IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

F I L E D

November 2, 2009

No. 09-10151
Summary Calendar

Charles R. Fulbruge III
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

RELVY ESQUIVEL,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:08-CR-174-ALL

Before JOLLY, WIENER, and ELROD, Circuit Judges.

PER CURIAM:[*]

Defendant-Appellant Relvy Esquivel appeals the 240-month sentence imposed following his conviction by guilty plea to possessing with intent to distribute cocaine. Esquivel contends that the district court erred in refusing to award him the additional level decrease for acceptance of responsibility under U.S.S.G. § 3E1.1(b) Esquivel asserts that his case should be remanded for resentencing because the government declined to file a motion for an additional

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

level decrease under § 3E1.1(b), which he contends amounts to an "incorrect application of the Guidelines."

We review the government's refusal to move for the additional level decrease to determine whether that refusal was based on an unconstitutional motive or was not rationally related to a legitimate end. *See United States v. Newson*, 515 F.3d 374, 378-79 (5th Cir.), *cert. denied*, 128 S. Ct. 2522 (2008). Esquivel does not contend that the government's refusal to file the motion was based on an unconstitutional motive, and a defendant's refusal to waive his right to appeal is a basis rationally related to the purposes of § 3E1.1(b). *See id.* Esquivel's arguments are foreclosed by *Newson*. *See id.* at 378.

The government has filed a motion for summary affirmance. In light of the foregoing, the government's motion is GRANTED, and the judgment of the district court is AFFIRMED.