

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 15-20716
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

January 12, 2017

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MILTON EARL CARBE,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:01-CR-337-1

Before JONES, WIENER, and CLEMENT, Circuit Judges.

PER CURIAM:*

Milton Earl Carbe, federal prisoner # 66325-079, appeals the district court's order granting his motion to reduce his sentence pursuant to 18 U.S.C. § 3582(c)(2) and its order denying his motion for reconsideration. Carbe was found guilty of conspiracy to possess with intent to distribute cocaine (Count One) and possession with intent to distribute cocaine (Count Two), and he was originally sentenced to life in prison as to Count One and to a concurrent 480-

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

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month term of imprisonment as to Count Two. In its August 14, 2015 order, the district court reduced Carbe's sentence to 405 months of imprisonment on both counts.

The Government has filed a motion to dismiss the appeal as frivolous or, alternatively, a motion for summary affirmance. In the event that the motions are denied, the Government requests a 30-day extension to file a merits brief. Summary affirmance is proper where, among other instances, "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case." *Groendyke Transport, Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).

As an initial matter, Carbe's assertion that he was not given timely notice of the district court's grant of his motion to reduce his sentence was not raised in his motion for reconsideration and, thus, is raised for the first time on appeal and will not be considered. *See Stewart Glass & Mirror, Inc. v. U.S. Auto Glass Disc. Ctrs., Inc.*, 200 F.3d 307, 316-17 (5th Cir. 2000). Nonetheless, the assertion is belied by the record as the docket sheet reflects that the parties were notified of the district court's order.

We agree with the Government that Carbe's notice of appeal, dated December 2, 2015, was not timely as to the August order granting his motion to reduce his sentence. Although Federal Rule of Appellate Procedure 4(b) is not jurisdictional, a defendant may not have his untimeliness disregarded when the Government timely objects, as is the case here. *See Eberhart v. United States*, 546 U.S. 12, 18 (2005); *United States v. Hernandez-Gomez*, 795 F.3d 510, 511 (5th Cir. 2015). Nor can we ignore that the Government has timely objected to the untimeliness of Carbe's motion for reconsideration filed in the district court. As such, the Government's motion for summary

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affirmance is GRANTED. The Government's alternative motions for dismissal as frivolous and for an extension of time to file a brief are DENIED.