

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60061
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

REYNALDO FUENTES-ORTEGA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CA-B-92-099(CR-B-78-538))

(September 30, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:*

The tortured procedural history of appellant's case is unnecessary to relate. In this § 2255 habeas petition, he seeks relief from an allegedly unauthorized term of special parole imposed with a sentence for drug trafficking and conspiracy, 18 U.S.C. §§ 841(a)(1) and 846, in 1979.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

In the district court, Ortega argued that the five-year special parole term violated Bifulco v. United States, 447 U.S. 381, 100 S.Ct. 2247 (1980). The Government answered and filed a motion for summary judgment. The Government argued that Ortega was no longer in custody and thus not entitled to relief under a writ of coram nobis. The Government also argued that Ortega's motion was procedurally barred because he had failed to appeal the denial of his 1990 Rule 35 motion in which he had raised the same issue as he raised in the current motion. Finally, the Government argued that Ortega's motion was without substantive merit.

The magistrate judge agreed with all of the Government's arguments and recommended that the Government's motion for summary judgment be granted and Ortega's motion dismissed. The district court adopted the magistrate judge's report and recommendation. This appeal followed.

On appeal, the Government concedes that it erroneously urged the district court to construe Ortega's motion as a petition for a writ of coram nobis. The Government argues, however, that the district court's dismissal of Ortega's motion should be affirmed because Ortega's claim was procedurally defaulted and because Ortega's argument is without substantive merit. A good argument can be made in support of the position that Ortega procedurally defaulted his complaint about the validity of his special parole term. We will, however, pretermitt discussion of that issue because Ortega clearly cannot succeed on the merits of his claim.

Ortega argues that the special parole term should be eliminated from his distribution convictions under 21 U.S.C. § 841. He argues that the distribution offenses were merely "overt acts to show that the conspiracy was at work . . . otherwise, [the] sentencing court would have not imposed [sic] identical concurrent sentences[.]" He further argues that he was sentenced only under § 846 and that § 846 "incorporates" § 841.

Ortega's argument is without merit. Convictions for conspiracy to distribute and for the substantive crime of distribution are separate and distinct offenses. See United States v. Casiano, 929 F.2d 1046, 1051 (5th Cir. 1991). Under the rule of Bifulco, supra, even if a district court sentences a defendant to concurrent sentences under §§ 841 and 846, a special parole term may be imposed for the conviction under § 841 although it may not be imposed for the conviction under § 846. See United States v. Buitrago, 919 F.2d 348, 349 (5th Cir. 1990). That is what happened here. The judgment of the district court is **AFFIRMED**.