

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 04-4077

United States of America,

Appellee,

v.

Robert Martin,

Appellant.

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* Appeal from the United States
* District Court for the
* Western District of Missouri.
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* [UNPUBLISHED]
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Submitted: December 7, 2005

Filed: December 20, 2005

Before MELLOY, HANSEN, and GRUENDER, Circuit Judges.

PER CURIAM.

Robert Martin appeals the 120-month sentence the district court¹ imposed after granting the government's Federal Rule of Criminal Procedure 35(b) motion to reduce Martin's sentence for his post-sentencing substantial assistance. His counsel has moved to withdraw and has filed a brief under Anders v. California, 386 U.S. 738 (1967), arguing that (1) the government breached its promise to advocate for a substantial reduction, and (2) the district court erred by focusing on Martin's criminal history, as opposed to his assistance, in determining the amount of the departure. In

¹The Honorable Nanette K. Laughrey, United States District Judge for the Western District of Missouri.

his pro se supplemental brief, Martin raises issues concerning his original sentencing, and argues further that the government breached its promise to give him 5 years off his sentence for testifying, that he received a lesser reduction than a defendant who had provided the same assistance, and that his sentence is unreasonable under United States v. Booker, 125 S. Ct. 738 (2005). Martin also requests appointment of counsel.

Initially, we note that Martin may not in this appeal raise issues he could have raised in a direct criminal appeal following his conviction and original sentencing. See Goff v. United States, 965 F.2d 604, 605 (8th Cir. 1992) (per curiam). Further, Martin's argument concerning the extent of the departure is unreviewable. See United States v. Noe, 411 F.3d 878, 885 (8th Cir.), cert. denied, 126 S. Ct. 184 (2005); cf. United States v. Williams, 324 F.3d 1049, 1050 (8th Cir. 2003) (per curiam) (refusal to depart is not reviewable unless defendant makes substantial showing that court's decision was based on unconstitutional motive).

As to Martin's arguments concerning the government's advocacy at the Rule 35(b) hearing, nothing in the record suggests the government promised to advocate for any particular sentence at the Rule 35 hearing, or that the government promised Martin he would receive a 5-year sentence reduction for his assistance. We also find that the sentence is not unreasonable. See United States v. Booker, 125 S. Ct. 738, 765-66 (2005).

Finally, having reviewed the record under Penson v. Ohio, 488 U.S. 75, 80 (1988), we find no nonfrivolous issues. Accordingly, we grant defense counsel's motion to withdraw, deny Martin's request for appointment of counsel, and affirm.