

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-6175

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

GARRETT DON SMITH,

Defendant - Appellant.

Appeal from the United States District Court for the District of South Carolina, at Greenville. G. Ross Anderson, Jr., District Judge. (6:04-cr-00466-GRA; 6:05-cv-02932-GRA)

Submitted: March 13, 2006

Decided: October 12, 2006

Before MICHAEL, GREGORY, and DUNCAN, Circuit Judges.

Affirmed in part; dismissed in part by unpublished per curiam opinion.

Garrett Don Smith, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Garrett Don Smith, a federal prisoner, seeks to appeal the district court's order denying his motion for summary judgment and granting the Government an extension of time in which to respond to his motion filed under 28 U.S.C. § 2255 (2000). We have reviewed the record and conclude that Smith has not made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2000). Accordingly, we deny a certificate of appealability and dismiss this portion of the appeal.

Smith also appeals from the district court's order denying relief on his claims that the court erred in relying on prior convictions to enhance his sentence without first providing the notice required by 21 U.S.C. § 851 (2000), and that, in light of United States v. Booker, 543 U.S. 220 (2005), his sentence violated the Sixth Amendment. In this order, the district court also granted relief under United States v. Peak, 992 F.2d 39 (4th Cir. 1993), on Smith's claim that counsel failed to file a notice of appeal from the criminal judgment after being directed to do so, vacated the criminal judgment, and reinstated the judgment to afford Smith an opportunity to file a direct appeal.* We note that Smith's direct appeal currently is pending before this court. Because the sentencing claims on which the district court denied

*Smith does not challenge on appeal the district court's grant of relief under Peak.

§ 2255 relief on the merits may be raised in the reinstated direct appeal, we grant a certificate of appealability, modify the district court's dismissal of Smith's sentencing claims to be without prejudice, and affirm the dismissal as modified.

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED IN PART;
DISMISSED IN PART