

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

January 8, 2010

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JORGE MONTANO, a/k/a Jorge
Cardenas,

Defendant-Appellant.

No. 09-7048
(D.C. No. 6:08-CR-00041-RAW-4)
(E.D. Okla.)

ORDER AND JUDGMENT*

Before **MURPHY, McKAY, and BALDOCK**, Circuit Judges.

A jury convicted Jorge Montano of one count of conspiracy to possess with intent to distribute and distribution of controlled substances (“Count One”) and one count of possession of marijuana with intent to distribute (“Count Two”).

The jury concluded that less than one hundred grams of marijuana was attributable to Montano. The district court sentenced Montano to seventy months’

* 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)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

imprisonment on Count One and sixty months on Count Two. Montano announced at the sentencing hearing that he intended to appeal because he thought the sentence on Count One was excessive. After sentencing, and at the request of the government but outside the presence of defense counsel, the court reduced the sentence on Count One to sixty months. By the time Montano received notice of the sentence modification, however, he had already filed his notice of appeal. Montano's attorney has filed a brief under the authority of *Anders v. California*, 386 U.S. 738 (1967). Neither Montano nor the government has filed briefs in this matter.

Pursuant to *Anders*, Montano's counsel has informed this court that this appeal is wholly frivolous and has requested to withdraw. *See id.* at 744. As for our obligation under *Anders*, *see id.*, we have fully examined the record and agree with counsel that this appeal is frivolous. The sentencing issue that triggered the appeal in the first instance has been mooted; the evidence was sufficient to sustain Montano's conviction; and the evidence of another conspiracy presented at trial could not have confused the jury.

After reviewing the record on appeal, we see no meritorious issues for appeal. We therefore DISMISS this appeal and GRANT counsel's motion to withdraw.

Entered for the Court

Michael R. Murphy
Circuit Judge