

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 01-20395  
Conference Calendar

---

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BOBBY JOE BURTON, JR.,

Defendant-Appellant.

- - - - -  
Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. H-97-CR-36-3  
- - - - -

December 11, 2001

Before HIGGINBOTHAM, BARKSDALE, and STEWART, Circuit Judges.

PER CURIAM:\*

Bobby Joe Burton, Jr., appeals his sentence on remand from a jury trial and conviction for various drug trafficking offenses. Burton argues that (1) the indictment failed to allege a drug quantity in violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000); (2) 21 U.S.C. § 841(b) is unconstitutional; (3) the sentence enhancement based on a prior felony drug conviction violated *Apprendi* because the prior felony was not alleged in the indictment; and (4) the sentence under the guidelines violated *Apprendi* because the indictment did not allege a leadership role.

---

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Although Burton's indictment did not allege a drug quantity or leadership role, he was not sentenced in excess of the 30-year statutory maximum under 21 U.S.C. § 841(b)(1)(C). Consequently, there was no *Apprendi* violation. *United States v. Doggett*, 230 F.3d 160, 166 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1152 (2001); *United States v. Keith*, 230 F.3d 784, 787 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1163 (2001). *Apprendi* does not invalidate a court's factual findings for purposes of determining the applicable Sentencing Guidelines. *Id.* Likewise, the indictment need not allege a prior felony conviction under *Apprendi*. See *Almendarez-Torres v. United States*, 523 U.S. 224, 235 (1998); see also *United States v. Dabeit*, 231 F.3d 979, 984 (5th Cir. 2000)(noting that the Supreme Court in *Apprendi* expressly declined to overrule *Almendarez-Torres*), *cert. denied*, 121 S. Ct. 1214 (2001). The constitutionality of 21 U.S.C. § 841(b) has been upheld by this court. See *United States v. Slaughter*, 238 F.3d 580 (5th Cir.), *cert. denied*, 121 S. Ct. 2015 (2001). Accordingly, Burton's sentence is AFFIRMED.