IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-5548

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LIZARDO RESTREPO LONDONO,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(B-87-20-CR-02)

(June 27, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

Lizardo Restrepo Londono appeals the district court's sentence. Finding no error, we affirm.

I.

On April 10, 1987, Lizardo Restrepo Londono was indicted on three counts: importation and aiding and abetting the

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

importation of cocaine, in violation of 21 U.S.C. §§ 952 and 960(a)(1) and 18 U.S.C. § 2 (Count I); possession with intent to distribute cocaine and aiding and abetting such, in violation of 21 U.S.C. § 841 and 18 U.S.C. § 2 (Count II); and conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846 (Count III). Londono was convicted by a jury on all counts. The district court sentenced him to a thirty-year term of imprisonment and to a five-year special parole term on Count I. He was also sentenced to a ten-year term of imprisonment and a five-year special parole term on Count II, and to a ten-year term of imprisonment on Count III. His sentences on Counts II and III were to run concurrently with each other and consecutively with his sentence on Count I. Additionally, he was ordered to pay a $100,000 fine on Count I and $150 in special assessments on Counts II and III.

Proceeding pro se, Londono then filed a motion pursuant to 28 U.S.C. § 2255, which the district court denied. On appeal, this court remanded the case to the district court, and an attorney was appointed to represent Londono during further proceedings on this motion. The district court then granted Londono's § 2255 motion, set aside Londono's sentences, and scheduled the case for resentencing.

Prior to resentencing, the government and Londono entered into an agreement which provided that the government would recommend a sentence of twenty years imprisonment but would make no recommendation as to the term of supervised release or as to

the amount of any fine. At his resentencing hearing, the district court sentenced Londono to a twenty-year term of imprisonment and a five-year term of supervised release on Count I; a ten-year term of imprisonment and a five-year term of supervised release on Count II; and a ten-year term of imprisonment and a five-year term of supervised release on Count III (collectively the "second sentence"). The sentences imposed on Counts II and III were to run concurrently with the sentence imposed on Count I. Thus, the total term of imprisonment was twenty years. The district court also ordered Londono to pay a $10,000 fine on Count I and $150 in special assessments on Counts II and III. Londono now appeals his second sentence.

II.

This court may not exercise general appellate review of a pre-Guidelines sentence issued by the district court. See United States v. Frontero, 452 F.2d 406, 409 (5th Cir. 1971); see also United States v. Mathis, 579 F.2d 415, 419-20 (7th Cir. 1978); United States v. Maples, 501 F.2d 985, 986 (4th Cir. 1974). However, we may vacate and correct on appeal a pre-Guidelines sentence imposed in violation of a defendant's constitutional rights. Frontero, 452 F.2d at 409; cf. United States v. Lemons, 941 F.2d 309, 319-20 (5th Cir. 1991) (reviewing the merits of an appellant's claim that his pre-Guidelines sentence was disproportionate to the crime committed and thus violative of the Eighth Amendment). Because Londono contends that his second

sentence was imposed in violation of his constitutional rights, we review the merits of his claims.

III.

Londono first contends that his second sentence is presumptively vindictive and thus violative of his due process rights. He points out that the pre-sentence investigative report (PSI) prepared before his original sentencing contained the implicit representation that he was eligible for parole,[1] even though he was not actually eligible for parole by the terms of the statutes under which he was convicted. He thus argues that because the judge at his original sentencing was under the mistaken impression that he was eligible for parole after ten years, "[a] realistic likelihood exists that [his second] sentence [was] a penalty" in that the judge resentenced him to a twenty-year term of imprisonment without parolesQwhich he now asserts is a harsher sentence than his previous sentence.

On resentencing, a sentencing court may not impose a sentence that is harsher than the original sentence unless the record shows that the harshness was not motivated by vindictiveness. United States v. Vontsteen, 950 F.2d 1086, 1088-89 & n.2 (5th Cir.) (en banc), cert. denied, 112 S. Ct. 3039 (1992); see North Carolina v. Pearce, 395 U.S. 711, 723-25

[1] Londono's PSI contained the following information, which Londono asserts indicated that he was eligible for parole:

> Parole Guideline Data: (Estimate) Offender Characteristics (SFS): 9; Offense Category: VII; Adult Guideline Range: 52-80 months.

(1969). Because Londono did not make a contemporaneous objection to his second sentence on grounds of vindictiveness, the plain error standard of review applies. Vontsteen, 950 F.2d at 1089. A second sentence that is harsher than the first is the sine qua non of a vindictiveness claim. Id. at 1092. Without such a showing, "'there can be no claim at all of vindictiveness upon resentencing.'" Id. (quoting United States v. Schoenhoff, 919 F.2d 936, 939 (5th Cir. 1990)).

Despite Londono's contentions otherwise, his second sentence was considerably more lenient than his original sentence. Londono's term of imprisonment was decreased by twenty years, and Londono admits that he actually was ineligible for parole on either sentence. Moreover, the record gives no indication whatsoever that the judge, at Londono's original sentencing, was under the impression that Londono was eligible for parole or that the judge sentenced Londono as he did because he was under such an impression, as Londono contends. Further, Londono bargained for the government's recommendation that he receive the sentence he actually did receive at resentencing. We thus conclude that Londono's contention that the sentencing judge was presumptively vindictive is meritless.

IV.

Londono also contends that his second sentence violates the Eighth Amendment's proscription against cruel and unusual punishment in that it is grossly disproportionate to the severity

of his crime. He bases this contention on his argument that had he been sentenced pursuant to the Guidelines, he would have been sentenced to between 121 and 151 months imprisonmentsQi.e., not more than approximately 12.5 years.[2] We find Londono's contention to be completely void of merit. The offenses for which Londono was sentenced were committed prior to November 1987; therefore, the Guidelines are totally inapplicable. Lemons, 941 F.2d at 319. Accordingly, "'the matter and extent of sentencing was committed to the district court's discretion.'" Id. (quoting United States v. Stovall, 825 F.2d 817, 826 (5th Cir. 1987)). Absent proof from the defendant that the court was influenced by impermissible motives or incorrect information, a sentence within the range provided by statute will not be reversed. Id. (quotation and citation omitted). Londono admits that his sentence was within statutory bounds, and his assertion that the district court failed to look to the Guidelines for an equitable sentence is not evidence that the court was influenced by impermissible motives or incorrect information. Hence, we cannot say that the district court abused its discretion in resentencing Londono.

V.

For the foregoing reasons, we AFFIRM the judgment of the district court.

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[2] We note that Londono does not indicate how he calculated the 121-151 month range under the Guidelines.