IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1615
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JIM D. HUGHES,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:92-CR-216-H(2))

(March 14, 1994)

Before JOLLY, WIENER and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

Defendant-Appellant Jim D. Hughes has appealed the district court's denial of his motion under former Federal Rule of Criminal Procedure 35(b) for reduction of sentence. For the reasons set forth below, we conclude that the district court committed no reversible error and therefore affirm the denial of Hughes' motion.

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

I

FACTS AND PROCEEDINGS

After Hughes pleaded guilty to conspiracy to commit bank fraud and was sentenced to twenty-one months imprisonment, he filed a motion for reduction of sentence pursuant to former Fed. R. Crim. P. 35(b). He argued, in part, that his sentence was disproportionate to the sentencing of his co-conspirators. The district court denied Hughes' motion, and he timely appealed.

II

ANALYSIS

As the conduct of conviction occurred prior to November 1, 1987, the Sentencing Guidelines did not apply. In addition, Hughes had the benefit of former Rule 35(b), which provided: "A motion to reduce a sentence may be made, or the court may reduce a sentence without motion, within 120 days after the sentence is imposed . . . ." See United States v. Chagra, 957 F.2d 192, 194 n.1 (5th Cir. 1992).

As an initial matter, the government argues that Hughes' motion was untimely, thereby depriving the district court of jurisdiction to consider the motion. See In re United States, 900 F.2d 800, 803 (5th Cir.) ("The time limit imposed by Rule 35 is jurisdictional."), cert. denied, 498 U.S. 905 (1990). Hughes' sentence was pronounced orally on February 4, 1993, yet he did not file his motion for reduction of sentence until June 7, 1993.

Thus the basis of the government's argument that Hughes' motion for reduction was untimely is that it was filed 123 days

after oral pronouncement of sentence. The government cites no Fifth Circuit precedent for the proposition that the Rule 35(b) time period commences when sentence is orally pronounced, as opposed to when judgment is entered. To the contrary, United States, 900 F.2d at 803-04, suggests in dicta that the time limit begins to run when a conviction becomes final. This view is supported by the Eleventh Circuit in In re United States, 898 F.2d 1485, 1486-87 (11th Cir. 1990) (holding that time limit begins to run when sentencing order constitutes a final, appealable order).

Hughes attempts to avoid this issue altogether by insisting that, as he was incarcerated at the time, his motion was timely filed because he delivered the motion to prison officials on June 2, 1993, to be mailed to the district court for filing. Hughes, proceeding pro se, argues that under Houston v. Lack, 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988), his motion was, therefore, timely filed. Although the rule of Houston v. Lack has been extended to all appellate filings by amended Fed. R. App. P. 25, it is unclear whether the rule has been extended to filings under the Federal Rules of Criminal Procedure. Cf. Thompson v. Rasberry, 993 F.2d 513, 515 (5th Cir. 1993) (extending Houston v. Lack rule to filings under Fed. R. Civ. P. 72(b)).

Regardless of the issue of timeliness, though, Hughes' motion for reduction was properly denied because it was wholly without merit. We need not and therefore do not address the questions whether the period for timely filing commences upon oral pronouncement of sentence, and whether a Rule 35(b) motion is

deemed filed when a prisoner delivers the motion to prison officials.

A district court's ruling under Rule 35(b) will be reversed only for illegality or gross abuse of discretion. United States v. Sinclair, 1 F.3d 329, 330 (5th Cir. 1993); United States v. Castillo-Roman, 774 F.2d 1280, 1283 (5th Cir. 1985). Hughes does not argue illegality; rather, he contends that the district court abused its discretion by failing to sentence him in proportion to co-conspirators who had been charged in separate indictments or not charged at all. But a defendant cannot rely on his co-defendants' sentences as a yardstick for the propriety of his own sentence. Alone, a mere disparity in sentences among co-defendants does not constitute abuse of discretion. United States v. Lindell, 881 F.2d 1313, 1324 (5th Cir. 1989), cert. denied, 496 U.S. 926 (1990); Castillo-Roman, 774 F.2d at 1283-84. Hughes' argument, grounded in comparative sentences, is therefore without merit.

Even were we to undertake to make a comparison of sentences, the record on appeal contains no persuasive evidence that Hughes' sentence was disproportionate to those of other co-conspirators. Hughes points to F. Roy Phillips and Roland Maness as co-conspirators who were given disproportionately lesser sentences, but neither of those individuals was charged in Hughes' indictment. The only other individual charged in the Hughes' indictment was Donald Carl Edington, who was sentenced to fifty-four months imprisonment. Although Hughes' indictment indicates that Phillips played a role in the scheme, there is nothing in the record showing

the charges for which Phillips was eventually convicted, the conduct that gave rise to his conviction, or the factors that may have influenced his sentence. As for Maness, he was never indicted or convicted; and, contrary to Hughes' suggestion, the record contains no evidence reflecting that he was given any type of immunity. As such, there is no basis upon which we could compare Hughes' sentence with those given to Phillips and Maness even if we were constrained to do so. As to Edington, the district court explicitly stated that it considered his sentence when it sentenced Hughes. Given the severity of Edington's sentence in comparison to Hughes', there would be no basis to find that Hughes was excessively sentenced even if we were to engage in such a comparative exercise. The district court's denial of Hughes' motion is

AFFIRMED.