

FILED
United States Court of Appeals
Tenth Circuit

AUG - 3 1990

ROBERT L. HOECKER
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JAMES OLIVER CAMERON,
Defendant-Appellant.

No. 89-7043
(D.C. No. 82-23-CR)
(E.D. Okla.)

ORDER AND JUDGMENT^{*}

Before LOGAN, SEYMOUR, and TACHA, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

James Oliver Cameron appeals the district court's denial of his Fed. R. Crim. P. 35 motion for correction of an illegal sentence due to a defective indictment. The district court summarily denied the motion on April 11, 1989. Cameron filed an appeal on April 24, 1989. The district court then granted permission to appeal in forma pauperis on April 24, 1989.

^{*} This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

The government contends that we lack jurisdiction because Cameron's notice of appeal was untimely. We disagree. We construe the district court's order granting permission to appeal in forma pauperis as granting an extension of time in which to appeal pursuant to Fed R. App. P. 4(a)(4). The appeal is timely.

Reaching the merits, we hold that Cameron is not entitled to relief from a defective indictment under Fed. R. Crim. P. 35. In United States v. Willis, 804 F.2d 961 (6th Cir. 1986), the Sixth Circuit held that "[a] Rule 35 motion presupposes a valid conviction and is an inappropriate vehicle for collaterally attacking the underlying proceeding." Id. at 964 (citing Gilinsky v. United States, 335 F.2d 914, 916 (9th Cir. 1964); Hill v. United States, 368 U.S. 424, 430 (1962) ("the narrow function of Rule 35 is to permit correction at any time of an illegal sentence, not to re-examine errors occurring at trial or other proceedings prior to the imposition of sentence." (emphasis in original))); see also United States v. Hamilton, 553 F.2d 63, 65 (10th Cir.) ("A motion to correct a sentence does not attack the validity of the underlying conviction."), cert. denied, 434 U.S. 843 (1977). We agree with this reading of Rule 35.

Accordingly, the judgment of the district court is AFFIRMED. The mandate shall issue forthwith.

ENTERED FOR THE COURT

Deanell Reece Tacha
Circuit Judge