IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-1991
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ELIAS GOMEZ RIVERA,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(4:89-CR-76-K)

(February 17, 1994)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Elias Rivera appeals the denial of his motion for modification of sentence pursuant to 18 U.S.C. § 3582(c)(2). Finding no error, we affirm.

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 Pursuant to that rule, the court has determined that this opinion should not be published.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

The facts of this case are set forth in United States v. Rivera, 898 F.2d 442 (5th Cir. 1990). In June 1989, Rivera pleaded guilty to distribution of a quantity of heroin. His sentence included a ninety-two-month term of imprisonment, which was remanded to determine the appropriateness of a firearms enhancement and of whether Rivera was a participant in his co-defendants' scheme to distribute heroin. Rivera, 898 F.2d at 445-46.

On remand, the district court found that Rivera participated in the scheme to distribute 224.47 grams of heroin. Because Rivera's knowledge of firearms possessed by his co-defendants was not reasonably foreseeable, his sentence was reduced to eighty-two months. Rivera's conviction and sentence were affirmed on his second direct appeal.

In April 1992, Rivera filed a pro se 28 U.S.C. § 2255 motion, alleging, inter alia, that his guilty plea was involuntary because it was made in reliance upon the government's promise, as communicated by counsel, that his sentence would be in the range of only twenty-one to twenty-seven months. An integral part of Rivera's allegations was that he should have been sentenced according to the indictment quantity (.37 grams) rather than the sentencing quantity (222.7 grams). The district court denied the § 2255 motion.

Rivera filed a "Motion for Modification of an imposed term of imprisonment pursuant to 18 U.S.C. section 3582(c)(2)." The district court denied the motion, and Rivera filed a timely notice of appeal.

II.

When the Sentencing Commission lowers a sentencing range after a defendant has been sentenced, the district court may reduce the term of imprisonment on motion of the defendant or the Director of the Bureau of Prisons or sua sponte. 18 U.S.C. § 3582(c)(2); see United States v. Watson, 868 F.2d 157, 158 (5th Cir. 1989). Section 3582(c)(2) is an exception to the general rule that the applicable guideline is that in effect on the date of sentencing. United States v. Crain, No. 92-3869, slip op. at 2 (5th Cir. June 22, 1993) (unpublished). A § 3582(c)(2) motion, however, applies only to guideline amendments that operate retroactively, as listed in U.S.S.G. § 1B1.10(d). Id.

Rivera argues that the district court misapplied § 1B1.2 and "failed to specifically establish a more serious offense." He fails to invoke an amendment listed under § 1B1.10(d). See id. Section 3582(c)(2) is therefore unavailing. See United States v. Miller, 903 F.2d 341, 349 (5th Cir. 1990).

The core of Rivera's argument is that the district court should have sentenced him under the indictment quantity rather than the sentencing quantity because he never stipulated to the latter, which constituted "a more serious offense." See § 1B1.2(a) & (b). Rivera notes in his brief that a "closely related" issue is pending in a § 2255 motion.

To the extent that Rivera raises it, the district court's technical application of the Sentencing Guidelines generally is not cognizable in a § 2255 proceeding. See United States v. Vaughn,

955 F.2d 367, 368 (5th Cir. 1992). Further, as alluded to by the district court, because this court addressed the relevant-conduct issue on direct appeal, it would not be considered again in a § 2255 motion. United States v. Kalish, 780 F.2d 506, 508 (5th Cir.), cert. denied, 476 U.S. 1118 (1986).

AFFIRMED.