

April 15, 2003

Charles R. Fulbruge III
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-20362
SUMMARY CALENDAR

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

ROBERT GARZA, JR

Defendant - Appellant

On Appeal from the United States District Court for the
Southern District of Texas, Houston Division
(6:01-CR-33-2)

Before REYNALDO G. GARZA, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:¹

Robert Garza, Jr. appeals his sentence following his guilty-plea conviction for possession with intent to distribute cocaine. He argues that the district court clearly erred when it refused to credit him with acceptance of responsibility. He states that the court's determination that he did not accept responsibility because he denied knowing that the cocaine he delivered was going to be converted into crack cocaine conflicts with the court's decision to not sentence him based upon

¹Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

crack cocaine.

The record indicates that Garza waived his right to appeal his sentence except to challenge an upward departure from the Sentencing Guidelines, a sentence above the statutory maximum, or the type of drug upon which his sentence was calculated. *See United States v. Baymon*, 312 F.3d 725, 729 (5th Cir. 2002). Even if Garza did not waive his appellate acceptance-of-responsibility argument, there was a sufficient foundation in the record supporting the district court's finding that Garza frivolously denied knowing that the cocaine he delivered would be converted into crack cocaine. *See United States v. Brace*, 145 F.3d 247, 264 (5th Cir. 1998); *United States v. Patino-Cardenas*, 85 F.3d 1133, 1135 (5th Cir. 1995); *see also* USSG § 3E1.1, comment. (n.1(a)).

AFFIRMED.