

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-60580
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

LINDA STELLA GONZALES,

Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Texas

(CR-C-93-69; C-94-135)

(June 12, 1995)

Before REYNALDO G. GARZA, DUHÉ AND EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

BACKGROUND

On April 15, 1993, a grand jury indicted Linda Stella Gonzales (Gonzales) for conspiracy to possess with intent to distribute marijuana and cocaine, in violation of 21 U.S.C. § 846 (Count 1), possession with intent to distribute marijuana, in violation of 21

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

U.S.C. §§ 841(a)(1), (b)(1)(D) (Count 2), and possession with intent to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(D) (Count 3).¹ Pursuant to a plea agreement with the government, Gonzales pled guilty to Count 3 and in return, Counts 1 and 2 were dismissed. After receiving a three point reduction for acceptance of responsibility, Gonzales had a total offense level of 27 and a criminal history category of I, resulting in a Sentencing Guideline's imprisonment range of 70 to 87 months. The government recommended that Gonzales be afforded a one-level departure from the lower end of the guideline range, and further recommended that she be sentenced to 63 months of imprisonment as a result of her substantial assistance to the authorities. On November 4, 1993, the district court sentenced Gonzales to 63 months of imprisonment, to be followed by four years of supervised release, a \$500 fine, and a \$50 mandatory assessment. Gonzales did not file a notice of appeal from that judgment, nor did she request an extension of time in which to file one.²

After her sentencing, Gonzales filed what the parties refer to as a "Motion for Compassionate Release" and thereafter, a Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255. The former motion was premised on "extraordinary and compelling

¹The offenses occurred on or about April 9, 1992.

²Gonzales asserts that the district court suspended the judgment pending a determination of her Motions for Compassionate Release and to Vacate, Set Aside or Correct Sentence. There is nothing in the record to support that contention. However, Gonzales concedes in both her 18 U.S.C. § 2255 motion and her appellate brief that she never appealed her conviction or sentence.

reasons," meaning that Gonzales was a single mother and desired early prison release in order to raise her four young daughters. The latter motion was aimed at the downward departure that Gonzales received in her sentence.

The first motion was dismissed by the district court on the basis that it did not have the authority to grant such motion under Federal Rule of Criminal Procedure 35. The case was then referred to a United States Magistrate, who recommended that Gonzales' motion under § 2255 be dismissed as it was without merit. These findings were adopted by the district court and a judgment, entered on July 14, 1994, denied the motion under § 2255 and again denied the Motion for Compassionate Release. On August 17, 1994, Gonzales filed a "Response to Order Denying Motions" which the district court accepted as a notice of appeal. The notice stated that Gonzales requested an "appeal to [her] motions pursuant to Federal Rule of Criminal Procedure 35 and 28 U.S.C. § 2255 which were denied."

ANALYSIS

On appeal, Gonzales argues that the district court has the authority to grant her early release for extraordinary and compelling reasons, i.e., familial ties and responsibilities,³ and

³Gonzales proceeds with this argument despite the fact that she did not raise it during sentencing and that this contention is treated with disfavor by the Sentencing Guidelines: "Family ties and responsibilities are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range." U.S.S.G. § 5H1.6. Nonetheless, in her Motion for Compassionate Release she alleges that the district court has the authority to modify her sentence after it has been imposed based on this section of the Sentencing Guidelines.

that it erred in not doing so. Further, she alleges that the government did not live up to its end of the bargain by not asking for an adequate departure for her substantial assistance as defined in U.S.S.G. § 5K1.1.⁴

A.

First, given that this is not a direct appeal, the district court has no jurisdiction to modify the sentence under 18 U.S.C. § 3742. United States v. Early, 27 F.3d 140, 142 (5th Cir. 1994) ("The provisions for modification of a sentence under § 3742 are available to a defendant only upon direct appeal of a sentence or conviction."), cert. denied, ---U.S.---, 115 S.Ct. 600 (1994) (citations omitted). Second, Gonzales' Motion for Compassionate Release is not one under 18 U.S.C. § 3582(c), which states that a district court may not modify a term of imprisonment once it has been imposed except under certain conditions. Gonzales satisfies none of these conditions because no motion has been filed by the Director of the Bureau of Prisons to reduce the term of imprisonment, see 18 U.S.C. § 3582(c)(1)(A), nor has Gonzales been sentenced on the basis of a sentencing range that has subsequently been lowered by the Sentencing Commission. Id. § 3582(c)(2).

Nonetheless, Gonzales argues that Rule 35 can provide the

⁴The government argues that her § 2255 motion has not been raised in this appeal and is thus waived. Although the government is probably correct in its assertion, because Gonzales' brief is confusing and arguably raises the point, we will give her the benefit of the doubt and assume that this point was raised as well.

basis for granting her Motion for Compassionate Release.⁵ However, her motion cannot be considered a Rule 35 motion to correct or reduce sentence, as the motion and situation do not fit the provisions of that Rule. See FED. R. CRIM. P. 35. As the Early Court stated,

Rule 35(a), as applicable to offenses such as this one committed after November 1, 1987,⁶ does not provide a district court with authority to modify or reduce a sentence. Rule 35(b) was amended in 1987, along with the enactment of the Guidelines, to provide that only the Government can file a motion for reduction of a defendant's sentence. By the plain language of the amended Rule 35(b), resentencing is permitted only on the Government's motion, and only if the defendant rendered substantial assistance after sentencing. Rule 35(c) is inapplicable in that it pertains to the correction of a sentence by the sentencing court within 7 days of the imposition of the sentence for 'arithmetical, technical or other clear error.'

Early, 27 F.3d at 141 (internal citations omitted) (emphasis added). No relief is warranted under: Rule 35(a), as the original sentence was not appealed and this Court has not remanded the case for resentencing; Rule 35(b), as the government has not moved to resentence Gonzales; or Rule 35(c), as no correction of sentence was requested. FED. R. CRIM. P. 35.

In addition, Gonzales' argument that § 5K1.1 of the Sentencing

⁵"[T]he court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure . . ." 18 U.S.C. § 3582(c)(1)(B). Although Gonzales claims that a Sentencing Guidelines amendment allows the district court to modify the sentence after her sentencing, she does not provide the Court with this alleged authority. However, she does suggest that Rule 35 may provide a basis for such modification.

⁶The Court would remind Gonzales that the instant offenses occurred in 1992. Thus, contrary to her assertions, the current version of Rule 35 is applicable to this case.

Guidelines allows a district court to modify a sentence on its own volition after it was imposed is unfounded. "Section 5K1.1 is a sentencing tool; at the time of the original sentencing, the court may sentence the defendant below the guideline range on a motion from the government stating that the defendant has provided substantial assistance in investigating and prosecuting other persons." United States v. Howard, 902 F.2d 894, 896 (11th Cir. 1990) (emphasis added). Again, the only way in which the district court could change Gonzales' sentence under these particular circumstances is by motion of the government, and that has not occurred. FED. R. CRIM. P. 35(b).

The district court correctly determined that it lacked the authority or jurisdiction to entertain, much less grant, the relief requested by Gonzales. Thus, Gonzales has appealed from the denial of a meaningless and unauthorized motion.⁷ Any other argument made by Gonzales on this point is without merit.

B.

In her § 2255 motion, Gonzales argues that the government breached the plea agreement because it did not pursue a § 5K1.1 downward departure on her behalf. The government is not required to move for a downward departure under § 5K1.1 if the defendant provides substantial assistance; instead, it grants the government discretionary power to make such a motion. United States v.

⁷However, even if we could somehow determine that this motion was properly submitted as a Rule 35 motion, which we clearly do not, we would not address it because the appeal on that motion was not timely filed. The notice of appeal for the Rule 35 motion was filed approximately one month after it was denied.

Garcia-Bonilla, 11 F.3d 45, 46 (5th Cir. 1993) (citing Wade v. United States, ---U.S.---, 112 S.Ct. 1840, 1844 (1992)). The government did in fact move for and receive a reduction in Gonzales' sentence for substantial assistance. The fact that Gonzales was not pleased with the extent of the departure does not provide her with an avenue for relief under § 2255. The government complied with the terms of the plea agreement as explained to Gonzales.

AFFIRMED.