

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-4993

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JERRY LILLY,

Defendant - Appellant.

Appeal from the United States District Court for the Southern District of West Virginia, at Beckley. Thomas E. Johnston, District Judge. (5:07-cr-00137-2)

Submitted: November 19, 2009

Decided: December 1, 2009

Before MOTZ, GREGORY, and SHEDD, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Mark L. French, CRISWELL & FRENCH, PLLC, Charleston, West Virginia, for Appellant. Miller A. Bushong, III, OFFICE OF THE UNITED STATES ATTORNEY, Beckley, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Jerry Lilly pled guilty, pursuant to a plea agreement, to conspiracy to distribute oxycodone, in violation of 21 U.S.C. § 846 (2006), and was sentenced to eighty-four months' imprisonment in a medical facility. Lilly's counsel has filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967), stating that in his view, there are no meritorious issues for appeal, but questioning whether the district court erred in denying Lilly's motion for a downward departure pursuant to U.S. Sentencing Guidelines Manual § 5H1.4 (2007). Lilly was informed of his right to file a pro se supplemental brief, but he has not done so. The Government declined to file a reply brief. Finding no error, we affirm.

Lilly's counsel questions the district court's refusal to grant a downward departure based on Lilly's advanced heart condition. See USSG § 5H1.4 (authorizing departure based on "extraordinary physical impairment"). A district court's refusal to depart from the applicable guidelines range does not provide a basis for appeal under 18 U.S.C. § 3742 (2006), "unless the court failed to understand its authority to do so." United States v. Brewer, 520 F.3d 367, 371 (4th Cir. 2008). The record confirms the district court thoroughly considered Lilly's written and oral arguments in support of a departure. In fact, in this regard, the district court heard extensive testimony

from Lilly's cardiologist. It is thus apparent that the court understood its authority to depart but determined that a downward departure was not warranted. Accordingly, this claim is not cognizable on appeal.

In accordance with Anders, we have reviewed the entire record in this case and have found no meritorious issues for appeal. We therefore affirm Lilly's conviction and sentence. This court requires that counsel inform Lilly, in writing, of his right to petition the Supreme Court of the United States for further review. If Lilly requests that a petition be filed, but counsel believes that such a petition would be frivolous, then counsel may move in this court for leave to withdraw from representation. Counsel's motion must state that a copy thereof was served on Lilly. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED