

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL ACTION
: :
v. : :
: :
JACKIE ROBINSON : No. 93-138-06

MEMORANDUM AND ORDER

J. M. KELLY, J. **SEPTEMBER , 2002**

Presently before the Court is a Motion to Modify Term of Imprisonment filed by pro se Petitioner, Jackie Robinson ("Robinson"). Robinson seeks a reduction of his sentence pursuant to 18 U.S.C. § 3582(c)(2) (1994) based on Amendments 599, 535, and 613 of the Sentencing Guidelines.

BACKGROUND

On September 8, 1993, Robinson, a supervisor in the Mark Anthony Brown drug distribution organization (MABO), pled guilty to conspiracy to distribute cocaine base, cocaine, and marijuana, in violation of 21 U.S.C. § 846, a RICO violation, in violation of 18 U.S.C. § 1962(c), and carrying and using a firearm in connection with drug trafficking, in violation of 18 U.S.C. § 924(c). At the November 2, 1994 sentencing, this Court determined that Robinson's offense level was 38, with a two point enhancement for possessing a firearm. With a criminal history category of I and a base offense level of 40, Robinson received a 292 month prison sentence on the conspiracy and RICO counts, and

a consecutive 60 month sentence on the firearms count.

Robinson timely filed an appeal of his conviction and sentence. On May 31, 1995, the Third Circuit Court of Appeals affirmed Robinson's conviction and sentence. No. 94-2099. On March 7, 1997, Robinson filed a pro se Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255, which this Court dismissed on April 22, 1997. This Court also denied Robinson's certificate of appealability on July 23, 1997. The Third Circuit also denied Robinson's requests for certificates of appealability on September 17, 1997, NO. 97-1336, August 7, 1998 No. 98-1180 and March 13, 2001 at No. 00-2052. On May 16, 2002, Robinson filed the instant Motion to Modify Term of Imprisonment.

DISCUSSION

18 U.S.C. § 3582(c) provides:

Modification of an imposed term of imprisonment.--The court may not modify a term of imprisonment once it has been imposed except that- (2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 18 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

Sentencing Guidelines Section 1B1.10 sets forth the policy statement regarding when a term of imprisonment reduction is

warranted when it is based on an amendment to the guideline range. Section 1B1.10 provides:

§1B1.10. REDUCTION IN TERM OF IMPRISONMENT AS A RESULT OF AMENDED GUIDELINE RANGE (POLICY STATEMENT)

(a) Where a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, a reduction in the defendant's term of imprisonment is authorized under 18 U.S.C. § 3582(c)(2).

(b) In determining whether, and to what extent, a reduction in the term of imprisonment is warranted for a defendant eligible for consideration under 18 U.S.C. § 3582(c)(2), the court should consider the term of imprisonment that it would have imposed had the amendment(s) to the guidelines listed in subsection (c) been in effect at the time the defendant was sentenced, except that in no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.

I. Amendment 599

Amendment 599 Amends Application Note 2 to U.S.S.G. § 2K2.4.

The new Application Note 2, which applies retroactively, see U.S.S.G. § 1B1.10(c), reads:

If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristics for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense.

Application of Amendment 599 would reduce Petitioner's offense level from 40 to 38. As a consequence, his imprisonment range

would be reduced from 292-365 months to 235-293 months.

Petitioner's term of imprisonment, 292 months, is within either range. Furthermore, Petitioner is not entitled to a reduction as a matter of right. The factors to consider are listed in 18 U.S.C. § 3552(a):

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed--
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range [under the guideline];
- (5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2)...;
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

Additionally, the Court must consider the nature and circumstances of the offense and the defendant's roles in the crime. See United States v. Brown, 104 F.3d 1254, 1255 (11th Cir. 1997).

The Court is convinced now, as it was when it sentenced Robinson, that 292 months represents an appropriate sentence for Robinson. Robinson was a MABO supervisor who opened new

territory for MABO and used force to protect his territory. A 292 month sentence will protect society from further similar serious crimes by Robinson.

II. Amendment 535

On March 25, 1989, Robinson and others committed armed robbery. Based on this incident, Robinson pled guilty to criminal conspiracy in Chester County Court of Common Pleas on June 20, 1990. Following his conviction, the Court sentenced him 3-11 years. His federal conviction in violation of 18 U.S.C. § 924(c) also arose from the March 25, 1989 armed robbery. Robinson seeks credit for the 41 months he spent in state prison under Amendment 535.

Amendment 535, which applies to Application Note 2 to Sentencing Guidelines § 5G1.3, may be applied retroactively. Robinson, however, was paroled from his state sentence on November 1, 1993. This Court sentenced him on November 2, 1994. By its terms, § 5G1.3 applies only to on undischarged term of imprisonment. Further, the Court was fully aware of Robinson's 41 month term of state imprisonment at sentencing. Accordingly, Robinson is entitled to no relief under Amendment 535.

III. Amendment 613

Application Note 1 of Sentencing Guideline § 1B1.2 regards plea agreements containing stipulations made by the defendant which would establish a more serious offense of conviction. As

set forth in the first paragraph of this Note, an exception to this general rule is that if a plea agreement (written or made orally on the record) contains a stipulation that establishes a more serious offense than the offense of conviction, the guideline section applicable to the stipulated offense is to be used. A factual statement or a stipulation contained in a plea agreement (written or made orally on the record) is a stipulation for purposes of subsection (a) only if both the defendant and the government explicitly agree that the factual statement or stipulation is a stipulation for such purposes.

The essence of Robinson's argument is that he would not have agreed to a stipulation that the conspiracy involved in excess of fifteen kilograms of cocaine if he had been adequately advised by his attorney of the sentence associated with that amount of drugs. What Robinson is arguing is ineffective assistance of counsel. Such a claim is appropriately raised in a Habeas Corpus petition pursuant to 28 U.S.C. § 2255. Because Robinson has previously filed a § 2255 motion, a second or successive § 2255 motion must be approved by the United States Court of Appeals for the Third Circuit before it is filed. 28 U.S.C. § 2244(a). Robinson is therefore not entitled to relief under Amendment 613.

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O R D E R

AND NOW, this day of September, upon consideration of the Motion to Modify Term of Imprisonment (Doc. No. 1222) of Defendant, Jackie Robinson, the Response of the Government, and Jackie Robinson's Response thereto, it is **ORDERED** that the Motion is **DENIED**.

BY THE COURT:

JAMES MCGIRR KELLY, J.