not file a direct appeal. In light of the circumstances in this case, there has been no showing of a "transgression[] of constitutional rights" or an injury that would result "in a complete miscarriage of justice." See Vaughn, 955 F.2d at 368. Accordingly, we affirm the dismissal of Willeby's motion.

Willeby also raises an issue concerning the Government's request for an enhanced penalty under 18 U.S.C. § 924(e). This pleading was withdrawn in exchange for the guilty plea. Willeby now argues that section 924(e) does not apply to his case. Because Willeby raises this issue for the first time on appeal, we need not address it. See United States v. Carvajal, 989 F.2d 170, 170 (5th Cir. 1993).

AFFIRMED.