

IN THE UNITED STATES OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4421
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DAVID WAYNE JOHNSON,

Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Texas
(1:93 CV 81 (1:91 CR 77 1))

(August 17, 1993)

Before JOLLY, SMITH, and WIENER, Circuit Judges.

PER CURIAM:*

David Wayne Johnson challenges the district court's refusal to decrease his base level offense by two levels based upon his acceptance of responsibility. Johnson raised this claim for the first time not on direct appeal but in a motion pursuant to 28 U.S.C. § 2255. The district court dismissed Johnson's motion, and he appeals.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

The government first raises this procedural issue: a non-constitutional claim not raised on direct appeal may not be asserted in a collateral proceeding. The government's first argument, therefore, is that Johnson's claim is not properly before this court.

The government is correct. Section 2255 motions may normally be used to challenge a final conviction only on issues of constitutional or jurisdictional magnitude. United States v. Shaid, 937 F.2d 228, 232 (5th Cir. 1990) (en banc), cert. denied, 112 S.Ct. 978 (1992). An issue may not be raised for the first time in a collateral proceeding without a showing of both cause for the procedural default and actual prejudice resulting from the error. Id. An error not of constitutional or jurisdictional magnitude may be considered in a § 2255 only if the error could not have been raised on direct appeal and would result in a complete miscarriage of justice. Id. at 232 n.7 (citing United States v. Capua, 656 F.2d 1033, 1037 (5th Cir. 1981)).

Johnson's challenge to his sentence is based solely on the district court's failure to award a reduction for acceptance of responsibility. The district court's application of the sentencing guidelines does not comprise a constitutional issue. See United States v. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992). We may therefore consider the merits of Johnson's claim only if the alleged error could not have been raised on direct appeal and would result in a complete miscarriage of justice.

Johnson's challenge to his sentence is based on the November 1992 amendments to the Sentencing Guidelines, or more specifically, § 3E1.1 as amended. Johnson was sentenced on August 30, 1991; therefore, this issue could not have been raised on direct appeal. We still may not consider Johnson's claim, however, unless the alleged error would result in a complete miscarriage of justice.

The Sentencing Guidelines include a listing in § 1B1.10 of the amended sections that courts may apply retroactively. There is no separate provision regarding retroactive reduction of a prisoner's term based on § 3E1.1, and § 3E1.1 is not listed under § 1B1.10. Therefore, there has been no miscarriage of justice because Johnson could not have been sentenced under the amended § 3E1.1.

In sum, Johnson has not presented an issue of constitutional or jurisdictional magnitude in his § 2255 claim. Furthermore, any error alleged by Johnson in regard to a reduction in his sentence would not result in a complete miscarriage of justice. For these reasons, the decision of the district court denying Johnson's § 2255 motion is

A F F I R M E D.