

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-30321
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LEO YOUNG,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. CA 94 241 M (CR 92 528 M)

- - - - -
(November 17, 1994)

Before JONES, DUHÉ, and PARKER Circuit Judges.

PER CURIAM:*

On December 10, 1992, without benefit of a plea agreement with the Government, Leo Young pleaded guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). On June 3, 1993, the district court sentenced Young to 37 months imprisonment. Young did not appeal the sentence.

On January 21, 1994, Young filed a § 2255 motion, alleging that he qualified for a reduction in his offense level pursuant to U.S.S.G. § 2K2.1(b)(1) for firearms possessed solely for sporting purposes. The district court concluded that Young had

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

improperly styled his motion as a claim for § 2255 relief because the claim concerned technical application of the guidelines and not a constitutional issue. The court treated Young's motion as a motion to correct or reduce the sentence pursuant to Fed. R. Crim. P. 35. The court denied the motion, and Young timely noticed his appeal.

Relief under § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and, if condoned, would result in a complete miscarriage of justice. United States v. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992). A district court's technical application of the guidelines is not of constitutional dimension and thus is not cognizable in a § 2255 motion. Id. The issues Young raises in the § 2255 motion are not cognizable.

The district court incorrectly stated that Young's motion was cognizable under Rule 35, as his motion and situation do not fit any provision of that Rule. Rule 35(a) does not provide a district court with authority to modify or reduce a sentence. United States v. Early, 27 F.3d 140, 141 (5th Cir. 1994). Rule 35(b), as amended in 1987, provides that only the Government can file a motion for reduction of a defendant's sentence. See Rule 35(b). By the plain language of Rule 35(b), resentencing is permitted only on the Government's motion, and only if the defendant rendered substantial assistance after sentencing. Early, 27 F.3d at 141. Rule 35(c) is inapplicable in that it pertains to the correction of a sentence by the sentencing court within seven days of the imposition of the sentence for

"arithmetical, technical or other clear error." Young's motion is not cognizable under either § 2255 or Rule 35.

The Government argues that this Court lacks jurisdiction because Young has appealed from "an unauthorized motion which the district court was without jurisdiction to entertain." This contention ignores the fact that Young has appealed from the denial of his § 2255 motion. Significantly, the Government did not advise the district court of its contention that this guidelines application complaint is not cognizable under § 2255.

The appeal is without arguable merit and is thus frivolous. See Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983). Because the appeal is frivolous, it is DISMISSED. See 5th Cir. R. 42.2.