

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-20923
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EVERETT RENGER, JR.,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Southern District of Texas
(H-98-CR-335-1)
- - - - -

July 18, 2000

Before POLITZ, WIENER, and PARKER, Circuit Judges.

PER CURIAM:*

Defendant-Appellant Everett Renger, Jr., appeals from his jury conviction and sentence for willful failure to pay federal income tax in violation of 26 U.S.C. § 7203. Renger argues that the trial court abused its discretion in refusing to instruct the jury that, to find that he willfully failed to pay income taxes, it must find that he acted with evil motive or bad purpose. Renger insists that the trial court erred in refusing to instruct the jury as to his so-called theory of defense, and plainly erred in refusing to

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

depart downward on the erroneous belief that it lacked discretion to depart.

The trial court did not abuse its discretion in refusing to adopt Renger's instruction as to willfulness. See Cheek v. United States, 498 U.S. 192, 201 (1991); United States v. Masat, 948 F.2d 923, 932 (5th Cir. 1991); United States v. Tucker, 686 F.2d 230 (5th Cir. 1982). Neither did the trial court err in refusing to instruct the jury as to Renger's theory of defense. United States v. Robinson, 700 F.2d 205, 211 (5th Cir. 1983). Because the district court affirmatively established that its refusal to depart was primarily based upon its determination that the facts of the case did not warrant a downward departure, we lack jurisdiction to review the district court's refusal. United States v. Brace, 145 F.3d 247, 263 (5th Cir. 1998) (en banc), cert. denied, 119 S. Ct. 426 (1998). Accordingly, the judgment of the district court is AFFIRMED.