

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 03-1217

United States of America,

Appellee,

v.

Curtis Anthony Holmes,

Appellant.

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Appeal from the United States
District Court for the District
of Nebraska.

[UNPUBLISHED]

Submitted: July 15, 2003

Filed: July 21, 2003

Before WOLLMAN, FAGG, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

PER CURIAM.

Curtis Anthony Holmes appeals the sentence the district court¹ imposed after he pleaded guilty to conspiring to possess with intent to distribute crack cocaine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1) and 846. At sentencing, the district court denied Mr. Holmes's motion for a downward departure based on claimed overstatement of his criminal history category. The court thereafter sentenced Mr. Holmes to 292 months imprisonment and 5 years supervised release. For

¹The Honorable Laurie Smith Camp, United States District Judge for the District of Nebraska.

reversal, Mr. Holmes argues that the district court should have departed downward to impose a lesser sentence.

Given the district court's explicit recognition of its authority to depart, its decision not to depart is unreviewable. See United States v. Orozco-Rodriguez, 220 F.3d 940, 942 (8th Cir. 2000). To the extent that Mr. Holmes's reference in his appeal brief to the Tenth Amendment was intended to challenge his sentence on Tenth Amendment grounds, we will not consider this constitutional argument, which is raised for the first time on appeal. See United States v. Dixon, 51 F.3d 1376, 1382-83 (8th Cir. 1995).

Accordingly, we affirm.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.