

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 97-40092  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDUARDO FLORES,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. M-96-CR-81-1  
- - - - -

December 3, 1997

Before WIENER, BARKSDALE and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:\*

Eduardo Flores appeals his conviction and sentence for conspiracy and possession with intent to distribute marijuana. 21 U.S.C. §§ 841(a)(1) and 846. Flores' claim of insufficient evidence to show possession with intent to distribute is a challenge to the credibility of eyewitness testimony. This court may not substitute its credibility assessments for those of the jury. United States v. Lopez, 74 F.3d 575, 578 (5th Cir.), cert. denied, 116 S. Ct. 1867 (1996). This claim is without merit.

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\* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

The evidence did not establish that Flores was less culpable than others involved in the offense. The district court did not clearly err in refusing to award a reduction in his offense level pursuant to U.S.S.G. § 3B1.2. See United States v. Tremelling, 43 F.3d 148, 152 (5th Cir.), cert. denied, 514 U.S. 1122 (1995).

Flores' argument that he should have received a downward departure on the basis of his poor health and diminished mental capacity is not reviewable on appeal. See United States v. Leonard, 61 F.3d 1181, 1185 (5th Cir. 1995). Because the district court did not misapply the sentencing guidelines, this court lacks jurisdiction to review the court's refusal to grant a downward departure. Id.; United States v. DiMarco, 46 F.3d 476, 477 (5th Cir. 1995).

AFFIRMED.