

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-50105
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JACKSON AYOBAM OLANIYI-OKE,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. A-98-CR-81-1-SS

December 13, 2000

Before DAVIS, STEWART, and PARKER, Circuit Judges.

PER CURIAM:*

Jackson Ayobam Olaniyi-Oke appeals the sentence he received after his case was remanded for resentencing in United States v. Olaniyi-Oke, 199 F.3d 767 (5th Cir. 1999). He contends that the district court erred by declining to hold a hearing regarding the applicability of a downward departure based upon mitigating circumstances prior to his resentencing. As the issue of a downward departure is beyond the scope of remand, the district court did not err in refusing to hold a sentencing hearing. See United States v. Marmolejo, 139 F.3d 528, 530-31 (5th Cir. 1998).

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Olaniyi-Oke also asserts that his counsel at sentencing was ineffective for failing to move for the aforementioned downward departure at the first sentencing hearing. However, in the present state of the record, we could only speculate as to the reasons for any of counsel's actions and omissions. See United States v. Thomas, 12 F.3d 1350, 1368 (5th Cir. 1994). He may raise this issue in an appropriate proceeding under 28 U.S.C. § 2255. Id.

Accordingly, the judgment is AFFIRMED.