

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-8659  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DONNY JOEL HARVEY,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Western District of Texas  
USDC No. W-93-CA-204 (W-88-CR-85)

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(July 19, 1994)

Before POLITZ, Chief Judge, and JOLLY and DAVIS, Circuit Judges.

PER CURIAM:\*

Appellant Donny Harvey was convicted in 1989 of possession of a firearm by a convicted felon, a violation of 18 U.S.C. §§ 922(g)(1) and 924(a). The district court, departing upward from the Sentencing Guidelines, sentenced Harvey to serve 60 months. On direct appeal, a panel of this Court affirmed. United States v. Harvey, 897 F.2d 1300, 1305-07 (5th Cir.), cert. denied, 498 U.S. 1003 (1990). Harvey has appealed the district court's denial of his motion to vacate sentence, 28 U.S.C. § 2255. We affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Harvey contends that he is entitled to relief on grounds that the district court's upward departure in his case was "overruled" by United States v. Lambert, 984 F.2d 658, 660-63 (5th Cir. 1993) (en banc). Since his brief contains no argument in support of this point, the Court would be justified in not considering it. See Weaver v. Puckett, 896 F.2d 126, 128 (5th Cir.), cert. denied, 498 U.S. 966 (1990). At any rate, it is not grounds for § 2255 relief because no constitutional right is implicated and denial of such relief would not "result in a complete miscarriage of justice." United States v. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992) (citing United States v. Capua, 656 F.2d 1033, 1037 (5th Cir. 1981)).

Harvey contends that he is entitled to relief on grounds that the district court relied on his prior arrest record as a ground for the upward departure. He cites Williams v. United States, \_\_\_ U.S. \_\_\_, 112 S.Ct. 1112, 117 L.Ed.2d 341 (1992), which indicates that this would be improper. See 112 S.Ct. at 1122.

In the order denying § 2255 relief, the district court justified Harvey's sentence, in part, by stating that "[o]ne of [his] convictions was for unlawful possession of a firearm, while his criminal history reflects an additional arrest for unlawfully carrying a weapon and another for carrying a prohibited weapon." However, the sentencing transcript shows that Harvey did not deny that he carried the weapons, resulting in these two arrests; he asserted only that the offenses were minor. These acts were admissible relative to whether his criminal history category was

adequate, as constituting "prior similar adult criminal conduct not resulting in a criminal conviction." U.S.S.G. § 4A1.3(e). Furthermore, Harvey's presentence report indicates that he was sentenced to a 60-day jail term on each of these two charges. Thus, the district court's consideration of the acts did not constitute a "complete miscarriage of justice" entitling Harvey to § 2255 relief. See Capua, id. In the order denying § 2255 relief, the district court adequately stated reasons why, "even under the analysis announced in Lambert, [Harvey's] sentence would still be appropriate."

Harvey contends that he is entitled to relief on grounds that the district court refused to consider mitigating evidence in determining his sentence. This consisted of his defense that he possessed the firearm because he was being harassed and threatened by David Koresh and his followers. The Court will not consider this point because Harvey did not present it in his § 2255 motion. See United States v. Madkins, 14 F.3d 277, 279 (5th Cir. 1994). Furthermore, defense counsel argued this point in mitigation at Harvey's sentencing; and the record does not suggest that the court did not consider it.

AFFIRMED.