

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50067

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES EVERETT PRICE

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(M0-93-CA-270 (M0-91-CR-062))

(February 17, 1995)

Before DAVIS, JONES, and EMILIO M. GARZA, Circuit Judges.

EDITH H. JONES, Circuit Judge:*

A felon, James Price, pleaded guilty to possessing a firearm in violation of 18 U.S.C § 922(g)(1) in 1991, and did not pursue any direct appeal of his sentence. By 1993, however, an objection to his sentence had occurred to him and he filed a §2255 motion to vacate or correct it. He alleged that the sentencing court erroneously concluded that his offense of commission was a "crime of violence" triggering the career offender provisions of

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

the Federal Sentencing Guidelines. The district court rejected Price's argument on the merits and denied relief.

I.

Normally this court would refuse to consider the merits of such a motion. A district court's technical application of the sentencing guidelines simply does not raise a constitutional issue. United States v. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992). Nonconstitutional claims that could have been raised on direct appeal, but were not, may not be asserted in a collateral proceeding. Id. In this case, however, the government failed to brief this issue so this court considers it waived. See Atwood v. Union Carbide Corp., 847 F.2d 278, 280 (5th Cir. 1988), cert. denied, 489 U.S. 1079 (1989).

II.

Yet we affirm the district court's denial of Price's motion. Under the provisions of § 4B1.1 of the Sentencing Guidelines, a defendant is a career offender if: (1) he was at least eighteen years old at the time of offense; (2) the present offense is a felony that is either a crime of violence or a drug crime; and (3) the defendant has at least two prior convictions of either a crime of violence or a drug offense. Price was born in 1950 and has been convicted previously for burglary of a dwelling and for robbery.

Price correctly notes that generally his crime of commission (felon in possession of a firearm) is not a crime of violence. Stinson v. United States, 113 S.Ct 1913 (1993);

Application Note, U.S.S.G. § 4B1.2 . The definition of the term "crime of violence," however, includes all felonies that involve conduct that presents a serious potential risk of physical injury to another. Hence an ordinarily nonviolent crime qualifies as a "crime of violence" where the particular defendant's actions jeopardize the physical safety of others. See United States v. Goodman, 914 F.2d 696 (5th Cir. 1990).

Without a doubt, Price's conduct satisfies this test. He was arrested after becoming embroiled in an argument with the manager of a nightclub. During the argument, the pre-sentence report indicates that he produced a revolver and pointed it at the manager and other customers. A "bouncer" at the club actually knocked the gun out of Price's hand and then knocked the defendant to the ground.

This court has previously held that similar conduct converts a possession of a firearm offense into a crime of violence. Id. (defendant involved in altercation returned with pistol that he pointed at others; dropped pistol and returned with rifle) As this court sensibly reasoned, "[c]onsidering defendant's intent at the time of his apprehension . . . [we are] unwilling to require the defendant's potential victims to wait until the trigger is pulled before we consider his act a crime of violence." Id. Because Price manifested the same intent and same danger as the defendant in Goodman, the sentencing court committed no error.

II.

In appeal to this court, Price "direct[s] th[is] court's attention to the fact that [he pleaded] guilty to a written plea agreement" that included a promise by the government not to seek enhancement. Although an allegation that the government violated the terms of a plea agreement is cognizable in a § 2255 motion,¹ Price failed to present this issue to the district court. This court will not consider new issues on appeal. United States v. Carvajal, 989 F.2d 170, 170 (5th Cir. 1993).

Accordingly, we **AFFIRM** the judgment of the district court.

¹ See United States v. Cates, 952 F.2d 149, 151 (5th Cir.), cert. denied, 112 S.Ct 2319 (1992).